

# Still a Hollow Hope

State Power  
and the Second  
Amendment

Anthony D. Cooling



## Still a Hollow Hope

This book expands the literature on law, courts, and social change. The Supreme Court increasingly matters in American political life when those across the political spectrum look at the Court for relief from policies they oppose and as another venue for advancing their own policy agendas. This book expands the volume of case studies that research the ability of courts to make major political and social change to include the topic of firearms in the wake of the Supreme Court's controversial and divided opinions in *D.C. v. Heller* (2008) and *McDonald v. Chicago* (2010). These decisions interpreted the Second Amendment as an individual right and protected it against state encroachment, resulting in more than a thousand cases litigated in state and federal courts. But how successful have activists been in expanding the right to keep and bear arms? The test of how much political and social change has been made is primarily done through a test of Gerald Rosenberg's framework from his seminal work, *The Hollow Hope: Can Courts Bring About Social Change*, but it also utilizes Daniel Elazar's Political Culture Theory to explain state-level variations in political and social change. The findings indicate that while courts are not powerless institutions, reformers will not have success unless supported by the public and the elected branches, and most specifically, that pre-existing state culture is a determining factor in the amount of change courts make.



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*State Power and the  
Second Amendment*

Anthony Cooling

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*Peter J. Cooling, tempus fugit, memento mori.*



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# Introduction

## *Second Amendment*

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.

## *Fourteenth Amendment*

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Prior to *District of Columbia v. Heller* (2008), the Supreme Court had yet to definitively state what right the text of the Second Amendment protected. The two main opposing theories on the amendment, very oversimplified, were that the amendment protected an individual citizen's right to keep and bear arms, or a states' rights approach, that the amendment only protected the right to keep and bear arms while in connection with service in a state militia. Additionally, the amendment served only as a bar against federal government actions, and not states and municipalities.

The Supreme Court in *Heller* stated that the District of Columbia's total ban on handgun possession in the home amounted to a prohibition on a class of "arms" that citizens use for self-defense, and that the prohibition thus violated the Second Amendment. Secondly, they held that the District's

storage requirements (that all guns in the home be disassembled or bound by a trigger lock) also violated the Second Amendment because it made a gun impossible for a citizen to use in self-defense. The Supreme Court reasoned that the prefatory clause of the amendment, “A well regulated Militia, being necessary to the security of a free State,” which supporters of the states’ rights theory believed limited its scope to militia service, did not limit the breadth of the operative clause, i.e., “the right of the people to keep and bear arms, shall not be infringed.” The prefatory clause, the decision said, conformed to their decision on the operative clause because it stemmed from the concern at the Founding Era that the federal government would disarm individuals in order to prevent a citizen militia.

The decision, however, only applied to the federal government. In short order, the Supreme Court struck down Chicago’s handgun ban with the *McDonald v. Chicago* (2010) decision. This decision incorporated the Second Amendment right recognized in *Heller* through the Fourteenth Amendment, making its protections apply to the states. The Court reasoned for incorporation that the right to keep and bear arms is fundamental to ordered liberty, that self-defense is a basic right, and that individual self-defense with a firearm was a central component of the Second Amendment.

The decisions were a watershed in the gun rights movement. Gun rights advocates, notably the lead attorney in both cases, Alan Gura, was sanguine on the prospect of continuing to expand gun rights through the courts. Gun control advocates took a more nuanced view; while pessimistic about the outcome, they noted that the Supreme Court’s opinions only precluded total handgun bans and strict storage requirements, leaving all other types of gun control in place.

Within both the legal scholarship and the public sphere there is a continuing debate regarding the power of Supreme Court decisions to effect social change. The traditional view, still held in much of the conventional wisdom, what Gerald Rosenberg (2008) called the Dynamic Court Theory, identifies the Supreme Court as a powerful institution, capable of protecting rights and enforcing its interpretation of the Constitution. The alternate view, what Rosenberg called the Constrained Court Theory, is that the Supreme Court may issue rulings from on high, but it lacks the power to make major political and social change because it has no power to ensure that those rulings are implemented; that courts can only make significant change when certain conditions are met, most notably public support.

These competing views ebb and flow throughout popular writings on the Supreme Court and the scholarship of those who examine the Court’s influence. For example, even before the Supreme Court was created, by its

design, Alexander Hamilton in Federalist 78 said that “the judiciary, from the nature of its functions, will always be the least dangerous branch to the political rights of the Constitution.” Indeed, in that era, the Supreme Court, despite the marker flag planted by Chief Justice Marshall establishing the concept of judicial review in *Marbury v. Madison* (1803), the case was still a hollow victory in that the Court retreated in the face of Jeffersonian opposition and an inability to implement a decision requiring the actions of other political actors. Even the first chief justice agreed, later resigning due to poor health and the opinion that the Supreme Court lacked “the energy, weight, and dignity which are essential to its affording due support to the national government” (Stepman 2018).

Various, in the face of showdowns over time between Presidents Jefferson, Jackson, Lincoln, a Republican Congress during Reconstruction, and President FDR, the Supreme Court likewise capitulated. In key periods in American history, however, the Supreme Court has been particularly influential, such as at the beginning of the twentieth century, when the Court struck down a plethora of state and federal laws that would have otherwise expanded the role of government, most (in)famously with *Lochner v. New York* (1905). Likewise, from the 1950s through the 1970s the Supreme Court wielded a strong influence on policy as the Court under Chief Justices Earl Warren and Warren Burger issued groundbreaking opinions that changed the nature of race relations in America, the practice of criminal law, the way congressional districts were apportioned, the breadth of religion in public life, as well as the civil liberties of citizens, to just name a few areas. Furthermore, a more recent revival of federalism under Chief Justices Rehnquist and Roberts have shaved away at the scope of the Commerce Clause and have shown that the Court does have some ability to project power upon the rest of government.

*Still a Hollow Hope* is an examination of the Supreme Court’s ability to create significant political and social change by expanding the keeping and bearing of arms by an individual right interpretation of the Second Amendment, and to find on this topic which view has more explanatory power, the Dynamic Court Theory of the Constrained Court Theory. My findings in this book may be disappointing to those who strongly support going to court to expand individual rights, but it is likewise not disheartening to those who worry about the antidemocratic nature of court power. In short, as the title indicates, as per Rosenberg’s findings from more than a decade ago, the Supreme Court is still a “hollow hope” for those who support judicial activism to promote their policy agendas with regard to the right to keep and bear arms. Significant social change can occur, in this case more keeping

and bearing of arms, but only when supported by the elected branches of government and by public opinion.

My arguments boldly build upon earlier volumes that have systematically looked at how effective courts are in bringing about social change. Earlier works produced key insights, specifically the conceptual stance taken by Rosenberg of testing a “dynamic court” model and a “constrained court” model. While those earlier insights will be applied, this book builds upon them by being more systematic, stating its central arguments in the form of testable hypotheses in the manner of social science to try to remedy the problems with them. While not a replication of earlier topics that the courts touched upon, it takes advantage of the abrupt shift in jurisprudence on the gun issue to test the strength of courts to make social change. It advocates for a common approach to testing this perennial issue on the strength of courts by creating specific testable hypotheses with quantitative indicators for any social change that are tied directly with the issue at hand, with the dynamic model (the conventional wisdom) as a null hypothesis. Further, this work tries to close an enormous gap in the way social science examines how federalism, state power, and local political power, affects the ability of courts to create social change flowing from national-level decisions. Future research on the ability of courts to make social change, no matter the topic, are going to have to at least minimally account for state-level variations in their measures of change.

The book’s contents follow an argumentative pattern, split into four parts, that begins with Part I on theory. Chapter 1 is a literature and theory review that discusses how efficacious courts have been in achieving their policy goals and the ability of courts to create significant social change. The chapter reviews an enormous amount of literature from several disciplines on law, courts, social change, and decision implementation. I review why activists go to court and what they could hope to achieve, and I detail a linear progression of research on courts and social change through the expansion of individual rights and the research Rosenberg himself was drawing upon. Peripheral issues, such as judicial decision making, are not discussed at present, with the exception of the “regime” periodization of American history most prominently put forth by Steven Skowronek to help explain instances when the Supreme Court has more, or less, influence depending on the context it may find itself in with regard to the elected branches of government.

As part of the theory and literature review, there is an explanation of the theories that are being used, which include Rosenberg’s theory and Daniel Elazar’s Political Culture Theory and how the latter affects state-level vari-

ability in the right to keep and bear arms. The interaction between Elazar's Political Culture Theory and implementation of *Heller* and *McDonald* involves detailing and explaining Political Culture Theory and why I am using it for a state-level examination of this topic. Under Political Culture Theory, the fifty states are categorized as a variation of moralistic, individualistic, or traditionalistic political culture. In short, the pre-existing political culture of a state has a significant effect on the implementation of the Supreme Court's decisions in *Heller* and *McDonald* because each state is a self-contained governmental unit able to set its own policy with regard to the scope of the right to keep and bear arms. Traditionalistic political culture is more supportive of the right to keep and bear arms, and the more traditionalistic a state, the more *Heller* and *McDonald* were implemented and the more the right to keep and bear arms was expanded.

In chapter 2, I lay out the research design and analysis method used throughout the rest of the book. The level of legal "keeping and bearing of arms" is the significant social change, the dependent variable, and the court cases (*Heller* and *McDonald*) are the independent variable. A quantitative analysis method is used, which shows a statistically significant relationship between state political culture and the level of gun control in the state. The analysis involves descriptive statistics on the effects of political culture on the right to keep and bear arms, and then a regression analysis, both of which show there is predictive and explanatory value in using Political Culture Theory to show state-level variation in differences in the implementation of *Heller* and *McDonald*. There is an examination of policies and practices before and after the Supreme Court decisions looking for quantitative and systematic changes through process tracing. This qualitative process tracing is akin to Rosenberg's methods of testing the Dynamic Court Theory against the Constrained Court Theory to see which has more explanatory power. I use qualitative process tracing to show implementation of these decisions at the national level, then repeat this process in three state-level case studies (chapters 9 through 11) to show how implementation of these decisions is modified by state-level variation with a state's political culture as an intermediate variable.

Part II of the book consists of the testing and discussion of the dynamic and constrained court theories across chapters 3 through 8. Chapter 3 is the nationwide qualitative analysis and process tracing of the hypotheses generated from the Constrained Court Theory. This process tracing is of the effects of the *Heller* and *McDonald* decisions. The following chapters break down the hypotheses of the theory into deeper discussions about how significant social and political change through the courts cannot occur with-



out ample legal precedent (chapter 3), support from the executive and the legislature (chapter 4), public support (opinion) (chapter 5), and the use of incentives (positive or negative) or market forces (chapter 6). Finally, Washington, D.C.'s response to the *Heller* decision is explored in detail in chapter 7, as *Heller* applied only to them, as is the countermobilization, or backlash, against the *Heller* and *McDonald* decisions by gun control activists. Chapter 8 concludes the theory analysis and Part II by summarizing the arguments presented before moving on to the case studies in Part III.

Part III consists of three chapters of case studies. The first case study, chapter 9, is the state of Illinois, which as per the chapter title, "A State of Conflict," is in perpetual political turmoil due to differences in ethos between Chicago and the rest of the state. The cultural lodestone that is firearms is one of the issues about which the two main political cultures (moralistic and traditionalistic) in Illinois are fractured. The *McDonald* case, which incorporated the Second Amendment, deals with the city of Chicago, making implementation specifically at issue here.

The second case study, chapter 10, is the state of Texas, which from its start has had a unique relationship with a qualified right to keep and bear arms by dint of the birth of the independent country in revolution sparked by, in part, gun control and by the ever-present danger of American Indian raiders and conflict with its former colonial master of Mexico. The story of the right to keep and bear arms in Texas layers seamlessly over the state's grappling and eventually coming to terms with a racial underclass gaining the full rights and privileges of citizenship. Once that Gordian knot was cut, Texas gradually adopted at the state level a strongly pro-Second Amendment policy agenda.

Chapter 11 is a case study on the state of California, which has frequently been in the avant-garde of social and cultural phenomena. California has exported its culture to other states and indeed to the world. It stands at the vanguard of the negative reactions to *Heller* and *McDonald* as it adopted an agenda of increasing gun control right up to, and in some cases stepping over, the lines drawn by the Supreme Court. It is also possible that the state is fighting a rearguard action against the expansion of the right to keep and bear arms that it is already too late to prevent, but an action that is made possible at the state level by the American system of federalism that gives states significant political powers to govern their own affairs.

Part IV consists of two chapters (12 and 13) that conclude the book and includes some thoughts about avenues for fruitful further research on law, courts, and social change, and why there will be a perpetual cultural conflict between those who want gun control and those who want gun rights. The

process tracing of this book at both the federal and state level shows that *Heller* and *McDonald* did not significantly alter the status quo, though it did provide a central rallying point for the gun rights movement by legitimizing their long-held interpretation of the Second Amendment as protecting an individual right. The Supreme Court's carefully measured opinions in *Heller* and *McDonald*, however, did not undermine any federal or state gun control other than total handgun bans and strict storage laws, and subsequent decisions rolling back additional gun controls have been slow in coming, or in many cases nonexistent, as subsequent court decisions have locked in the post-*Heller/McDonald* status quo until such time as the Supreme Court decides to revisit the Second Amendment. In some limited cases, though, courts have been a lever that sympathetic elected officials have used to expand the right to keep and bear arms.



PART I

Theory



## Literature Review and Theory

Robert Dahl was the researcher who began the systematic study of whether courts could change the culture through rights litigation, rather than courts reflecting the culture. In his seminal work on the Supreme Court and national policy making, his conclusion was that the Court is inevitably an institution that, when called upon to decide among a range of policy choices, will act more to uphold the majoritarian culture before it protects the rights of minorities (1957). By this, Dahl was referring to both demographic minorities for such political issues as segregation, but minority opinion on non-rights-related policy as well. At the time of Dahl's writing in the mid-twentieth century, he found that in the entire history of the Supreme Court, there was not one case arising under the First Amendment in which the Court held federal legislation unconstitutional. As for amendments Four through Seven, there were fewer than ten cases where the Supreme Court declared unconstitutional something regarding basic liberties. Also over the course of its history, in fifteen cases, it used its power and the protections of the Fifth, Fourteenth, and Fifteenth Amendments to preserve the rights and liberties of privileged groups *against* that of a "submerged group" (292). "Under any reasonable assumptions about the nature of the political process, it would appear to be somewhat naïve to assume that the Supreme Court either would or could play the role of Galahad" (284). The Supreme Court generally uses what power it has to legitimize the "lawmaking majority" (294) over the rights of minorities.

Following on Dahl's seminal work, were three pieces in the mid-1970s: Horowitz's *Courts and Social Policy* (1977), which spelled out structural limitations of courts, Handler's *Social Movements and the Legal System* (1978), which also examined the success of social reformers and found that they had some limited incremental success but that they had to turn to courts was a

sign of their inability to exert influence in electoral politics, and Stuart Scheingold's *The Politics of Rights* (1974). The most consequential of the three was Scheingold's look at the politics of rights and how they contributed to progressive social movements. His key insight was what he called the "myth of rights." Jefferson's turn of phrase from the Declaration of Independence that it is self-evident that all men are created equal has led to the ideology, and promise, of "rights" holding significant influence in the American conscience. The logical follow on conclusion is that if we are self-evidently equal, then we must also have self-evident rights, but self-evident rights are not self-enacting. Rights must be enshrined and protected against inevitable encroachment.

Scheingold's research in *The Politics of Rights* (which Rosenberg had clearly read) was a product of the political conflicts of the 1960s and the Warren Court. He wrote, in a way that parallels Rosenberg's work, that courts have extremely limited abilities to directly affect social change and that, "The civil rights experience has made us all skeptics" (1974, 95). This is because despite the bold, repeated, and unanimous decisions to racially desegregate public schools, the whole effort of law reformers was bogged down in controversy in the political branches of government, that is, the ones directly accountable to the people. In *Taking Reform Seriously: Perspectives on Public Interest Liberalism*, McCann (1987) explores the aims and tactics of those law reformers of the 1960s and 1970s whose focus was on minority rights, a focus that is also seen in *The Hollow Hope*. These are the types of reformers Rosenberg examines, and while they were not naïve, their expectations were perhaps not as high as his collections of quotes makes them out to be. Still, these works on the importance of rights and the people that tried to use them in litigation are the basis for what Rosenberg systematically set out to test.

Rosenberg's findings show that, ultimately, the Court's success in implementing social reform depends on the political support it receives. Admittedly, his results were limited to the case studies he chose, but he found that the success of civil rights litigation, such as on voting and integration, depended on political actors actively enforcing court decisions. The initial lack of support for same-sex marriage led to additional legal barriers being put in place in the form of electoral backlash. With women's issues, a lack of enforcement from the executive branch and a limited desire to extend protections put a halt to courts' meddling in the labor market. Women's irregular access to legal abortion, despite a legal market for it, and the increasing creep of restrictions also show how decisions can be curtailed piecemeal. In sum, Rosenberg found courts are just not effective in producing social

change where there is resistance of any magnitude because they lack enforcement powers.

Despite the difficulties, however, there is still a continued stream of litigation, because, as recent law and society literature notes, courts have become an extension of the political process rather than an institution that stands apart from it. Further, both sides of most debates use the language of rights when framing their take on a dispute that ends up before a court. Given the limitations of courts, it would behoove us, before laying out the two main theories used in this book, Rosenberg's Constrained Court Theory and Elazar's Political Culture Theory, to initially provide a brief summation of the reasons why activists continue to go to court to try to achieve social change. This will also aid the literature review with regard to the Dynamic Court Theory, the view that the Supreme Court is powerful and capable of creating change on its own, against which Rosenberg tests his Constrained Court Theory by framing the possible effects that activists could conceivably achieve by favorable court decisions. I then cover the impact of Rosenberg's seminal book, *The Hollow Hope*. The chapter finishes with a detailed review of Elazar's Political Culture Theory and why it is relevant and applicable to a state-level analysis, but only with an understanding of its weaknesses.

Why do activists go to court? They do so because we empower our courts with judicial review. Therefore, in the context of the legal system of the United States, social reform movements look to the judicial branch to either redress grievances or to push their social agendas. Activists go to courts because courts are a shortcut for social reform through the Rule of Law. A cultural respect for law and order by the public and elected branches, therefore, is a strong counterbalance to the structural issues that Murphy (1964), Epstein and Knight (1998), and others as far back as Alexander Hamilton have noted, which hamstring the courts, in short, that they have neither the "purse" nor "sword" to implement their own decisions. Activists achieve change through courts because, in effect, a skeptical public not desirous of enacting the activists' desired social change electorally, respects the Rule of Law as expressed through a court decision and not necessarily the activists' policy agenda.

This respect for the legitimacy of courts as arbitrators means that other political actors are generally bound by their decisions lest they undermine their own authority, and this is the main reason why there is support for the Dynamic Court Theory from elected politicians. For groups seeking change, the temptation is to see courts as a shortcut to pursuing wider cultural acceptance. And as a consequence of the continued use of litigation to enact social change, there has been an ongoing debate about the efficacy of



reversing the causal arrow of making social reform top down through law rather than bottom up through culture (S. A. Scheingold 1974; Rosenberg 2008; Feeley 1992; M. E. Hall 2011; Keck 2014), an idea from Roscoe Pound (1910), who introduced the idea of the difference between law on the books and law on the ground.

Further, courts are an inviting avenue because of constitutional restraints that make majoritarian social change so difficult, something those same scholars note incentivizes social reform litigation. The American constitutional design creates a separation of powers that constrains the development of comprehensive programs that implement social reforms. Large legislative coalitions are necessary to enact legislative agendas, which is difficult with gridlock inherent in America's constitutional design, a design that requires majority public opinion to overcome gridlock through a series of elections. Going to court is therefore a strategy of social reform groups when there is divided government and fragmented public opinion (C. R. Epp 2008). There are many examples of this across many fields such as criminal law, environmental regulations, tort law, and social insurance programs (Kagan 2001).

With limited resources and multiple avenues, what political avenue will provide the best bang for the buck for reformers? If the movement has no traction with public opinion and with politics being downstream of culture, then courts seem an attractive option. This was the situation facing the civil rights movement by mid-twentieth century, and why Rosenberg's *The Hollow Hope* starts out with the following quote from the oral arguments of *Briggs v. Elliot* (1952), one of the five school integration cases that would later be combined into *Brown* (1954).

JUSTICE JACKSON: "I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress. Certainly it would be much stronger from your point of view if Congress did act, wouldn't it?"

MR. RANKIN: "That is true, but . . . if the Court would delegate back to Congress from time the question of deciding what should be done about rights . . . the parties [before the Court] would be deprived by that procedure from getting their constitutional rights because of the present membership or approach of Congress to that particular question."

Mr. Rankin, the civil rights attorney, admits in oral argument that he can't get traction for his social reform through elections, so the reformers

turned to the courts for succor. With the case of long-shot reform movements without mass public support yet strong constitutional and moral cases to be made, courts may be the best avenue to start with to get publicity, but certainly no reformers think of them as their only recourse. Given the differences in social reform movement objectives, there are great difficulties in looking systematically at just what they actually expect to obtain. A sharp critique of *The Hollow Hope* is that Rosenberg took the strongest quotes as representative of a given movement's opinions, as if social movements are solitary actors who were primarily using courts to try to achieve significant social change and only haphazardly looked at *indirect* effects of courts as catalysts for change (Feeley 1992). This then, moves me to the next aspect of this literature review, and this is *how* courts are used as tools for social reform?

There are several ways courts benefit reformers who are successful in the courtroom. They are, according to Hirschl (2009), ordered from smallest to largest by size and scope:

1. favorable interpretation of the Constitution
2. the creation of a new right
3. court-supervised reform programs
4. expanding "standing"
5. court (re)interpretation of existing statutes or regulations
6. publicity

Judicial interpretation of the Constitution has the largest potential to create significant social change. The topic of this book, the interpretation of the Second Amendment as an individual right to keep and bear arms, is one such example. Closely following in size and scope to a favorable interpretation of the Constitution is the creation of new rights, liquidated out of the Supreme Court's understanding of the meaning of the text of the Constitution itself where there is (often) a lack of specificity, such as was the case with abortion and a right to privacy when the Supreme Court decided *Roe v. Wade* (1971).

Moving down the spectrum of size from an interpretation of the Constitution are small-scale and pointed decisions, though ones that are more intrusive. These are cases of court-supervised reforms, such as school busing cases and prison reform. These are more common in an increasingly regulated society (Chayes 1976), and this saw the largest expression in the wide swath of prison reform cases since the 1960s (Feeley and Rubin 1998), which have resulted in different standards of incarceration than prior to

the litigation. Less overbearing than blatant judicial policy making in the form of judicial management of institutions is when courts make decisions that affect future litigation, thus shaping the playing field for future social reformers. Most notably this is done by expanding access to courts to some groups or individuals, giving them the right to sue for redress of grievances (standing) or by limiting the standing of others. In historical context, it has been the case that the expansion of standing is also an expansion of rights. The ruling in *Dred Scott v. Sanford* (1857) was, essentially, that as a black man Mr. Scott had no standing to sue Mr. Sanford for his freedom as he was not a citizen. Additionally, and important to the Second Amendment, the court in *Dred Scott* also ruled that free persons of the “negro race” should not have the rights of citizens as it would “give them the full liberty . . . to keep and carry arms wherever they went.” This subject, limiting the keeping and bearing of arms to particular races, is covered in depth in the state level chapters.

Next down in size and scope are decisions that interpret and apply existing legislation and agency created regulations. Courts are often interpreters of the vague laws that spawn the regulations that congressionally delegated agencies create. Finally, the last way that courts can aid social reformers is indirectly through the publicity that can be had through judicial events. Reformers use the hearings, arguments, and decisions to generate publicity (T. M. Keck 2009). Tort lawsuits against organizations and their indirect effects, such as bad publicity, are often more worrisome to managers than damage judgments (C. Epp 2009b).

To review, the ways that courts help reformers are, from smallest to largest by size and scope: favorable interpretation of the Constitution, the creation of a new right, court-supervised reform programs, expanding “standing,” court interpretation of existing statutes or regulations, and publicity.

Now that we have covered why social reformers go to court, using the Rule of Law as a proxy for public support for their reform position, as well as the ways in which courts can aid reformers, let us turn to a more detailed examination of Rosenberg’s *The Hollow Hope*. After that examination of *The Hollow Hope*, we will then turn to Elazar’s Political Culture Theory.

## The Impact of Rosenberg’s *The Hollow Hope*

If Rosenberg could be summed up in a sentence, it would be to say that the institutional context of the Supreme Court’s rulings and the popularity of them makes all the difference in whether the Court can successfully imple-

ment a decision. He does a systematic analysis of how successful courts can be in implementing their decisions in his seminal work, *The Hollow Hope*, “the single most influential work of scholarship in the judicial impact tradition” (Keck and Strother 2016, 5), which is a test of the dynamic and constrained court viewpoints to see which has more explanatory power. These two competing views weave in and out of the literature on the Supreme Court. Even before Rosenberg, decades ago political scientists who study the Supreme Court’s capacity to implement policy change noted how it didn’t go out of line with the lawmaking majority (R. A. Dahl 1957; McCloskey 1960), that the Court eventually loses out in confrontations with the elected branches through turnover (Funston 1975), and as such courts more often “legitimize” the lawmaking majority than ever rule against it (Whittington 2007). But for there to be the persistent conventional wisdom about the Dynamic Court Theory among politicians, some legal experts, the media, and the public, the Supreme Court must have the ability to alter the behavior of government and private actors to some extent. First, there is the legitimization Whittington writes about. Courts alter the behavior of other institutional actors, even separate from the institutional context of the Supreme Court, especially when they are amongst supportive elected officials or public opinion willing to implement a decision they agree with it ideologically. Obviously, this ability to alter behavior declines when a decision is not supported by either elected officials or public opinion. Secondly, not all scholars see what Horowitz calls the “impotence of the Courts” (1977, 263). For example, McCann (1994) uses interpretive historical analysis to describe the important secondary effects of court decisions, and Keck (2009, 2014) shows how litigation was essential for social reformers who sought to obtain same-sex marriage, even if elected officials and public opinion did not always agree with a court. In a direct rejoinder to *The Hollow Hope*, Hall (2011) also made an intuitive point that nobody had previously bothered to test, that the Supreme Court is more successful in exercising power when its rulings can be “directly implemented by lower state or federal courts” (21) because of the vertical nature of the judiciary as opposed to the horizontal nature of courts requesting implementation by elected officials.

So that naturally leads one to ask more specifically: Under what conditions can the Supreme Court make significant social change? Rosenberg summarizes the two viewpoints of courts as dynamic or constrained and makes a list of the structural nature of courts that limit the ability of the Supreme Court to enact social change, synthesizing a substantial amount of the theoretical work in the law and courts literature going back to the Federalist Papers before moving on to a systematic analysis with case studies.

This list of constraints on courts frames the logic of what he later explains is the Constrained Court Theory. The constraints on Courts are

1. The limited nature of constitutional rights (Constraint I)
2. The lack of judicial independence, and (Constraint II)
3. The judiciary's lack of powers of implementation (Constraint III) (Rosenberg 2008, 35).

In regard to Constraint I, the Constitution is not a document that has unlimited enumerated rights. Certain ones are enshrined; others are not found in it. In economic terms, private control over the allocation and distribution of resources and property are protected in the Constitution (A. Miller 1968). On the other hand, there are not “rights” found in the Constitution to a certain distribution of resources and property. This is the difference between positive and negative rights. In a concrete sense, a positive right is a demand on the resources of others, whereas a negative right only requires that others, including the government, abstain from interfering with the actions of individuals or groups. For citizens to be on free and equal terms, positive rights have to be grounded in consensual relationships, otherwise they are a form of redistributive coercion. Because of this, Rosenberg notes that when claims of new rights are made, social reformers must argue that the right is an “extension of a generally accepted right to new situation” (2008, 10).

In regard to Constraint II, while courts were deliberately set up to be partly insulated from the elected branches and public opinion—for example that judges serve for life on good behavior and are not up for election—the appointment process means that judges will tend to reflect the judicial philosophies of the presidents who nominate them and the Senate that confirms them. This leads them to be wary of going outside the political mainstream. Further, the federal government is remarkably successful at convincing the Supreme Court to hear cases it appeals and to not hear those it opposes. The solicitor general, because of this, is sometimes referred to as the “Tenth Justice” (Wohlfarth 2009). Importantly, courts can only make decisions on the cases that are brought before them and cannot reach out to a conflict between two parties and make it into a case, and courts themselves do not have unlimited resources. Regarding Constraint III, it can be succinctly stated that courts lack implementation tools and are dependent on the elected branches to impose their will by proxy, or if their decision are related to economic conditions or terms, the free market may implement a decision for them.

To sum up this list, litigants asking courts to make significant social change are faced with large constraints at the outset that must be overcome. First, social reformers need resources and litigants. Second, they have to convince a court that the rights they are using as the vehicle for social change are found in the Constitution or, at the very least, a particular law's statutory language. Thus, the breadth of a law limits the amount of social change that can be done through a court when the mechanism it uses is a law's statutory language. A law may leave whole swaths of social relations untouched, or it may touch virtually all aspects of free market exchange, as in the case of insurance or financial regulations. Even if a litigant can convince a court there is a "right" in the language of the statute, the law may not cover a significant area of policy. That is, finding a right in a law does not mean the law itself allows for any given course of action by the government. Third, judges are wary about stepping outside of the mainstream of political ideology of those who nominated and approved them and are thus deferential to the elected branches of government, and besides, they usually share the ideological beliefs of those who nominated them. Fourth, even if there is a decision in favor of the social reformers, there is still the practical problem of how a court would implement it. A decision that requires implementation is an imposition on the elected branches, branches that could have implemented that very same decision as a new law or policy had they desired, but instead chose not to. Inaction is also a policy decision. Therefore, the decision had best be one the elected branches are willing to implement if a court expects compliance.

Therefore, these constraints on courts have to be overcome for the Supreme Court and other courts to influence policy and create significant social change. Rosenberg formulated the Constrained Court Theory, an explanatory and predictive theory, which states that when certain conditions are met, courts can make any policy changes to overcome the aforementioned constraints on them. These conditions are

- Overcoming Constraint I, there is ample legal precedent for change; *and*
- Overcoming Constraint II, there is support for change from substantial numbers in Congress and from the President; *and*
- Overcoming Constraint III, there is either support from some citizens or low opposition from all citizens; *and*
  - Positive incentives induce compliance (Condition I); *or*
  - Costs induce compliance (Condition II); *or*
  - Courts permit market implementation (Condition III); *or*

- Officials regard court orders as a tool for leverage (Condition IV). (Rosenberg 2008, 36)

While Rosenberg's critics have been partly successful in questioning *The Hollow Hope's* theoretical underpinnings (Feeley 1992; M. McCann 1994) and his methodology (Flemming, Bohte, and Wood 1997), and have shown that he should have created a typology of case types (M. E. Hall 2011) or should have created refinements to the theory (Swedlow 2009), it is fair to say that Rosenberg's well-researched work hit a raw nerve. When explaining the Dynamic Court Theory, Rosenberg was implicating the legal profession and the psychosocial payoffs that come to those in the legal field who want to believe in the importance of what they do. A long line of scholarship has set out to refute its central tenets, but with expansive treatments of bellwether cases such as *Brown v. Board of Education*, Rosenberg succeeded in moving the burden of proof onto those who say courts have the power to enact social change without cultural support. Google scholar shows that as of 2021, it has been cited about 4,400 times, far more than any of his critics. *The Hollow Hope* should not have been so controversial, considering Hamilton's and Alexis de Tocqueville's centuries-old observations about courts being reliant on other branches and not being too far outside public opinion in their decisions, but Rosenberg used a significant amount of data to support the Constrained Court Theory. Given the evidence in his case studies, such as that only 1.2 percent of black pupils were attending schools with whites a full decade after *Brown*, Rosenberg persuaded many scholars and students that the Court alone is an ineffective policy maker.

What Rosenberg drew together in *The Hollow Hope* showed not that Courts were incapable of making significant social change, but instead that it could only do so under certain conditions. *The Hollow Hope* provided a good applause line in its conclusion that the Court is "fly paper" (2008, 420) to attract reformers who should focus on organizing to change culture rather than expecting the Court's decisions to change the culture for them, and that line is perhaps a reason for the vociferous criticism. Rosenberg's polemical writing, in a book written in an adversarial style, much like a legal brief, certainly contributed to the criticism. But again, just like his conclusions built on the centuries-old observations of Hamilton and Alexis de Tocqueville about courts being mainstream, his systematic conclusions also built on the work of Dahl's seminal and equally well-researched and noncontroversial paper *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker* (1957), which showed that the judicial appointment mechanism (the president appoints and the Senate confirms) ensures

that the Supreme Court is policy-oriented toward the lawmaking majority and almost never sides with a submerged minority to protect their rights.

Rosenberg clearly states his central thesis in *The Hollow Hope*, and he does so with a testable theory, and this approach avoided a muddy argument, and for clarity of writing and debate, he created a dichotomy out of the extremes of both positions (dynamic and constrained courts). It was not a wrong decision because although scholars may not technically pick a side and have their own theory on judicial power, the fundamental debate is still about whether courts are dynamic or constrained. If there is a weakness of this approach, one for which Rosenberg perhaps cannot be held liable for, it is that follow-up social science research was done via different methods, using different theories, and with different case study topics. While this research has also shown that the Court, generally speaking, is constrained, without using the Constrained Court Theory to test against the Dynamic Court Theory, it makes the latter a bit of a straw man. This leaves one who seeks to repeat Rosenberg's work with the same methodology on another case study to state the Dynamic Court Theory without fully investing in it. Likewise, *The Hollow Hope* reads a bit like a history book or law review article, albeit one that engages in what is best termed "analytical history," which is "the use of historical events and evidence to develop a generalized understanding of the social world" (Singleton and Straits 2010, 583). Rosenberg uses his historical explorations as applications of his theory, focusing on how the theory applies, and then moving onto why there were particular outcomes for certain events. In simpler terms, he treats court cases as the independent variable and the specific outcomes of those cases he examines as the dependent variables. The vulnerability of this research design, which was pointed out by Rosenberg's critics, is that of case selection. In effect, one can reach the conclusory outcome they want if they choose the right cases to test their hypotheses. If one wanted to show courts are powerful, cases could be selected to help demonstrate this, and vice versa. Rosenberg's case study choices, particularly *Brown*, are cases where the Supreme Court was asking a lot of the elected branches. Therefore, the choice between a constrained court and a dynamic court is a logical fallacy. This fallacy is called a false dichotomy, also sometimes called a false dilemma. A false dichotomy is where it is claimed that a choice or a situation is an "either/or" choice, when in fact there is at least one additional option. There is no bright line separating a "constrained" from "dynamic" Court, as Rosenberg himself elaborates several conditions by which the Court can make significant social change.

Regardless, increasingly sophisticated methodology with consistent findings over time have mimicked Rosenberg's findings and Hamilton's asser-



tions that the Supreme Court generally cannot act on its own. Court decisions themselves are neither necessary nor sufficient for creating significant social change. Social change can come without a court decision (such as Prohibition and its later repeal), but significant social change cannot come from courts alone and change from courts must be in tandem with other forces in society. The research question for the entire field has thus shifted from whether the courts *can* make social change and to *under what conditions* the courts are able to do so. Therefore, Rosenberg's Constrained Court Theory, that large-scale policy change is impossible for a court by itself, has taken on a life of its own. The broader and long-standing intellectual heritage in which scholars have engaged Rosenberg on his own terms is that the judiciary will rarely stray from the policy preferences of the lawmaking majority. Most scholars now agree that rights-creating or rights-protecting judicial decisions, even controversial ones, have to have broad public support to be effective. For instance, in *Gideon v. Wainwright* (1962) the Supreme Court unanimously ruled that states are required under the Sixth Amendment to the U.S. Constitution to provide an attorney to defendants in criminal cases who are unable to afford one, and that decision is now broadly supported in public opinion and is fully implemented. Likewise, not long after *Obergefell* (2015), same-sex marriage occurred in all fifty states. Most scholars also realize that past judicial decisions that have expanded individual rights currently have broad public support. The Fifth Amendment right to remain silent from *Miranda v. Arizona* (1966) has been enshrined in the public consciousness, found on the plethora of cop shows Hollywood puts out. From there, it is easy to conclude that because rights-expanding decisions have broad public support, they are not significant in that the Court is subordinate to the larger culture war such that courts are following along behind the culture rather than leading the way. Many states had laws requiring lawyers for felony cases prior to *Gideon*. But this is not entirely correct either, as Supreme Court decisions do have important consequences, even if some decisions have been successfully resisted, both temporarily and permanently, which is why the ability of the Court to create significant social change is a perennial topic of research.

Note that the first edition of *The Hollow Hope* came out in 1991, and since then there has been meaningful research directly building on it, including the second edition that came out in 2008. For instance, Hall (2011) rejected the black-and-white depiction of the dynamic and constrained view and instead asked "under what conditions is the Court powerful?" This work directly built on Rosenberg's conditions in his Constrained Court Theory,

and Hall specifically set out to answer Rosenberg. The result was a further specification elaboration of Rosenberg's theory (although he would not call it that, as Hall has his own theory of Supreme Court power) such that "horizontal" decisions with consequences on multiple actors, such as *Brown*, will show less judicial efficacy than will "vertical" decisions in which the Court is only asking lower courts to abide by its mandates, such as in *Miranda*. This makes sense when lots of other research literature shows the indoctrination of judges, among other variables like a fear of having a decision reversed, leads to lower courts following the doctrines of higher courts (Epstein and Knight 1998; W. F. Murphy 1964; Klein and Hume 2003). The social science literature has shown that despite a fragmented court system, the policies of higher courts are generally followed by lower courts, and the few studies on judicial compliance have concluded that lower courts quickly adopt the doctrines, even controversial ones, of higher courts (Songer, Segal, and Cameron 1994; Kilwein and Brisbin 1997). The three years of socialization in law school are a big influence on how judges make decisions. Judges have internalized norms that prize compliance because it is an essential component of being a judge (Haire, Lindquist, and Songer 2003). For an overview of judicial compliance literature, see Epstein, Landes, and Posner's (2013) *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*.

The story overarching all judicial decision making, which aligns closely with political science's "regimes" literature about dominant ruling coalitions, is that judges are a product of the legal profession, which inculcates them in belief in the Rule of Law, and it appears that all courts (particularly lower courts) are a product of the society that spawned them (S. A. Scheingold 1974); the law and Constitution as written still matter. Even if a judge is doing contortions with the original meaning of a constitutional provision to obtain a favored policy position, the fact remains that he still has to use formal legal reasoning to get there, no matter how tortured it may be. As such, lower court noncompliance with higher courts is indirect without overtly defying doctrinal imperatives (Tokson 2015), and noncompliance only happens with a change in law, and case law, that conflicts with long-entrenched positions or social norms (Benesh and Martinek 2009). Case law allows for more wiggle room than even legislatively enacted law. There are several examples of this with the *Heller* and *McDonald* decisions, as they overturned several long-held lower court precedents that the Second Amendment didn't protect an individual right. This is the case particularly with the Ninth Circuit, given the nebulous guidance of Justice Scalia's *Heller* decision as to what gun control laws are constitutional alongside long-established prec-

edents of erstwhile legal impositions on the right to keep and bear arms; this is a phenomenon that is more fully explored in subsequent chapters.

Significant social change is easier, then, the less is asked of other noncourt actors and becomes more difficult the further one moves away from courts. Hall argues that public opinion can create pressure on elected officials to act in support of the Court's decisions. His tests on these two assertions on fifty-nine Supreme Court decisions in more than two dozen policy domains found substantial support for his points. And while his claim about horizontal and vertical decisions is intuitive and obvious at first glance, he was the first one who offered insights by taking this idea and testing its implications. In another example, Keck (2014) in a recent work on the subject of court power, formulated his research question as "are judges umpires, tyrants, or sideshows?" Even if, as in the case of Keck, you try to square the circle by making a continuum rather than a dichotomy by asking if the Court even matters, the research questions are still essentially the same as Rosenberg's, which are: Is the Court powerful or not, and by that regard, if it is powerful, when and how?

Many recent studies of judicial power have refined Dahl's initial take of a constrained court, which Rosenberg built on even if he did not realize it, as working within the ruling majority coalition, or "regime," and attached to it a theory of a politically constructed idea of judicial review. In short, this regime literature builds on the periodization of American presidential history by Skowronek (2008), in which his "political time" thesis has been fairly influential in explaining how presidents and ruling coalitions situate their power within current political events and use their authority in the service of change toward their policy goals. These studies argue that the Supreme Court is integral to the ruling coalition, so when a judge decides an issue based on policy preferences, that judge is vindicating the preferences of the president and the Senate (Peretti 1999), as shown in recent works (Frymer 2003; Pickerill and Clayton 2004; Clayton and Pickerill 2006; Whittington 2007; T. M. Keck 2007; McMahon 2011).

This regimes literature shows how courts can make significant social change, but only when they are in alignment with the dominant ruling coalition. Therefore, a discussion to show its inverse situation is warranted. Regimes literature ironically shows courts are constrained because their ability to make significant social change in furtherance of the majority ruling coalition is still channeled into only these five avenues. Taken together, this political regime literature can generally be shown to say that the Court is more than welcome by elected officials to exercise significant power in five instances (M. E. Hall 2011):

1. regime enforcement
2. division of labor
3. overcoming gridlock
4. blame avoidance
5. legitimation

When courts participate in “regime enforcement,” it influences policy in the direction that the elected branches already desire it to go toward. It involves decisions that rein in outlier political units at the local and state level (M. J. Klarman 1997; Graber 2005; K. Whittington 2005). The “division of labor” is when courts address low-salience issues that elected branches avoid so they can save their political capital; “Elected officials can then husband their resources to go after bigger political game” (Whittington 2007, 121). Courts are also less constrained when they are either “overcoming gridlock” or when the elected branches are too overcome by gridlock to constrain them (Swedlow 2009).

The Court also allows elected officials the opportunity for “blame avoidance,” and this is when the Court’s decision is a policy that the ruling coalition desires but elected officials, primarily concerned about re-election (M. Fiorina 1989), do not want to be seen publicly endorsing. This last one is particularly important when you trace out historically why Whittington (2007) calls our system “judicial supremacy,” something that the Anti-Federalist Brutus foresaw when he argued against adoption of the Constitution due to judicial review. This has happened as elected branch officials give the Court difficult policy decisions that could possibly have a negative impact on voters’ perceptions of them, allowing them to posture for votes and simultaneously avoid making hard choices. The last way the Court exercises significant power is similar to the first, and that is “legitimation.” This is at the heart of Dahl’s work and that of the regime theorists like Whittington, Clayton, and Pickerill, whose arguments are that the Supreme Court uses its institutional legitimacy to cement policy from the elected branches’ ruling coalition into place.

When taken together, the past sixty years of academic scholarship, from Dahl onward, suggests that the Supreme Court (and lower courts in general) are constrained. The Court is incapable of exercising power over behavior and creating social change unless there is already public support (R. A. Dahl 1957; D. Horowitz 1977; S. A. Scheingold 1974; Rosenberg 2008; Nagel 2001). The exceptions are the five circumstances listed above and Hall’s work on vertical issues (higher courts telling lower courts what to do).

This is not to say that courts do not matter. They most certainly do.

In the absence of independent judges and rights groups using courts to push for social change, then the social landscape on abortion, affirmative action, same-sex marriage, and guns would be quite different (Keck 2014), but how different depends on a lot of factors, mostly social support for the position the Court takes, bringing us right back to Hamilton's, de Tocqueville's, Rosenberg's, and Dahl's main thoughts and findings on judicial efficacy. Keck (2014) in *Judicial Politics in Polarized Times* ultimately concludes, "In the contemporary American context, rights-based litigation is better understood as a form of democratic politics than as an effort to subvert such politics."

In conclusion about the state of the research, it must be reiterated that Rosenberg set out to see if courts could make "significant social change." That is a higher bar we should not look past. Thus, we have to take lightly the critique of *The Hollow Hope* that Rosenberg selects on the dependent variable. In other words, because he selects for evaluation difficult cases with large social implications like abortion, same-sex marriage, and civil rights, he should have expected to see a limited effect for courts because courts are just one actor in the American federalist system. But given that the research question was "significant social change," it seems disingenuous, *ex post facto*, to make the case selection critique when in 1991 the data were not entirely clear if courts could or could not make significant social change on their own. Aspects where broad changes, such as prisons (Feeley and Rubin 1998), environmental policy (Swedlow 2009), disability rights (T. F. Burke 1997), sexual harassment, playground safety, and police brutality (C. Epp 2009a) have not been top down instances of court-led decision making but instead courts working in conjunction with the elected branches, just as Keck notes. In *Making Rights Real*, Epp explains how social activists and bureaucrats use legal liability, lawsuit-generated publicity, and managerial policy to pursue the implementation of rights. These strategies resulted in frameworks designed to make institutions accountable through employment rules, training, and managerial oversight. When courts do have top down broad policy changes, they come in the form of changes to the practices within the institutions they have control over, such as the expansion of procedural rights to the accused (M. E. Hall 2011). It would be better to say that broad social reform is court-facilitated rather than court-created. Rosenberg's Constrained Court Theory shows how that change is facilitated. The literature can be summed up to say that the judicial branch's power is relative along at least two or more axes depending on who is to implement the decision, to whom it applies, and whether it goes against or with the current political regime and popular opinion.

## Rosenberg's Theory as a Set of Testable Hypotheses

Rosenberg examined two competing theories against each other to see which has more explanatory power. The first is the Dynamic Court Theory, which is where the Supreme Court has the power through its rulings alone to create significant social change. On the other hand, Rosenberg's multielement theory, called the Constrained Court Theory, is that the Supreme Court can create significant policy change only if certain conditions are met. In those cases, Rosenberg observed which of his theories (Dynamic or Constrained) had more evidence to support it by examining policies and practices before and after court decisions, looking for significant independent direct or indirect effects using systematic evidence, including quantitative indicators. For example, for the topic of abortion, the direct effect Rosenberg examined was the number of abortions, and for civil rights it was number of schools integrated before and after court decisions. For direct effect changes, they must be tied directly to the courts rather than other political actors through process tracing, a method that analyzes the trajectory of change and causation over time, essentially sequencing independent, dependent, and intervening variables to show causality (Mahoney 2010). For indirect effects, the standard is that change must be either be attributed to public opinion changing, political pressure, or issue salience that came about as a result of the Court's decision. Further, any of these must occur within a reasonable time span such that it makes rational sense that any actions taken to enact significant social change, say due to public opinion changing, can be tied together as cause and effect.

For *The Hollow Hope's* case study topics, the Constrained Court Theory was shown to have more explanatory power than the Dynamic Court Theory; public support is a necessary, although not a sufficient, condition for courts to make significant social change. With public support, policy change is implemented toward the Court's desired direction through lower courts' compliance with new case law (overcoming Constraint I), legislatures fund the decision (if applicable), or the executive implements it through the administrative state (Conditions I, II, and III). If there is a low level of opposition from all citizens or a high level of support from some citizens, then the policy can happen by way of legal market forces (Condition IV). The free market acts as a proxy for lower court implementation or executive branch enforcement, as it did, for example, with abortion. But if there is a court decision that has a specific policy outcome desired by the Court and a simultaneous lack of public support, it leads politicians and officials to selectively make use of limited tax resources for priorities that do have sup-

port. Legislatures and officials can make commerce difficult, if not impossible, through a profusion of constantly changing rules, regulations, and inspections that deter entrepreneurs from engaging in commerce with an otherwise legal product or service. Furthermore, a decision can provoke a legislative backlash by the elected branches if there is widespread antipathy to it. These items are why public support is a necessary, but not a sufficient, condition for significant social change to occur through the Court.

Again, the significant social change I am examining to see if the Supreme Court was capable of creating is greater keeping and bearing arms, which is defined as higher levels of civilian firearm ownership and use, especially in jurisdictions where it was legally prohibited before *Heller* and *McDonald*. This measure is similar to Rosenberg's when he was testing his theory on the topic of abortion. In that case, his measure of significant social change was the number of legally performed abortions.

While *The Hollow Hope's* hypotheses are never explicitly stated, the Dynamic and Constrained Court Theories implicitly guide all the research as if they were hypotheses because Rosenberg is testing the relationship between public support and social change. Formally stated, a hypothesis is the expected but unconfirmed relationship between two variables (Singleton and Straits 2010). To put this book in the methodology of political science, I rephrase the Constrained Court Theory as a series of falsifiable hypotheses specific for my case study in order to answer the research question of whether there has been significant social change in the public's keeping and bearing of arms at national and state levels. The testing of these hypotheses will be the way of determining which theory, the Dynamic Court Theory or the Constrained Court Theory, is better at explaining empirical reality by showing which has more explanatory power, just as Rosenberg did in *The Hollow Hope*.

- $H_0$ : Null Hypothesis. Increased levels of keeping and bearing arms will occur via implementation of *Heller* and *McDonald* with or without public support (as measured by public opinion polling).
- $H_1$ : Increased levels of keeping and bearing arms will not occur without an interpretation of the Second Amendment that allows for an expansion of individual rights.
- $H_2$ : Increased levels of keeping and bearing arms will not occur without support for an expansion of individual gun rights from substantial numbers of members of the legislature and the executive.
- $H_3$ : Increased levels of keeping and bearing arms will not occur

without support for an individual right to keep and bear arms from some citizens or low opposition to an individual right to keep and bear arms from all citizens; unless

- $H_{3a}$ : Positive incentives are used to gain support of jurisdictions to expand citizens' ability to keep and bear arms, or
- $H_{3b}$ : Negative incentives are used to override opposition to an expansion of citizens' ability to keep and bear arms, or
- $H_{3c}$ : Market forces are allowed to allow for an increase in citizens purchasing arms to keep and bear, and likewise to utilize them in a legal manner, or
- $H_{3d}$ : Officials simultaneously convince citizens they have no choice but to implement the policies that allow for an increase in the keeping and bearing of arms and that such policies are a way to gain more resources.

Admittedly there is a danger in restating the Constrained Court Theory this way. Lord Kelvin is famous for stating, "Where you cannot measure, your knowledge is meagre and unsatisfactory." The natural next step when the Constrained Court Theory is laid out like a set of hypotheses is to ask, "how many or how much" questions like "how many cases make an ample legal precedent?" and "how many members of the legislature?" and "does 'the executive' mean *just* the president?" But in this instance, concrete quantitative measures are of dubious value when the social meanings and cultural significance of "support and opposition" are itself vague and undefined in an objective, quantifiable way. Note that I do change the phrasing from "Congress" to "the legislature" as this theory is examined at the state level, but executive can mean either the president or governor.

Exact measurements when testing the Constrained Court Theory would certainly be problematic in the sense that in normal science, we would expect thresholds to be clearly set and defined, such that a hypothesis can be considered falsified or refuted if those thresholds are not met. This also makes for ease of replication by other researchers. The problem is achieving predictive validity, which is when we as researchers "assess the operationalization's ability to predict something it theoretically should be able to predict" (Trochim 2006). Trying to get our hypotheses to perform this way for the Constrained Court Theory is a problem. Take Condition III (there is either support from some citizens or low levels of opposition from all citizens), where using exact measurements would be something like this: "strong public support must exceed 50% for the social change to occur or public opposition must be less than 25% strongly against." There are all sorts of problems when being this specific,



not the least of which is whether there are survey data to test the hypothesis accurately. Including caveats and additional variables to account for those cases would in turn lead to an overspecification of Rosenberg's already wordy model such that a researcher would not be replicating the Constrained Court Theory, but rather his or her own theory. There is, however, a difference between measurement and quantification. Just because we cannot fully measure each aspect of the Constrained Court Theory does not mean we cannot be as quantitative as possible without operationalization issues.

Rosenberg's Constrained Court Theory, reformulated as hypotheses, are used to organize the process tracing that takes place in this book. For example, as part of the national-level testing of whether the Supreme Court could make significant social change with the *Heller* and *McDonald* cases, I first analyze legal precedents and Second Amendment court cases prior to the decisions. I show that there was ample legal precedent for the decisions based on the standards that Rosenberg sets for others of his case studies, even if the Supreme Court overturned the majority of lower courts that ruled the Second Amendment did not protect an individual right to keep and bear arms.

### Elazar's Political Culture Theory

The extent to which Americans keep and bear arms in the various states was not uniform prior to *Heller* and *McDonald*, and we should not be expecting uniform reaction to the decisions. Public support, necessary for a court to make policy change, varies in strength, thus the different state-level reactions to cases like *Brown* (1954). In the *Brown* example from *The Hollow Hope*, schools were slower to integrate in the Deep South than in border states like Maryland. In a fresher example, there has been a range of variation among the states as to how far they have implemented portions of the Affordable Care Act, as modified by a Supreme Court decision, *NFIB v. Sebelius* (2012), which held that provisions of that act that required states to accept all the conditions placed on them to continue participating in an expanded Medicaid program or forfeit all federal funding were too coercive and violated state sovereignty. That the portion of the Court's decision related to state-level implementation of the Affordable Care Act even occurred was due to twenty-seven states filing lawsuits (Bulman-Pozen 2014).

Given these variations across the states, I am suggesting a refinement of the Constrained Court Theory, again specifying public support as described in Condition III from dichotomous (support vs. oppose gun rights) to an ordinal continuous variable measuring the extent of support and opposition

at the state level. States set their own boundaries on gun rights consistent with their political attitudes, and actual implementation of constitutional doctrines often falls to them. Pretreatment conditions and posttreatment implementation vary due to cultural context, thus a model that specifies differences at that unit of measurement should be used to test it. In doing this, I utilize Elazar's Political Culture Theory, a study of state-level cultural differences and federalism, to establish pre-existing conditions and how state culture affects implementation of *Heller* and *McDonald*.

In *The Hollow Hope*, this issue of the separation of powers, constitutionally implicit in the question of under what conditions the Court can make significant social change, is never fully examined. The separation of powers includes federalism, and federalism means state governments as sovereign political units capable of setting, within constitutional boundaries, their own laws derived from their specific cultures. "Our system of constitutional law does have institutions, including Congress and the states, empowered to assess and administer public preferences concerning rights enforcement" (D. A. Miller 2018, 33). As was pointed out decades ago by Sager (1978), states legislate and fill in the gaps between a culture's support of a right and actual judicial enforcement of rights. "Arguably, over the past 100 years, states have been the primary impediment to individual freedoms, formally or informally restricting civil liberties or rights—blue laws, Jim Crow, anti-miscegenation are a few examples" (Bowling and Pickerill 2013, 338).

We first must discuss federalism, however, before we get to an explanation of Political Culture Theory and how states take different approaches to rights in our constitutional system. Elazar's Political Culture Theory fits into a book about the power of courts because there is a hole in the literature with regard to how states, independent political entities, go about implementing court decisions. Although Rosenberg touches on this subject when he notes the difference in racial integration between states, we likewise can see differences at the state level in other various social reform movements that are affected by court decisions. Logically, we should expect to see state-level variations in how states react and implement, or choose not to implement, *Heller* and *McDonald*, with the key indicator of their willingness to do so based on the level of state gun control laws existing prior to the decisions. In some states, like California, the right to keep and bear arms is much more highly regulated than other states, such as Texas or Arizona. Among the states on other issues, "variance is created by the failure (or perception of failure) of the federal government to act in areas traditionally seen in their domain. For example, a number of states have resisted the federal government or adopted their own laws in immigration policy, education, and the regulation of 'frack-

ing.” Firearms policy is no different from the cited examples from a summation of “fragmented federalism” by Bowling and Pickerill (2013, 316). Californian politicians see the lack of federal gun control laws as a failure and responds accordingly. While nationwide, some 49 percent of the public thinks gun laws should be stricter (Saad 2013), support for gun control or gun rights varies considerably at the state level, and in some cases within the states themselves, which is the case in Illinois between urban Chicago and the suburban and rural portions of the state. Scholars, commentators, and politicians have long noted that the primary division of opinion between anti-gun control and pro-gun control is between rural and urban areas. The figures vary by survey, but only about 30 percent of urban residents own guns, while about 60 percent of rural residents do (Blocher 2013). More specifically, there are differences between the “primary” progun culture of the South and a “secondary gun culture” of the urbanized Northeast that principally respects armed self-defense only in the home (O’Shea 2008).

This diversity of policy responses to guns is on account of federalism. The primary structural reason for setting up separate institutions of power (to include states) was to prevent malfeasance, as Madison says in Federalist 41 that “in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused.” A side effect, or trade-off, of separate locations of power is a multiplicity of public policies. Traditionally this has been expressed as the idea that states are laboratories of democracy, but this differentiation between states comes about due not just to different concepts of the public good, but also polarized voter preferences, called “partisan federalism” (Bulman-Pozen 2014). Further, a system that divides power ends up having more than one locus of control. The arrangements of the different loci of power helps prevent widespread bad behavior by politicians by isolating it, but that lack of centrality is also used by groups opposing social reforms to stymie change. Good public policy tends to be whatever the ruling coalition at the time says it is, so proper social reform, or the lack thereof, is in the eye of the beholder. “There is no known method for discovering or defining the public interest. In reality, there is no such thing as *the* public interest . . . there are thus many public interests” (Feldman 1998, 35, emphasis in original). This again is the reason why I am using a state-level analysis with Elazar’s Political Culture Theory, which creates a typology of cultural types among the states.

While federalism can constrain social movements because of the multiple loci of power, it also simultaneously opens up multiple avenues for reformers interested in using courts; there may not be universal support for their position, but instead regional support. Movements “venue shop” at multiple lev-

els of the system such as state legislatures and at federal and administrative agencies, as well as federal and state courts (Sabatier 1999, 142). The impetus comes not just from social reformers outside of government, but local governments have also increasingly engaged in their own form of activism to promote and defend local interest within the intergovernmental system (Riverston-Newell 2012). This is what happens with Washington, D.C., and Chicago, as I show that they do their best to resist the Supreme Court decisions invalidating their handgun bans and gun storage laws. Clearly, the tension intentionally built into the system by federalism multiplies difficulties far more than in a less fragmented political system. Federalism, therefore, simultaneously limits the ability of social reform movements because, due to the diffusion of authority and jurisdiction, there is no top down control of judicial decisions. This creates numerous choke points where a decision in one jurisdiction does not apply to another. What tends to happen due to venue shopping is that just like a policy stalemate at the federal level due to choke points like the presidential veto and filibuster, there is a policy stalemate at the state level due to federalism. One coalition dominates one venue, while another coalition dominates an alternate venue (Sabatier and Jenkins-Smith 1993). With firearms, this is further complicated because there are no “full faith and credit” decisions or federal laws that make items like a concealed carry license, unlike a driver’s license, good from one state to the next except through voluntary intergovernmental agreements.

Despite federalism, it is best to remember that the ideal venue by social reformers using courts to seek social change is the Supreme Court, and after that the federal appeals courts. A Supreme Court decision that is nationwide in scope nevertheless will have pockets of greater resistance to its rulings, depending on regional culture. For example, little or no resistance to the Supreme Court’s decision against school-sponsored prayer was encountered outside of the South. Indeed, it was the culture of the South and not the Midwest or the Northeast to have school-sponsored student prayer in the first place. Likewise, resistance to *Brown* was not as serious outside of the Deep South. Border states like Maryland and Missouri were far less segregated the decade after *Brown*, with 50.9 percent and 42.3 percent of black students attending schools with white students, and by 1972–1973 it was 92.5 percent and 75.9 percent, respectively. Meanwhile, a decade after *Brown*, Alabama was still only .03 percent integrated in 1964, although by 1972 it was 83.5 percent integrated with the inducement of federal funding (Rosenberg 2008, 99). Again, these differences are on account of federalism. States are their own political units and can do what they want if the political leaders in the state are willing to accept the consequences.

For example, under the Constrained Court Theory, one way to overcome Constraint III (the judiciary's lack of powers of implementation) is Condition IV, which is where officials regard court orders as a tool for leverage. If no state officials wanted to implement the federal Supreme Court's desegregation ruling, it simply did not happen. In 1957, three years after *Brown*, Gov. Orval Faubus ordered the Arkansas National Guard to prevent black students from enrolling at Central High School in Little Rock. The weakness of the Supreme Court was on full display; not only did the Court, in Hamilton's terms, not have a "sword" to implement its desegregation rulings, but the "sword" was being used against them to prevent implementation. Unless the federal government is willing to use its bigger sword of force against states (which has happened at least once en masse in American history), then there is no implementation unless there is some sort of voluntary compliance, which is what happened much later when the aforementioned federal funding was offered (Condition I). As for Little Rock, the federal government's sword ended up being used when President Eisenhower sent in the 101st Airborne Division. Governor Faubus listened to President Eisenhower and withdrew his state's national guard from the scene, and the president later placed the Arkansas National Guard under federal control. Unlike in 1861, the troops did not have to decide to which political unit, the state or the federal government, they had to remain loyal.

Regionalism and variation in political culture is expected, if not encouraged, in a country that publicly celebrates multiculturalism and has made a mantra of the phrase "diversity is our strength." Across-the-board implementation of a Supreme Court decision cannot be taken for granted, because even if there is a national majority public opinion for an issue, at the state level, where significant power resides due to our federal system, there is still sufficient power to resist implementation for long periods of time. Southern states resisted *Brown* for a decade, until the federal government was willing to use one of the Conditions, or just plain brute force, to override that resistance, which might be considered a "negative incentive" if nothing else.

If we are looking at states as the political units in which the variation in gun control and gun rights takes place, and because all states have urban and rural portions in them, then we need a theory that explains the variation in terms other than the rural/urban divide. Elazar's Political Culture Theory is the pre-eminent examination of American state and local politics in political science. In it, there are three different political cultures that exist in broad geographic swaths across the states: moralistic, individualistic, and traditionalistic. These are subcultures derived from settlement and migration patterns that continue through today. Sharkansky (1969) found political culture was

a better explanation of political participation, policy activism, and size of government than economic indicators such as wealth and traditional indicators such as political ideology. He therefore operationalized the theory to provide a scale of how moralistic, individualistic, or traditionalistic a state is, with higher numbers as the state moves from moralistic → individualistic → traditionalistic. In addition, research by Wirt (1991) has shown that politicians' attitudes about decision making and the redistribution of public funds to various groups are related to Elazar's political cultures.

The moralistic political culture developed among the Puritans in upper New England in states like Maine, and as these colonists move westward across the top of the United States through the Great Lakes onto the West Coast, they took their values with them. In the middle 1800s, Scandinavians and Northern Europeans joined, and by dint of their own home countries' cultures reinforced the Puritan values of the original colonists. The individualistic political culture originated in the mid-Atlantic colonies, such as Pennsylvania, with settlers from non-Puritan England and Germany. They went westward through the Ohio Valley in a fairly straight line on to Wyoming. The traditionalistic political culture is from the southern colonies, such as Virginia, that tied their economies to slavery and spread into the Deep South and on into the Southwest (Elazar 1984), which can be seen in a map (see figure 1). It should be noted that settlement and migration patterns in the preindustrial era flowed like water, via the path of least resistance, and that resistance could include hostile Native tribes. The exact mix of political culture in a state is based on the favorable geography that allowed one group or another to spread easier than another rather than in clean lines on the map, most of which were only created from surveys after settlement. Consequently, most states have a mix of two of the political culture types. For instance, Illinois is a mix of the moralistic political culture in the northern portion of the state where settlement came via Lake Michigan and the individualistic political culture in the southern portion of the state, where individualistic and traditionalistic settlers comingled. But without the plantation agriculture, the traditionalistic political culture amalgamated to the individualistic. Elazar himself noted the particular breakdown. The scale on the right column in table 1 is Sharkansky's operationalization, with the higher the number showing the more traditionalistic a state's composition.

All three political culture types take different approaches to the role of government and how it is run. In moralistic states, policy and political positions are typically justified by politicians' appeals to the broad "public interest" rather than special interests. There is a professional class of public administrators. In individualistic states, there are strong parties and coalitions of

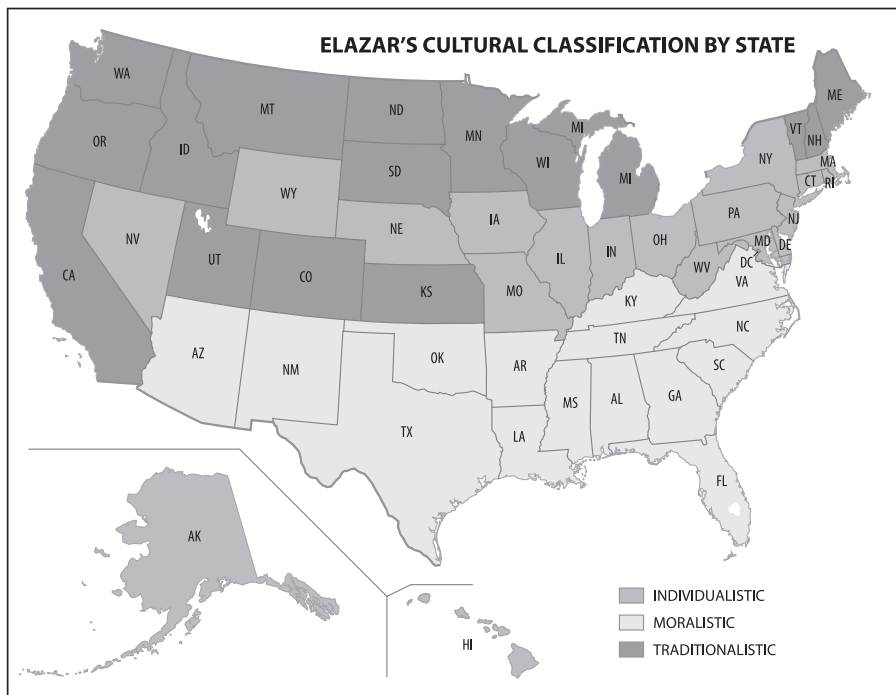


Figure 1. Map of Elazar's cultural classification by state (Lumen n.d.). (Source: LumenLearning.com and Robert Cronan.)

special interests seeking to use the government to advance their interests and reduce the position of their opposition. There is a public administration bureaucracy in individualistic states, but it is less professional than in moralistic political culture states. Lastly, in traditionalistic political culture states, which originated under the auspices of slavery and the institutionalized racial discrimination of the South, parties are not as strong, professional public administrations are not well-developed, and governments are actively distrusted (Elazar 1984; Mead 2004). A cultural path dependency, according to Elazar, is strong enough that nationwide the states reflect the culture of their first inhabitants. If entire political cultures can be carried through cultural transmission, then policy preferences for how a state balances gun control, gun rights, and public safety should also be expected to be part of that path dependency. Even today, white southerners (47 percent) are significantly more likely to have a gun in the home (Morin 2014), while only about half that many blacks are likely to have a gun in the home.

Based on Elazar's historiography and the traditional role of guns as sym-

Table 1. State Political Culture

	State	Elazar Culture Type	Scale		State	Elazar Culture Type	Scale
1	MN	Moralistic	1	26	IL	Individualistic/moralistic	4.72
2	WA	Moralistic/individualistic	1.66	27	AK	Individualistic	5
3	CO	Moralistic	1.8	28	NV	Individualistic	5
4	IA	Moralistic/individualistic	2	29	OH	Individualistic/moralistic	5.16
5	MI	Moralistic	2	30	AZ	Traditionalistic/moralistic	5.66
6	ND	Moralistic	2	31	HI	Individualistic/ traditionalistic	6
7	OR	Moralistic	2	32	IN	Individualistic	6.33
8	UT	Moralistic	2	33	DE	Individualistic/ traditionalistic	7
9	WI	Moralistic	2	34	MD	Individualistic/ traditionalistic	7
10	ME	Moralistic	2.33	35	NM	Traditionalistic/ individualistic	7
11	NH	Moralistic/individualistic	2.33	36	TX	Traditionalistic/ individualistic	7.11
12	VT	Moralistic	2.33	37	WV	Traditionalistic/ individualistic	7.33
13	ID	Moralistic/individualistic	2.5	38	KY	Traditionalistic/ individualistic	7.4
14	CT	Individualistic/moralistic	3	39	FL	Traditionalistic/ individualistic	7.8
15	MT	Moralistic/individualistic	3	40	VA	Traditionalistic	7.86
16	RI	Individualistic/moralistic	3	41	LA	Traditionalistic/ individualistic	8
17	SD	Moralistic/individualistic	3	42	OK	Traditionalistic/ individualistic	8.25
18	CA	Moralistic/individualistic	3.55	43	NC	Traditionalistic/moralistic	8.5
19	NY	Individualistic/moralistic	3.62	44	TN	Traditionalistic	8.5
20	KS	Moralistic/individualistic	3.66	45	AL	Traditionalistic/ individualistic	8.57
21	MA	Individualistic/moralistic	3.66	46	SC	Traditionalistic	8.75
22	NE	Individualistic/moralistic	3.66	47	GA	Traditionalistic/ individualistic	8.8
23	NJ	Individualistic	4	48	AR	Traditionalistic/ individualistic	9
24	WY	Individualistic/moralistic	4	49	MS	Traditionalistic	9
25	PA	Individualistic	4.28	50	MO	Individualistic/ traditionalistic	9

Source: Sharkansky (1969)



bols of patriarchal authority (Taylor 2009) and the history of the Second Amendment as a theoretical check against government tyranny, traditionalistic states that have a low trust in government should have less gun control and more keeping and bearing of arms. To further examine state-level variations in the results of *Heller* and *McDonald*, I proposed the following hypothesis:

- H<sub>4</sub>: The more traditionalistic a state, the fewer gun control laws it will have.

Moralistic political culture strongly supports collective action, politics is considered a high calling, and a good deal of faith is placed in the government with the belief that it exists for the betterment of the people's greater good. Participation in political activities is communal, rather than for individual self-advancement, thus "intervention into private activities is acceptable if it furthers a public good" (Leckrone 2013); this would include the private activity of gun ownership and use. Owning a gun expresses distrust of one's neighbors and toward the government: "Every handgun owned in America is an implicit declaration of war on one's neighbor" (Kates 1997, 109). In the moralistic Northeast, gun prevalence is significantly lower (27 percent) than in other parts of the country (Morin 2014). These two moralistic cultural preferences, trust in government and a willingness to interfere in otherwise private activities, means that moralistic political culture states theoretically should have more gun control and less keeping and bearing of arms. To examine state-level variations in the results of *Heller* and *McDonald*, I proposed the following hypothesis:

- H<sub>5</sub>: The more moralistic a state, the more gun control laws it will have.

Individualistic political culture sees the political sphere as filled with competing groups and interests. The individualistic political culture does not focus on achieving an idealized common good. Public administration is built on patronage and constituent service and there is a tolerance of corruption due to payoffs to interest groups. Looking purely at Elazar's Political Culture Theory, there is no theoretical cultural reason why an individualistic state should be pro-gun control or pro-gun rights. Politically, as individualistic states are a marketplace of ideas, the level of gun control should vary based on the strength of the competing interest groups pushing for their favored policy. Payback for electoral success will come in the way of favored

legislation that either restricts or loosens gun laws. Because few states are purely individualistic, because of settlement patterns that did not happen along clean lines on the map, portions of many individualistic states are either moralistic or traditionalistic, and the competing groups are culturally moralistic or traditionalistic. The more an individualistic state leans toward moralistic, the more likely it will have higher levels of gun control. The more a state leans traditionalistic, the less likely it will have high levels of gun control. Following through time with a type of political inertia, individualistic states as political units that already have less gun control prior to *Heller* should more fully implement the central holding. To further examine state-level variations in the results of *Heller* and *McDonald*, I proposed the following hypothesis:

- $H_6$ : Individualistic states will have less gun control the more traditionalistic they are, and more gun control the more moralistic they are.

The combination of Rosenberg's Constrained Court Theory with Elazar's Political Culture Theory is represented in this simple model<sup>1</sup>:

Before moving on, it is important to discuss the weakness of Elazar's Political Culture Theory. The theory itself is like an Impressionist painting. From far away it looks holistic, but the closer you get, the more it tends to break down due to a lack of specific details. Some of the same criticisms that can be leveled at Rosenberg's Constrained Court Theory when it is rephrased as positive and falsifiable hypotheses also fit here. Political Culture Theory is a "soft" theory that lacks "hard" identifiers. The existence of the theory owes itself to Elazar's interpretation of history and demographic trends, and it paints the states and demographic groups in broad swaths.

That weakness, however, does not make it much different from many other empirically valid social sciences theories. There is, though, a second and perhaps more valid criticism. Elazar focuses on ethnic and religious influences in the creation of the individualistic, moralistic, and traditionalistic subcultures. As Elazar has passed on, it has not been updated to account for the demographic shifts since his last volume came out in 1984. Yet there have been tremendous changes to the ethnic and religious mix of the United

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1. The lack of individualistic political culture in this model is explained by the fact that states with individualistic culture by itself (there are only a few states that are wholly individualistic) show no discernible pattern toward gun control or gun rights, and states that are partly individualistic and partly moralistic or traditionalistic bifurcate toward gun control for moralists and gun rights for traditionalists.

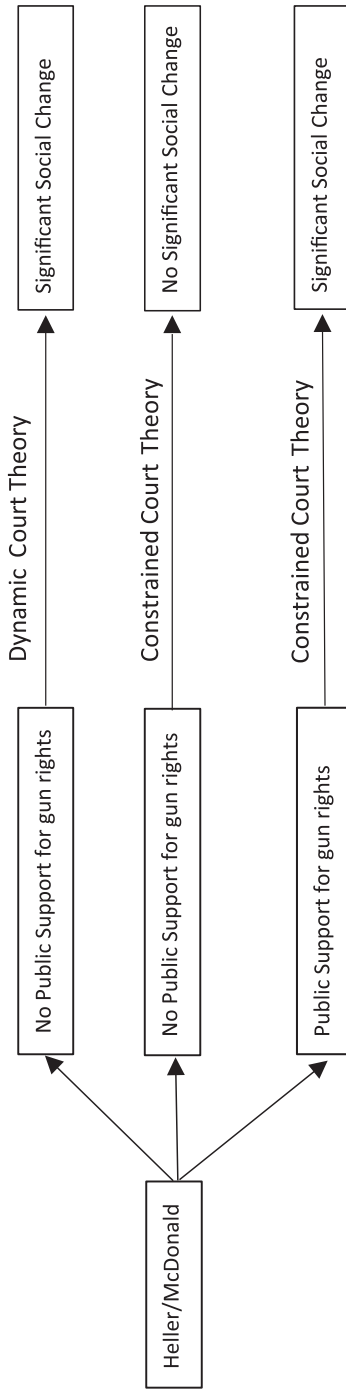


Figure 2. Model of combined theories. (Source: Anthony Cooling.)

States, most notably starting with changes caused by the Immigration and Nationality Act of 1965. This law ended the nation-by-nation quota system that sought to keep the existing proportions of the U.S. population the same. That quota system was in place from 1921 until the Nationality Act in 1965, which was when Elazar was first writing his theory and taking into account the early twentieth-century changes caused by the mass migration of Irish and southern European immigrants. Since 1965, the barriers in place that limited immigration to mostly northern Europeans have been removed, and as a consequence, the demographic mix of the United States has been significantly altered. Improvements in transportation that allow citizens to travel more easily, the internet that allows more research on relocation venues, demographic shifts caused by political units like Detroit that have had a marked decline, the Immigration Act of 1965, and the emergence of an educated urban elite in the past half-century take some of the explanatory power of Elazar's theory away and move toward a different model based on an urban/rural divide (Florida 2005).

Regardless of the weaknesses of Elazar's Political Culture Theory, culture is a comprehensive concept that escapes precise qualification. That this limits the explanatory power means that no matter what theoretical model was used to test where there is state-level variation in gun laws and any significant social change, we would arrive at many of the same weaknesses. Economic and demographic characteristics can be more precisely measured, and later in this book, the effects of demography on states are examined, but a theory that explains state-level variations is needed because it is within state government offices that power resides. That power is used to implement a court decision, or not. Demographic groups influence politics based on pre-existing governmental units; they do not set up their own governments. Economic or demographic forces may influence state governments, but it is a state government that writes and enforces the law.

## Research Design and Methods

Rosenberg's *The Hollow Hope* is a series of case studies organized like an extraordinary well-researched legal brief but with a quasi-experimental design in which Rosenberg tests two models, the Dynamic and Constrained Court, against each other after several court decisions (Feeley 1992). The text systematically frames issues, separates them from empirical questions, and uses quantitative indicators of impact to examine the effects of court decisions on several policy areas involving abortion, women's rights, civil rights, environmental litigation, reapportionment, criminal law, and same-sex marriage. Here I am using the same methodology to assess the impact of court decisions on policies involving gun rights and regulations. But I use more quantitative measures to improve upon it, including regression analysis, supported by state-level case studies that provide a deeper investigation into state-level variations of judicial influence to take into account each state's political culture as defined by Elazar's Political Culture Theory, where the fifty states are categorized as having a variation of moralistic, individualistic, or traditionalistic political culture.

The court cases (*Heller* and *McDonald*) are the independent variable, and the level of legal "keeping and bearing of arms" is the significant social change, the dependent variable. For example, if by way of a court decision, a state that did not allow the concealed carry of firearms comes to allow it, that would be significant social change. A state's political culture (moralistic, individualistic, traditionalistic, or some mix), as per Elazar's Political Culture Theory, acts as an intervening variable for state-level implementation of *Heller* and *McDonald*. When looking at the District of Columbia, where *Heller* applied specifically, *Heller* is the independent variable, as it only affected the District of Columbia, a federal jurisdiction. When examining the rest of the nation, however, I have to combine the two cases into one

independent variable because *McDonald* is what incorporated the Second Amendment against state encroachment through the Fourteenth Amendment's due process clause, giving it nationwide application. Moreover, both cases are intricately entwined. Much of the reason that two cases even happened is the path dependency of constitutional jurisprudence requiring incorporation through a separate case from *Heller*. For the District of Columbia, from which *Heller* sprang, the question of state encroachment on the Bill of Rights could not be in front of the Court. Also, the legal team that was behind *Heller* was behind *McDonald* as well, and they filed it the day after the *Heller* decision was released.

Both cases have to be treated as one independent variable when looking at the effects of the Supreme Court's decision nationwide, unlike the single case of *Roe v. Wade*, which had immediate nationwide implications. There is precedent, however, for using more than one case as an independent variable in a case study. For example, when Rosenberg tested his theory on same-sex marriage, he was not examining just one case (like a *Brown* or *Roe*) but the effect of several court decisions, at different levels of government, over a longer period of time than just the two years between *Heller* and *McDonald*. The time period in his case study on same-sex marriage goes from a court decision in 1993 until 2007, as the second edition of *The Hollow Hope* came out in 2008, seven years before the *Obergefell* decision in 2015.

More complete data are now available for the topic of firearms as opposed to the policy areas in *The Hollow Hope*. Rosenberg had to creatively search to find several of his quantitative measures of direct and indirect court effects, and some possibly suffer from survivorship bias. Public opinion polling also did not exist in any meaningful way prior to litigation by interest groups for some of his topics. But there is reliable public opinion polling on guns going back to the 1950s. Polls are constant, topical on many different firearms-related policies, and timely in that the same questions can be examined both before and after *Heller* and *McDonald*. As a matter of public policy, the number of concealed weapons licenses is tracked, at least in states that require permits. Moreover, the spread of concealed carry and the changes in the legal type of concealed carry ("may issue," "shall issue," and permitless) have been tracked across states since the 1980s. As a commercial product, there is a wealth of marketing information, such as number of guns produced and sold. As all government entities tend to do, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) keeps a large amount of publicly available statistics and compiles much of it in the Annual Firearms Manufacturers and Export Report. These manufacturing and export data were used in this book to examine the role of the free market in implementing *Heller* and

*McDonald*, as firearms are a legal, although regulated, product. Advocacy groups keep track of state-level gun laws, aggregate the data, and grade the states according to their policy preferences. The Brady Campaign to Prevent Gun Violence is both the largest gun control advocacy organization and also the most prominent gun control organization (Utter and Spitzer 2011). It does yearly tracking of gun laws state by state and ranks them against each other, and it regularly issues reports that allow for meaningful comparisons across states over time of the changes in gun laws and the level of keeping and bearing arms, which ties directly to my dependent variable. This wealth of data, combined with other demographic information available through the census, allows for the use of descriptive statistics and regression analysis, with appropriate controls, to help understand and explain relationships among variables and provide great evidence of causality. Strong theory, temporal precedence, and quantitative data make for a methodologically sound and needed expansion of Rosenberg's tests in *The Hollow Hope* as applied to this new topic of gun rights and control.

### Rosenberg's Methodology

Rosenberg derives much of the intellectual heft of his research from qualitative and quantitative measures of court impact. Although he does not describe this formally as the methodology of process tracing, defined as "the systematic examination of diagnostic evidence selected and analyzed in light of research questions and hypotheses posed by the investigator" (Collier 2011, 823), Rosenberg's formulations and analysis of impact is essentially the same. Process tracing is an analytic tool by which a researcher draws causal inferences from diagnostic pieces of evidence as part of a sequence of events. Describing and analyzing events over time addresses the problem of "correlation not causation" that comes from statistical analyses without strong foundational theory.

The diagnostic pieces of evidence in this process tracing are specific metrics or data tied to the hypothesis being tested. For example, as in Rosenberg's case study on abortion, one diagnostic piece of evidence where he could tell if the Supreme Court was successful or not in implementing its decision was the number of abortions women had nationwide. In my case study, where I am seeking to test if the Court had any effect on the level of keeping and bearing arms, one piece of diagnostic evidence I look at is the number of concealed carry licenses granted and, further, how many states have moved to permitless carry. If the number of concealed carry permits in

a state increases or the state removes permit requirements altogether, then that clearly shows increased keeping and bearing of arms.

More specifically, Collier describes different process tracing tests for causal inference. Testing the Constrained Court Theory against the default Dynamic Court Theory would be a “hoop test” (Collier 2011, 826). The hypothesis that the Constrained Court Theory’s conditions must be met for there to be significant social change means that the theory must “jump through the hoop” to remain under consideration. If significant social change happens without those conditions being met, the Constrained Court Theory would lose consideration as the better plausible explanation for observed reality. Passing the hoop test, however, does not affirm the Constrained Court Theory, it merely weakens the Dynamic Court Theory as a rival hypothesis without fully precluding the possibility that it may be relevant.

As in the *Hollow Hope* cases, I lay out the two competing theories and test them against each other to determine whether the Constrained Court Theory or the Dynamic Court Theory more closely approximates the role of courts in the American system. After amassing the evidence, I examine direct and indirect effects and where significant social change occurs, and I conclude which theory offers the better explanation for the given social reality. If there is evidence that any significant social change came directly from the Court and if it did not come after some significant legislative or administrative agency policy change, then the Dynamic Court Theory offers the better explanation. But if change only happens as per the Constrained Court Theory’s rubric of public support and the Court’s decision reflects change already underway rather than being the cause of it, then the Constrained Court Theory offers the better explanation for empirical reality. This process tracing examines legal, social, and political indicators before, during, and after *Heller*.

I examine each aspect of the Constrained Court Theory to see if it offers more explanatory power than the Dynamic Court Theory. In order to say that Constrained Court Theory offers a better explanation than the Dynamic Court Theory, there has to be a legal trail of supportive precedent predating *Heller*, support from the elected branches, or sufficient support from some citizens or generalized apathy from the majority. Legal citations, politicians’ public statements, election platforms, amici curiae, and polling data, respectively, provided evidence on these points. Process tracing was used to see if the decisions were implemented and how they were implemented: via positive or negative incentives, if the free market acted as a proxy for court implementation or executive enforcement, if officials used the decisions as a leverage for more resources, or if they used the decision as a shield to hide behind.



The careful description of what happened over time is what gives a researcher using process tracing the ability to make a causal inference about the relationships between independent and dependent variables. Rosenberg's chapters are laid out in such a way that he analyzed each aspect of his Constrained Court Theory for each particular topic (abortion, civil rights, etc.) before coming to his conclusion about which theory (Constrained or Dynamic) better fit the situation. For issues that required more in-depth analysis, each aspect of the Constrained Court Theory is examined, and they are sometimes presented in multiple chapters. Still, the process tracing he engaged in is the same, which is seeing if any significant social change occurred and, if so, whether it was tied directly to the actions of courts and which condition in his theory was met or not. I use a reformation of the Constrained Court Theory into a set of positive hypotheses as explained in the theory section as a chapter-by-chapter guide for a national-level analysis before looking at state-level variations. Each hypothesis is tested via process tracing, looking for concrete quantitative and qualitative markers that significant social change did or did not occur due to the Court's decisions in *Heller* and *McDonald* and the subsequent implementation of them.

### Nationwide Statistical Analysis

Descriptive statistics show the differences in the level of keeping and bearing arms prior the *Heller* and *McDonald* decisions, as varied by the different political culture types. This chapter then moves into a regression analysis to take into account other variables that need to be controlled for that might affect the level of keeping and bearing arms in a state, such as how much of the state is urban or rural.

The states, as one would expect in our federalist system, vary significantly in their level of gun laws. Federal gun laws provide the minimum restrictions on the keeping and bearing of arms is restricted from a laissez-faire situation. Federal law, for example, prohibits of the possession of guns by fugitives from justice. But if federal law is the minimum, then state laws erect additional legal and regulatory structures that further restrict the keeping and bearing of arms. For example, in Illinois, a specialized firearm's owner identification (FOID) card is required to possess and purchase firearms or ammunition. Meanwhile just across the border in Wisconsin there is no paperwork required for the purchase and ownership of a firearm and ammunition other than what federal law requires. The level of gun control in the states varies considerably, with some much more restrictive than federal law

requires, provided they do not have an outright handgun ban. The Brady Campaign, the most prominent gun control organization (Utter and Spitzer 2011), ranks the states on thirty different gun policy areas, with the states gaining points based on whether they have restrictive measures, such as bans on high-capacity ammunition magazines, and losing points if, for example, they allow the permitless carrying of concealed weapons (see appendix C for a complete list). The index goes from 0 to 100, with higher scores indicating stricter laws, and thus less keeping and bearing of arms. It is a weighted index, as no state's laws are as restrictive as the Brady Campaign's ideal policy goals. The lowest score is Louisiana with a 2, and the highest is California with an 89.

I listed the states by political culture type alongside an index derived from the 2013 Brady Campaign to Prevent Gun Violence's gun control scorecards on the strictness of that state's gun laws. The 2013 rankings take into effect the wave of new gun laws passed in the wake of the Newtown shooting. The Brady index was previously used by Gray (2016) as part of a "policy liberalism index" to examine the socioeconomic and political context of states in her analysis of Elazar's Political Culture Theory. The Brady Campaign has graded the states since 1997, although some years were skipped. The 2013 scores are the ones prominently listed on the website as of 2017–2018, and they were the result of a collaboration between the Brady Campaign and the Law Center to Prevent Gun Violence and were a reformulation of Brady's earlier scoring method. This reformulation prevents meaningful comparisons over time for scores prior to 2013, but even though the scores were reformulated in 2013, it is possible to look into archived score sets to see changes over time. As an aside, the Law Center to Prevent Gun Violence has since gone on to create its own ranking system.

## Descriptive Statistics

Descriptive statistics on Brady index scores provide some illumination on the way the Brady scores differ by Elazar's political culture types of moralistic, individualistic, and traditionalistic. A clear trend is established with the 2013 Brady Campaign scores. States with a mix of traditionalistic political culture have a lower average score, while states with individualistic and moralistic scores are higher, with a low standard deviation for purely moralistic states and for traditionalistic states. I construe this low standard deviation for moralistic states and traditionalistic states as evidence of support for the right to keep and bear arms in traditionalistic political culture, while

Table 2. 2013 Brady Index and Political Culture Descriptive Statistics

	Individ- ualistic	Individ- ualistic/ Moralistic	Individ- ualistic/ Tradition- alistic	Moralistic/ Moralistic	Moralistic/ Individ- ualistic	Tradition- alistic	Tradition- alistic/ Individ- ualistic	Tradition- alistic/ Moralistic
Mean	31.4	50.8	53.8	22	26.8	15.5	14	10.8
Median	18.5	57.3	60.5	25	16.8	15.5	15.3	10.8
Stan Dev	26.9	27.3	26.1	7.9	24.9	3.9	4.4	4.8
# of States	4	8	4	9	8	4	10	2

Source: Anthony Cooling

there is less support in moralistic political cultures; otherwise we would see greater variability. States that have some form of individualistic political culture without a traditionalistic component also have high standard deviations, although states that are dominantly traditionalistic with a secondary individualistic culture have a low standard deviation. This is likely due to the electoral competition between groups in individualistic states; one side, either progun or antigun, can win and further its policy agenda on a state-by-state level. As a side note, there are only two states that are traditionalistic/moralistic, Arizona and North Carolina, and there are not enough of them to make any meaningful comparisons.

If we look at scores over time, we also see some meaningful changes. The national average Brady score declined as a whole, while simultaneously the standard deviation increased, meaning that some states passed more gun control laws and other relaxed their gun laws. States went in opposite directions, increasing the spread. Moralistic/individualistic states increased their level of gun control, while other culture types passed gun rights legislation.

The years 2013 and 2007–2011 are separated by a gray column due to the change in the way the scores were calculated. Again, you can see a trend toward a lower nationwide mean and median score, while simultaneously the nationwide standard deviation increased because some individualistic/moralistic states, such as California and Illinois, increased their levels of gun control, while more traditionalistic states like Texas decreased their level of gun control.

## Regression

The different averages for traditionalistic and moralistic political culture states, along with their lower standard deviations, show a pattern worth

Table 3. Brady Index Score Over Time

	2007	2008	2009	2010	2011	2013
Mean	17.9	17.4	16.9	16.4	16	28.3
Median	11	9.5	9	7.5	6.5	17
Mode	4	6	4	4	4	15.5
Standard Dev	17.9	18.1	18.9	20.6	20.8	23.9
Individualistic Mean	22.4	22.2	23	21.4	21.4	31.4
Individualistic/Moralistic Mean	33.5	33.3	32.4	35.8	35	50.8
Individualistic/Traditionalistic Mean	30.5	30.5	29.8	28.5	28	53.8
Moralistic Mean	12	12	10.7	9.8	9.7	22
Moralistic/Individualistic Mean	18.9	17.6	17	15.3	15.1	26.8
Traditionalistic Mean	10.3	9.8	10.3	9	8	15.5
Traditionalistic/Individualistic Mean	6.5	5.9	5.7	5.3	4.7	14
Traditionalistic/Moralistic Mean	13	13	11	8	8	10.8
Texas	9	9	9	6	4	15.5
Illinois	28	28	28	35	35	59
California	79	79	79	80	81	89

Source: Anthony Cooling

investigating. I used ordinary least squared (OLS) regression with the Brady index as the dependent variable and the independent variable being Sharkansky's (1969) operationalization of Elazar's typology, which ranks states on a scale of 1 to 9, with low scores identifying moralistic states and high scores identifying traditionalistic states, with individualistic states in between with moderate scores. Although dated, Sharkansky's operationalization of Elazar was used recently by Fisher (2016) to adequately explain President Trump's poor showing in the Republican primary in moralistic states such as Utah when compared to his rivals. Whereas Elazar's work is comparative in nature and does not lend itself to direct measurements, Sharkansky's operationalization of all the qualitative traits of each culture type (see appendix B) is still the most useful rendering of Elazar's Political Culture Theory for statistical purposes. Recent work moves into the "New Political Culture" (Clark and Hoffmann-Martinot 1998), which entirely throws out Elazar's typology (Florida 2005) and is mostly the investigation of the symptoms of an urban/rural cultural divide (Leckrone 2013), and thus, it does not work for examining state-level variation in gun laws. See figure 3 for state culture scores cross-tabbed with the Brady Index scores.

The dependent variable is the Brady Index score. The regression results

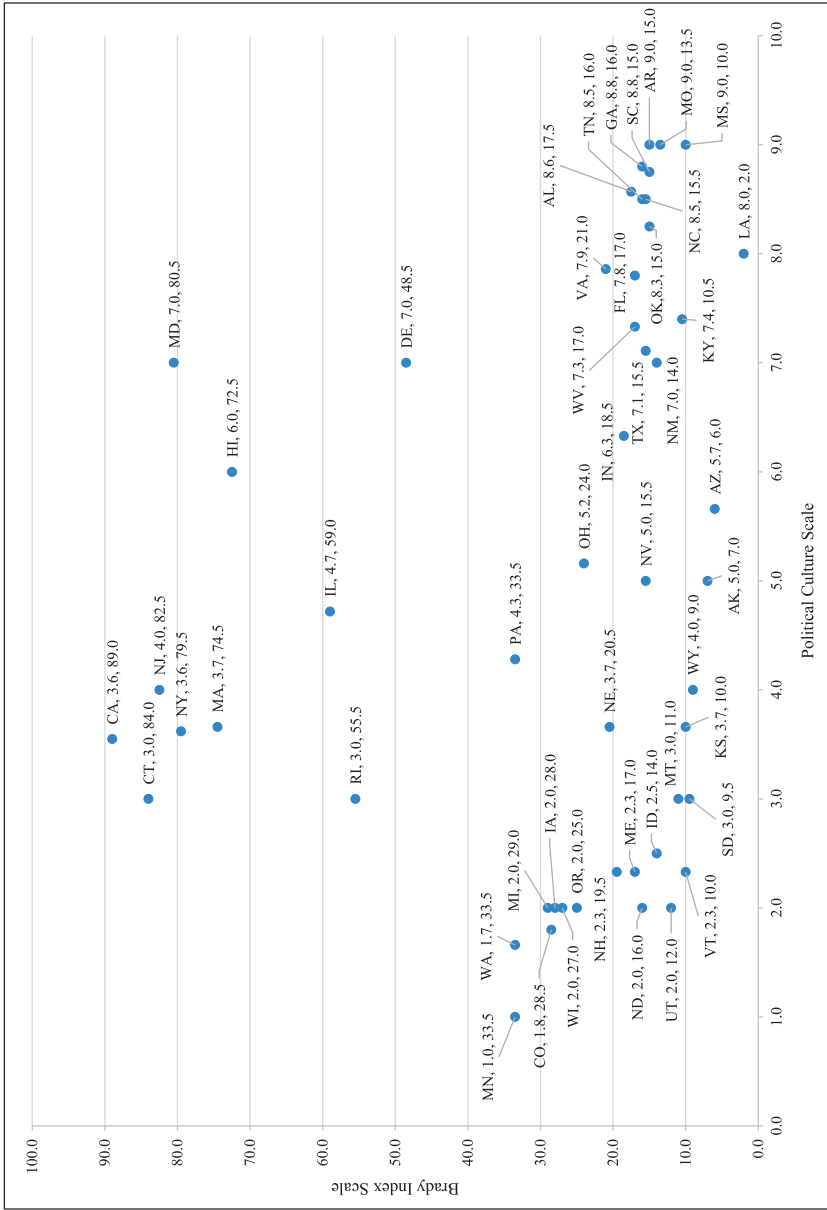


Figure 3. Culture type by Brady index score. (Source:Anthony Cooling)

show, controlling for the percentage white, percentage urban, and percentage Obama vote in 2012, that as a state goes from moralistic to traditionalistic, there is a statistically significant ( $p$ -value .00) change in the state's ranking on the Brady Index. The  $R^2$  is .55, which indicates that 55 percent of the variation is explained by the model. The formula is

$$\begin{aligned} \text{Brady Score} = & -2.65(\text{Culture Scale}) + 68.9(\% \text{urban}) + 52.7(\% \text{white}) \\ & + 63.22(\% \text{Obama Vote 2012}) + 4.24 \end{aligned}$$

The equation shows that on average, for every one-point increase on the Brady Index (more gun control) there is a 2.65-point decrease in the Political Culture Scale (less traditionalistic). The Political Culture Scale goes from moralistic to individualistic and then traditionalistic on the 1–9 range of the scale, the higher the number the more traditionalistic. The Brady Index goes from 0 to 100. Higher numbers indicate more gun control.

The bivariate correlation of political culture and the Brady Index produces a correlation coefficient of -.22 that has a  $p$  value of  $p = .12$ . While that is approaching statistical significance in a model where we theoretically propose that a traditionalistic culture should have less gun control, even on a one-tail test it is not statistically significant. There is something else going on, and we have to use control variables to isolate it.

O'Shea (2008), in a work on federalism and guns, reviewed demographics and public opinion, and his literature review concluded that the progun culture is primarily small-town, rural, and southern. The choice to control for percentage of urban population in states is to control for the largest opinion divide on guns, and that is whether a person lives in an urban or rural environment. Using the control variable, the percentage of white in a state also controls for the fact that the American South has states with large black populations relative to others, and black opinion on guns tends to support gun control over gun rights. In 2012, less than one-third of black families saw gun ownership as a positive (Igielnick and Brown 2017). The model also includes the state's percentage of 2012 Obama vote as a third control variable, even though there is multicollinearity between urban regions that have a larger proportion of black population, as well as Democratic Party voters. As a control variable, partisanship strengthens the model, in that even when controlling for partisanship, there is still a statistically significant relationship between political culture and the level of gun control in the state. Elazar's theory is independent of party affiliation. This analysis provides evidence that Political Culture Theory should be an intervening variable in the implementation of Supreme Court firearm decisions, as it shows

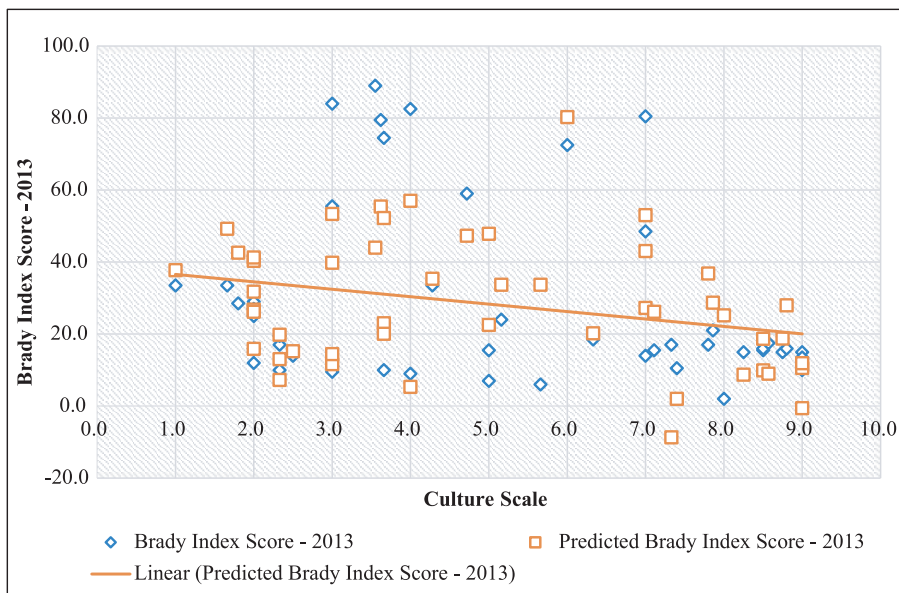


Figure 4. Brady index score—2013 line fit plot. (Source:Anthony Cooling.)

the pre-existing conditions are such that as a state goes from moralistic to traditionalistic, there is already less gun control.

The descriptive statistics and regression analysis results show that it is worthwhile to move ahead with state-level case studies, but before discussing case selection further, I need to annotate the section on culture more than what was in the theory portion of the book. Culture, the larger term underscoring Elazar's work, is widespread attitudes that shape how public governments and institutions operate. Elazar's Political Culture Theory has cultures that are distinct from other political differences between the states, for example ideology or partisanship. We should expect that political culture will influence states' responses to the issue of gun control and gun rights based on the differences among individualistic, moralistic, and traditionalistic cultures. Each of the three culture types is linked to many other features of state politics, but there are many other features of state politics and government than the ones Elazar cites. Mead criticized Elazar's categories that were said to "capture the beliefs of political elites and activists better than those of voters" and that "moralism and traditionalism" are the differences between the northern and southern states" (Mead 2004, 275). Elazar's

Political Culture Theory, while a useful tool, has culture types that are highly generalized and not focused on specific policies such as gun rights and gun control. The theory also does not capture culture as it is best expressed, as the person-to-person transmission of norms, social behaviors, and social learning.

It should be expected that traditionalistic states should have less gun control as a consequence of their suspicion of government and their patriarchal outlook, and that moralistic states support more gun control, as they generally treat a reduction of public vices such as gun violence as means toward an end of “good government” in a culture that stresses problem solving. Indeed, just listing state culture type by its Brady gun control score shows a relationship to the naked eye without the use of any descriptive statistics (see appendix C). It was a slight surprise, however, to see individualistic style states (which have a mix of traditionalistic or moralistic), where according to Elazar’s Political Culture Theory there is more tolerance for disagreement and a willingness to compromise, tending toward extreme gun control or gun rights positions. We see this when there is a mix of individualistic culture with moralistic culture, such is the case of Illinois, which has a lot of gun control relative to the rest of the nation. The same goes for Texas, which is individualistic and traditionalistic, which has much less gun control relative to the rest of the nation and is a state that has continued to roll back gun control restrictions in the wake of *Heller*.

Part of this discrepancy can be attributed to the fact that Elazar’s Political Culture Theory does not explicitly have any criteria for how any political culture type will deal with the problem of gun violence. Nor does it offer a particular window into how a state’s culture will deal with self-defense with a firearm, both in the home and carrying a concealed weapon, the latter of which is “bearing arms.” Clearly, moralistic culture is less concerned about individual rights, and traditional states are less trusting of government, but conceptions of the balance among gun rights, public interest, gun violence, and self-defense are four items that are not bound to align exactly along the lines of Elazar’s Political Culture Theory. Given this limitation of Elazar’s Political Culture Theory as applied to the issue of gun control and gun rights, while we do have a strong statistically significant relationship, we can and do have incongruous results in states that are off the best-fit regression line. Again, a traditionalistic/individualistic state like Texas is a good example of this, especially when we are removed from observations of Texas culture directly using Sharkansky’s operationalization of Elazar’s Political Culture Theory.



## Case Study Choice

A quantitative statistical analysis shows a clear relationship between Brady Campaign scores, which measure the level of gun control (or keeping and bearing arms) in a state, when examined alongside the state's political culture type of moralistic, traditionalistic, or individualistic. States with a mix of traditionalistic political culture have a lower average Brady score, while states with individualistic and moralistic scores are higher, with a low standard deviation for purely moralistic states and for traditionalistic states. A low standard deviation for moralistic states and traditionalistic states is evidence of support for the right to keep and bear arms in traditionalistic political culture and less support in moralistic political cultures. States that have some form of individualistic political culture without a traditionalistic component have high standard deviations, indicating electoral competition that occurs between groups in individualistic political culture.

The regression analysis showed a statistically significant relationship between the level of gun control in a state, controlling for the percentage of white and the percentage of urban. The more traditionalistic a state is on a numerical operationalization of Elazar's Political Culture Theory, the less gun control it has. When looking at this relationship on the whole, nationwide, very moralistic states like California and New Jersey have an outside effect.

Near or alongside the best-fit curve line of the regression analysis are three states: Texas, California, and Illinois. As a state becomes more traditionalistic, it has less gun control, and as it becomes more moralistic, it has more gun control. Regardless of methodology, Illinois had to be chosen since the *McDonald* case pertained to the city of Chicago, Illinois. These states also offer differing pre-existing conditions prior to *Heller*, in that California has passed the most gun control legislation prior to and after *Heller*, and likewise Texas has passed the most gun rights legislation prior to and after *Heller*. This variation is a "pathway most-different" design selection, where the cases vary in background factors (Z) and have a wide variation in responses (Y) to explore causal mechanisms (M) to see that they fit theoretical explanations.

There are, however, several types of case selection method techniques (Gerring and Cojocaru 2015) for comparison. By selecting Illinois, Texas, and California, I am using a "crucial" case design, in that the states are all followed over time, and also a "most-different" case design, in that they have dissimilar political cultures. Irrespective of methodology, Illinois was also chosen because *McDonald* was about Chicago's handgun ban and restrictive storage laws, and the state had to be fully examined at the local level to see the degree of compliance with the Supreme Court's decision.

In all three cases, there was an intervention (*Heller* and *McDonald* being the X change), while the Z (political culture) stays the same, and the change in the level of variable Y (keeping and bearing of arms) was examined. Illinois is of particular interest because the situation on implementation is not as obvious as in Texas and California. Testing Rosenberg's theory here will provide the best evidence of whether rights can be expanded without public support via the Dynamic Court Theory or if public support is necessary. Chicago complied with the results of *McDonald* to the most minimal extent possible, yet there has been a series of court cases and statewide legislative actions since. Tracing these actions and the effects and amount of public support through Rosenberg's theory has been essential for understanding how the difference in the pre-existing political culture of Illinois (indeed all three states) compound to maximize differences in implementation of *Heller*, the expansion of an individual's right to keep and bear arms, and the actions of distinct political actors and institutions. This is an examination of within case causality to look at how Court influence is predicted by political culture type.

Unlike *Brown*, the *Heller* and *McDonald* decisions themselves had narrow actionable items for implementation; Washington, D.C., and Chicago had to roll back their handgun bans and gun storage ordinances. This produces a limited result in the way of specific quantitative markers compared the integration of schools across the South, one of *The Hollow Hope's* prominent topics. The interpretation of the Second Amendment as protecting the people's individual right to "keep and bear arms in common use," however, has broad implications, and thus we should see legislative changes across various states. Based on our theory and hypotheses, moralistic states would be expected to read *Heller* in the narrowest sense possible, while traditionalistic states much more broadly. After the Second Amendment's incorporation via *McDonald*, state-level gun control laws needed to be examined by state officials to see if they contradicted the Supreme Court's decisions, and if they did, they should have been changed. If those laws were not changed, then they are potential targets for litigation.

Aside from the narrowness of the required actions by jurisdictions after *Heller* and *McDonald* to be in compliance with the rulings, the scope of an individual rights interpretation of the Second Amendment will show clear differences among the states in how they have responded to the pair of decisions. Before these two decisions, gun control was almost entirely in the political environment; now it is in a complex and ambiguous place where personal rights are in constant friction with government policy and where one gives way to another in a constant series of compromises increas-

ingly decided in a courtroom. For ten years, between the 2008 decision and 2018, there were approximately 1,153 Second Amendment cases (Ruben and Blocher 2018). While the *Heller* decision protected individual rights, it simultaneously said “reasonable restrictions” were constitutional, albeit with no bright lines other than total handgun bans and restrictive storage laws. The political branches are sorting out the aftermath of the Supreme Court, trying to make its decision scalable, and except for one remanding of a case from Massachusetts about stun guns, the Court made no further decisions on the matter. Although it announced in January of 2019 that it would be taking a Second Amendment case to be argued and decided in late 2019, the case was made moot by the New York State legislature revising the laws in question. In a brief opinion, the Court sent the case back down to the lower court for consideration of the relevant Second Amendment claims against the new rules currently in force. Despite a few dissents, the Supreme Court has declined to grant certiorari on Second Amendment cases and on the case made moot from New York. That the Supreme Court is largely silent will, ironically, allow a good test to see if the Supreme Court’s doctrine is being followed by state legislatures and state courts and by lower federal courts, and thus we will see if the Supreme Court is capable of making significant social change in the absence of the repeated unanimous declarations about the right to keep and bear arms, as was the case with repeated unanimous court declarations reformers sought to use to end segregation that went largely unheeded after *Brown*.

The public is increasingly wary of large claims similar to the one *The Hollow Hope* makes in a world of nonlinear and competing narratives; prudent scholars can possibly avoid the pitfall of choosing their case studies to fit their hypotheses through a mixed-method approach. The methodology partially used to select the case studies is “nested analysis” (Lieberman 2005), which combines a statistical analysis of a large-N data set with an in-depth investigation of several cases nested within the sample. This methodology begins with using available empirical and quantitative data, which in my cases is a nationwide analysis of the effects of *Heller* and *McDonald*, to include a statistical analysis and linear regression, using the state-level gun law data aggregated by the Brady Campaign. The researcher has a “baseline” theory that he or she wishes to test quantitatively to assess associations and the relationship among independent and dependent variables from a large sample of cases that fit within the baseline theory. The “baseline theory” is the Constrained Court Theory, with public support as an ordinal continuous variable at the state level, as modified by state-level political culture, with the hypothesis that political culture affects implementation of the Supreme Court decisions of *Heller* and *McDonald*.

If there is a relationship between the variables that conforms to the underlying theory, which in most research means that there is a statistically significant result of a regression analysis, the researcher will then “nest” a small-N analysis into the larger quantitative analysis. This step examines whether independent variables link with the hypothesized outcome from the baseline theory. This two-step process reveals if regression results are the product of correlation rather than causation.<sup>1</sup> This nested qualitative analysis of the actions of distinct political actors and institutions as a result of the decisions, and the effects and amount of public support through Rosenberg’s theory, is essential for understanding how the difference in the pre-existing political culture of all three states compound to make differences in implementation of *Heller*.

## Conclusion

A quantitative statistical analysis shows a clear relationship between Brady Campaign scores, which measure the level of gun control (or keeping and bearing arms) in a state, when examined alongside the state’s political culture type of moralistic, traditionalistic, or individualistic. States with a mix of traditionalistic political culture have a lower average Brady score, while states with individualistic and moralistic scores are higher, with a low standard deviation for purely moralistic states and for traditionalistic states.

Near or alongside the best-fit curve line of this regression analysis are three states: Texas, California, and Illinois. After a broad look at the national effects of *Heller* and *McDonald*, I arrive via different case selection methods, to nested qualitative analysis of these three states.

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1. Weller and Barnes (2014) prefer the idea of “pathway cases” to nested analysis. A pathway case is one that isolates the effect of the independent variable, then identifies the case whose prediction is most improved by including the independent variable in the regression model. A pathway case is also close to the regression line, but identifies the independent variable as the one that contributed most significantly to putting it there. The logic of the pathway case suggests that my case study selections are valid under this approach as well.



PART II

## Tests and Analyses



## Testing of the Dynamic and Constrained Court Theories

In *District of Columbia v. Heller* (2008) and its companion case *McDonald v. Chicago* (2010) the Supreme Court interpreted the Second Amendment as protecting an individual's right to keep and bear arms and subsequently incorporated it against state encroachment. The holdings of *Heller* are, succinctly, that the Second Amendment protects an individual right to keep a handgun in the home, free from a restrictive storage law requiring it to be locked up or otherwise inaccessible for self-defense, regardless of militia service. The holding of *McDonald* is that an individual's right to keep and bear arms is incorporated and applicable to the states through the Fourteenth Amendment's due process clause. In the majority opinion of *McDonald*, Justice Alito wrote, "It is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty" (31).

Chicago's ban on handguns was not ruled on specifically, but it was clear that the ban was unconstitutional based on its decision in *McDonald* and the previous *Heller* decision, and the case was remanded for additional proceedings. But what exactly does an "individual right" interpretation of the Second Amendment mean? This exposition is not to relitigate the case, as these summaries are by no means exhaustive of the legal and historical research that bolsters the views argued in court. But it is important to explain the background leading up the cases and what the decisions have changed.

The first interpretation of the Second Amendment was that it was, and is, superfluous. It was unnecessary as soon as a professional army was created to defend the nation, which happened with the War of 1812, and therefore, the Second Amendment is like a nonfunctional appendage that if removed



would not change anything, such that it could be safely ignored as a protection for the country. The view is not well-stated in case law, but it is the view taken by Justice Ginsburg in her vote on *Heller* and is a common view frequently expressed in public debate by gun control organizations. In a 2013 interview, when discussing the case, Justice Ginsburg said, “If the court had properly interpreted the Second Amendment, the Court would have said that amendment was very important when the nation was new.” Also she said that “it gave a qualified right to keep and bear arms, but it was for one purpose only—and that was the purpose of having militiamen who were able to fight to preserve the nation” (Hockenberry 2013). By implication, because we now have a standing army and a National Guard, the amendment is an anachronism. She further added that “I view the Second Amendment as rooted in the time totally allied to the need to support a militia. So . . . the Second Amendment is outdated in the sense that its function has become obsolete.” This is the argument often made when it is pointed out that guns today are far deadlier than the guns of earlier eras (which is true by the ratio of volume of fire at least).

Because we do not expect civilians to grab their muskets to defend their homeland, the Second Amendment has no modern function; therefore, there is no right for any one individual to own a gun. This interpretation is somewhat troublesome (despite the prefatory clause of the Second Amendment that mentions the importance of a militia) because, for example and by comparison, the First Amendment only specifically mentions “freedom of the press” in an era where there were only printing press newspapers. If paper newspapers were to die out completely, would the viewpoint protections of the First Amendment be an anachronism as well? While the First Amendment makes no mention of technological improvements, by logical extension, its protections have been extended to the internet and other media. Taken quite literally, the First Amendment’s protection of journalism would only protect communication on paper, so the reading of the Second Amendment as superfluous is a tough sell for most constitutional scholars, and it is because of that tough sell that such an interpretation never made its way into any case law (Torrez 2016).

The second interpretation is that the Second Amendment protects a collective right that is held by the people as part of a well-regulated militia. It is a middle ground between the reading of the amendment as an anachronism and the individual right interpretation of the Second Amendment found in *Heller*. In the collective right interpretation, the people have a collective right, in common with fellow citizens, to own a firearm, but that right is subordinated to participating in a militia. This reading would not unchari-

tably throw the whole amendment out as meaningless because the national defense purpose behind it has been superseded by the creation of a standing army; it still has a purpose, just one that, policy-wise, we choose not to exercise. In his book *Six Amendments: How and Why We Should Change the Constitution*, former Supreme Court justice John Paul Stevens (author of one of the two *Heller* dissents) clarified his understanding of the amendment by adding five small 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 *when serving in the militia*.” The collective right interpretation was the precedent the Supreme Court re-examined in *Heller*, based on the previous times during which the Court had cases on the Second Amendment in *United States v. Cruikshank* (1875), a case about freedmen’s right to bear arms; *Presser v. Illinois* (1886), a case about citizen militias; and *United States v. Miller* (1939), a case on the legality of a sawed-off shotgun. Although a narrow reading of *Miller* shows the Court never adopted the collective right interpretation in toto, this was certainly the case in the lower courts, a point I discuss later when laying out the legal precedents of *Heller* and *McDonald*.

The individual right interpretation, the one the Court settled on in *Heller*, is that the Second Amendment holds that the Founding Fathers sought to “secure the right to arm a state militia and also the right of the individual to keep and bear arms” for personal protection (Sprecher 1965, 699). This interpretation began to gain modern prevalence after Sprecher’s essay in the *American Bar Association Journal*, written not long before he was appointed to the federal bench by President Nixon. This interpretation of the Second Amendment is that it protected a pre-existing right to own a firearm for self-defense, unconnected with militia service, because it was an individual’s right to own a firearm for self-defense that even made a citizen militia possible. That the militia today is not the same as the one at the time of the Founders does not remove the underlying pre-existing right. By the Civil War it was widely understood that the Second Amendment protected the right of individuals to own firearms. Chief Justice Taney, in the *Dred Scott* decision, worriedly cautioned that if blacks became full citizens, they could “keep and carry arms wherever they went” (1857). This apprehension that, if made citizens, blacks could own and carry guns like whites could only makes sense if the Second Amendment protected an individual right to own firearms and not a collective right to be part of the militia. This interpretation was, perhaps pre-emptively, coined the “Standard Model” by constitutional scholar Glenn Reynolds (1995).

As opposed to the federal constitution, at the state level there is a mix of

collective and individual right interpretations. While only six states (California, Iowa, Maryland, Minnesota, New Jersey, and New York) have absolutely no provision of some sort related to the right to keep and bear arms, in the ones that do have protections, when state court case law history is added, the protections vary from explicit protection to a generalized protection of the right to keep and bear arms that is symbolic at best. Over time, however, the general trend is that states have added more specific protections of an individual right to keep and bear arms as opposed to a collective right in regard to service in a militia, and that state courts have consistently upheld those provisions (Volokh 2006). The most recent change to a state constitution to put in an explicit protection for the individual, not collective, right to keep and bear arms (prior to *Heller*) had been in the state of Alaska. In 1959, when Alaska became a state, the state constitution on this subject was a mirror of the federal one. In 1994, however, the state added to the federal language, “The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.”

There are older instances. For example, the state of Vermont has an article in its Bill of Rights that was adopted at the time of the Founding that says, “That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.” Ch. I, art. 16 (enacted 1777, Ch. I, art. 15). This was upheld as an individual right to keep arms for self-defense by the Vermont high court (*State v. Rosenthal* 1903). Meanwhile, the collective right interpretation was running parallel to the individual right model. The state of Massachusetts has in its Bill of Rights, also from the time of the Founding, the text: “The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority and be governed by it.” Pt. 1, art. 17 (enacted 1780). The Massachusetts high court interpreted this as a collective right in *Commonwealth v. Davis* (1976). The Founding Era provisions were the topic of much debate and discussion in the *Heller* case, but the change of state constitutions demonstrates, at least at the state level, ample legal precedent for an individual right interpretation. That most states have explicit protections for the right to keep and bear arms for individuals is part of the reason the lead attorney in *Heller*, Alan Gura, took a chance that there might be a 5-4 decision against an individual right interpretation of the federal constitution’s Second Amendment (Winkler 2013). Had the

case not come out his way, there was still a state bulwark for the right he sought to protect. From his blog on the case, Gura wrote in 2007:

There are several reasons why the time is ripe for Supreme Court Review.

- 1) The upside potential exceeds the downside risk. Current federal appeals courts covering 47 states say there's no Second Amendment recourse in federal courts if state laws violate gun rights. Those decisions would no longer be good law if the Supreme Court affirmed *Heller*. On the other hand, 44 states have their own constitutional provisions protecting an individual right to bear arms. None of those rest on the Second Amendment and would be unaffected if the Supreme Court reversed . . .
- 2) A bad case will ultimately reach the Supreme Court if *Heller* does not. (Gura 2007)

## Court Action

By adopting the Standard Model, the Supreme Court concluded that the individual right interpretation is supported by (1) the historical record, (2) the amendment's drafting history, and (3) interpretations of the amendment by scholars, courts, and legislators. The case specifically did this for self-defense in the home, and in doing so, it struck down as unconstitutional provisions of a Washington, D.C., law that (1) effectively banned possession of handguns by non-law-enforcement officials and (2) required lawfully owned firearms to be kept unloaded, disassembled, or locked when not located at a business place or being used for lawful recreational activities.

*Heller* did not have much of a legal precedent in the sense that it drew directly on any substantive Second Amendment jurisprudence from the Supreme Court, although it did not exactly fall from the sky in 2008 either. Sixty-nine years prior to *Heller*, the most recent Second Amendment case was *Miller* in 1939. One has to go back to 1894 for the previous one, *Miller v. Texas*, where the Supreme Court merely affirmed its 1876 decision in *Cruikshank*, which, in short, stated that the Second Amendment only applied as a limitation against the national government. This was part of what constitutional scholars sometimes call the "Slaughterhouse Era," where the Supreme Court interpreted a series of cases to limit the protections of the Fourteenth Amendment against state encroachment on individual rights.

The case preceding *Heller*, *Miller*, was an unusual case to say the least, as the defendant was never actually there to present an argument in his defense.

It was an outlier case that narrowly ruled that a bootlegger's sawed-off shotgun was not a militia weapon and therefore was not protected by the Second Amendment, as the amendment only protected militia arms. This ended the last ditch effort on the part of Mr. Miller to avoid prison without actually ruling on whether the Second Amendment protected an individual right or not, which conceivably it could have if the Court had decided that Mr. Miller did have a militia weapon. But when *Miller* is not read narrowly, as it was by other federal courts who took up Second Amendment cases, it led to an interpretation of the Second Amendment only being a collective right connected with participation in a militia.

In only one case, coming out of the Fifth Circuit, was there an individual right interpretation of the Second Amendment. In *United States v. Emerson* (2001) an appeals court engaged in an analysis of the text and history of the Second Amendment and determined that it protected an individual right, even as it upheld the denial of Mr. Emerson of that right due to a restraining order placed on him that prohibited the transportation of firearms or ammunition by those under a restraining order. Emerson, an honor-bound Texan, had allegedly threatened to kill the hairdresser that his soon-to-be ex-wife was having an affair with, and she had petitioned the court for a restraining order until the divorce was complete. It was not but a year later in the Ninth Circuit (*Silveira v. Lockyer* 2002) that another appeals court also engaged in an analysis of the text and history of the Second Amendment and determined that it did not protect an individual right to keep and bear arms. A circuit court ruling that the Second Amendment did not protect an individual right was what happened in panel decisions by the First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Spitzer (2004) compiled thirty-seven federal Second Amendment cases since *Miller* in which the collective right interpretation was adopted. In all fifteen of these cases that were appealed to the Supreme Court, they denied certiorari, as it did with *Emerson*, the only pre-*Heller* circuit court case that decided for an individual right interpretation.

### Was There Ample Legal Precedent Prior to *Heller* and *McDonald* as per the Constrained Court Theory?

H<sub>1</sub>: Increased levels of keeping and bearing arms will not occur without an interpretation of the Second Amendment that allows for an expansion of individual rights.

Rosenberg is not entirely clear as to what an “ample” legal precedent exactly is when he states that it must exist for courts to be able to make significant social change. For example, in his case study on abortion, where he notes that social change did occur because of market implementation of *Roe v. Wade* (1973), there is an ample legal precedent of only two Supreme Court cases. In *Roe*, the Court ruled that a right to privacy in the Fourteenth Amendment extended to a woman’s decision to have an abortion. Those precedent-setting cases are *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972). In the landmark *Griswold* case, the appellants were charged with violating a statute preventing the distribution of advice to married couples regarding the prevention of conception. The Court ruled that the right of a married couple to privacy was protected by the Constitution. Less famously, the *Eisenstadt* case had the Court overrule a conviction for providing a contraceptive to an unmarried person. Given the threshold that Rosenberg sets of a minimum of two precedent-setting Supreme Court cases, *Heller* does not meet that threshold. The *Heller* decision had to go out of its way to give a narrow reading of *Miller*. However, in the abortion case study, Rosenberg does note that ample legal precedent is not limited to Supreme Court cases only, and he goes on to say that before *Roe*, there were fourteen additional cases in lower courts and in state courts that supported the view that a woman’s right to privacy extended to having an abortion. If one is looking at only lower federal court cases, then there was not ample legal precedent for *Heller*, as there was only the *Emerson* case that ruled toward an individual right, while the majority of the cases had a collective right interpretation. This led some scholars to call Justice Scalia, the author of the *Heller* decision, the most “activist judge” in recent history (Torrez 2016), indeed a cutting dig at a justice who was an originalist. Although if one considers the state constitutional precedents and state court decisions, then there is certainly ample precedent. Prior to *Heller*, there were twenty-two states that had an individual right to keep and bear arms expressly secured (even if other militia type provisions are mentioned), and no court case was needed to secure an individual right interpretation. There were three states in which an individual right is secured and a court case that treats the decision as aimed toward individual self-defense. For example, Maine’s 1987 constitutional provision says that “every citizen has a right to keep and bear arms and this right shall never be questioned.” This was added after a collective right interpretation court case of the 1819 provision, which was that “Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.” Self-defense was then subsequently protected in a 1990 court case. Further, fourteen states had court decisions

that treated the right as at least partially aimed at the right to own a firearm for individual self-defense. On the other hand, there were two states with a provision not expressly favoring an individual right interpretation, but which the state courts had not ruled on the question. Prior to *Heller*, there were two states that had a collective right interpretation and six states with no provisions whatsoever.

Post-*Heller*, in 2010, voters in Kansas, one of the collective right interpretation states (along with the aforementioned Massachusetts), approved a ballot measure to allow the right to keep and bear arms for lawful purposes by an 88.2 percent to 11.7 percent margin (Ballotpedia 2010). The provision reads, "A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose." This replaced the 1859 provision that read, "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." Again, if we are allowing state court cases and state constitutional provisions prior to *Heller* to be ample legal precedent, then there certainly was ample legal precedent. These state provisions, especially the ones from the time period of the adoption of the Bill of Rights that made explicit note of an individual right, were drawn upon for the *Heller* decision, especially Vermont's from 1777, "That the people have a right to bear arms for the defence of themselves and the State." This is analogous to Rosenberg noting that in the leadup to *Roe*, in the five years prior to that decision, abortion reform and repeal bills had been debated in most states and eighteen had acted to liberalize their laws (2008, 184). This indicates for the Constrained Court Theory that making the decision to legalize abortion was not a huge leap from the constantly shifting status quo prior to the decision that was allowing ever growing access for women to get abortions.

Finally, Rosenberg says that there were four law review articles that argued for a constitutional right to abortion. If four is a bar, then *Heller* far exceeds that threshold. Three of these articles were cited by the Court in *Roe*, one specifically called out, as it was written by former Supreme Court justice Tom Clark. By comparison, the *Heller* decision made extensive use of voluminous law review articles and books, not all of which were the work of reformers with an interest in making the conclusions of their legal research match up with their preconceived opinions. SCOTUSblog has a page on which it gives access to all the amicus briefs supporting the petitioner (against an individual right to keep and bear arms) and supporting the respondent (for an individual right to keep and bear arms). There were

twenty for the petitioner and forty-seven for the respondent, many of the latter of which were cited by the Court in *Heller*.

The legal work to come up with the forty-seven briefs in support of an individual right to keep and bear arms was the product of a long line of research. The first modern and prominent article to argue that the Second Amendment protected the right of the individual to keep and bear arms for personal protection was the aforementioned essay by Sprecher in the *American Bar Association Journal*, called “The Lost Amendment” (1965). There were a few articles and scholars working on the issue in the 1970s and 1980s. Notable scholars in the gun rights movement scoured historical archives to produce works like “That Every Man be Armed” (Halbrook 1994); the first edition came out in 1984. But the individual right interpretation began to gain some traction after liberal constitutional scholar Sanford Levinson published “The Embarrassing Second Amendment” (1990) in the *Yale Law Review*. Aside from a textual history of the amendment, with a conclusion that the amendment protected an individual right, its primary impact was a serious discussion of how zealous devotion to the Bill of Rights to uphold the rights of “the people,” a phrase with clear meaning in the First, Fourth, Ninth, and Tenth Amendments, gets logically tendentious when those same defenders discount that “the people” are not the same in the Second Amendment. The article was very influential. In 1993, when Alfonso Lopez Jr.’s conviction under the Gun Free School Zones Act was overturned by a Fifth Circuit panel on a federalism issue related to the reach of the interstate commerce clause, Levinson’s article was cited to say that the Second Amendment was an orphan that needs to be taken seriously. While there were differences of opinion on the amendment’s scope, the hill that Levinson had planted a flag on was soon also occupied by other liberal scholars, such as Harvard’s Laurence Tribe and Yale’s Akhil Amar, the latter of whom was listed by *Legal Affairs* (2008) as one of the top twenty prominent legal thinkers in America. Both of these famous, and otherwise liberal, legal scholars supported an individual right interpretation of the Second Amendment, i.e., the Standard Model.

Regardless of the reach of Levinson’s article and a few liberal cohorts, the individual right interpretation never did take off in the legal academy. Still, there was a large increase in Second Amendment research, and certainly more than four articles by the time *Heller* was decided in 2008. The increase in quantity is also because a portion of it was funded by the National Rifle Association (NRA). For example, in 2003, the NRA Foundation provided \$1 million to endow a Patrick Henry professorship in constitutional law and the Second Amendment. This endowment was for George Mason Uni-



versity, a school at the locus of the “conservative legal movement” (Teles 2008). Naturally, that research had an individual right interpretation of the Second Amendment, and some scholars have said this advocacy-funded research essentially rewrote the amendment (Waldman 2014). Regardless, the amount of research was large enough that Waldman, in his *Biography of the Second Amendment*, likens it to a “fusillade.”

Certainly, from the perspective of the federal bench, the case law was mostly orthogonal to *Heller's* outcome in that only one Circuit Court case, *Emerson*, supported an individual right interpretation of the Second Amendment and prior Supreme Court cases were murkily open to interpretation as both for a collective right or an individual right interpretation. There were, however, ample state court cases that upheld highly similar state constitutional provisions protecting an individual's right to keep and bear arms, and an individual right interpretation was not a 180-degree reversal of Supreme Court precedent, just a 180-degree reversal of the majority of lower federal court opinions. Compared to the long-term and organized litigation strategies of the NAACP toward desegregation, the *Heller* suit was the legal equivalent of a wildcat strike. It was started by a couple of activists supported by a libertarian organization more interested in economic issues than social ones (Waldman 2014). However, *Heller* was built on decades of legal scholarship and movement toward an individual right interpretation at the state level.

There was also a trio of gun rights Supreme Court cases, which shows that the gun rights movement was pursuing an agenda, but they were all built on different foundations than an individual right interpretation of the Second Amendment and thus cannot be used as precedent in the sense of Rosenberg's Constrained Court Theory. While the gun rights movement was involved in these cases as a way to use the Court as a “veto point” for gun control (Keck 2014, 71), these cases are at their heart about federalism and not gun rights. Federalism is a topic of supreme importance to the conservative legal movement, which seeks to reduce the size and scope of the federal government, more than it is to the gun rights movement. The role of the Second Amendment in America closely tracks the classic eras of constitutional development as it pertains to other rights: the Founding of the country to the Civil War, Reconstruction to the court-packing scheme of 1937, the post-1937 order of legal liberalism and the Rights Revolution until the Nixon Administration and the rise of originalism, and our own era of constitutional development with its own conservative legal movement as a counter to legal liberalism.

At the start of the nation, just like other rights found in the Bill of Rights, there were some state-level restrictions on the right to keep and bear arms,

and the Bill of Rights was understood to only apply to the federal government. The Civil War amendments, particularly the Fourteenth Amendment, were meant to apply to the states the same restrictions that were placed on the federal government. But the promise of the Fourteenth Amendment in placing those restrictions on the states was held back by the Supreme Court in a series of late nineteenth-century cases. The ability of freed slaves to keep and bear arms was restricted in the post-Reconstruction South, as were other rights found in the Bill of Rights. Likewise, prior to FDR's court-packing scheme, the Commerce Clause was not read broadly enough to give Congress the authority to ban firearms outright or even to regulate manufacturing and sales. Attempts to restrict access to firearms were in the form of a large tax, for which Congress's power to levy was unambiguous. An example here is the prohibitive (at the time) \$200 tax on certain classes of firearms in the Gun Control Act of 1934. After the "switch in time to save nine," Congress broadly used its authority to regulate commerce with even the most tenuous connection to crossing state lines, and the result was laws such as the 1994 assault weapons ban, which was not a prohibitive tax on assault weapons but an outright ban, and the Gun Free School Zones Act of 1990, which assumed Congress had the power to regulate firearms near schools since students and education have a role in interstate commerce. With the rise of originalism, there also arose a pushback to these broad readings of the Commerce Clause and likewise to the regulation of guns via a tenuous connection to interstate commerce. As more and more rights were incorporated by the Fourteenth Amendment in the twentieth century, starting in earnest with speech cases in the 1920s, the Second Amendment followed along that linear progression and precedent.

While there is certainly overlap between the rise of originalism and the gun rights movement, which started in the 1970s, the primary goal of conservative originalist litigation was not an expansion of gun rights. The gun rights movement's involvement with these cases were as fellow travelers of the conservative legal movement. The first of these cases was *United States vs. Verdugo-Urquidez* (1990), a drug and immigration case in which the Supreme Court decision explicitly said that "the People" in the Second Amendment is the same as in the First, Fourth, Ninth, and Tenth Amendments, directly mirroring the language and thought process of the Levinson article. If the other amendments were long recognized as protecting an individual right, then this was groundbreaking, as it was the first individual right interpretation of the Second Amendment from the Supreme Court, albeit a circumspect one. The other Supreme Court cases, aside from *Miller*, that touched directly on the Second Amendment came from an era before incor-

poration under the Fourteenth Amendment. The second of these Supreme Court cases of recent vintage was a “wildcat” case: *United States v. Lopez* (1995). In this case, the Court held that the federal Gun Free School Zones Act of 1990, which banned the possession of handguns near schools, was unconstitutional because the regulated action, guns near schools, did not have a substantial impact on interstate commerce. That action was the hook by which Congress assumed it had regulatory authority. After the case, Congress amended the act to only apply to guns that had been moved via interstate commerce, which is a meaningless distinction for any potential violator of the act, as virtually every gun that is produced enters a national marketplace and, at some point, crosses a state line. The third case was *Printz v. United States* (1997), which held that certain interim provisions of the Brady Handgun Violence Prevention Act (that local sheriffs conduct background checks) violated the Tenth Amendment to the United States Constitution. The situation was rendered moot when the National Instant Computerized Background Check System (NICS) came online. The *Printz* case is important to note because of the signaling in which conservative justice Clarence Thomas engaged within a separate concurrence: that the Court would like to raise the issue of the Second Amendment’s meaning in a separate opinion.

If, however, the Second Amendment is read to confer a personal right to ‘keep and bear arms,’ a colorable argument exists that the Federal Government’s regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment’s protections. [n.2] As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms “has justly been considered, as the palladium of the liberties of a republic.” 3 J. Story, *Commentaries* §1890, p. 746 (1833). In the meantime, I join the Court’s opinion striking down the challenged provisions of the Brady Act as inconsistent with the Tenth Amendment.

Within his *Printz* concurrence, Justice Thomas said that the Court has never previously attempted to define the substantive right protected by the Second Amendment, and Justice Scalia in *Heller* said the same as a way to read *Miller* narrowly. In his *Printz* concurrence, Justice Thomas also notes an “impressive array of historical evidence, a growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.” Here we have one of the majority

opinion justices in *Heller* citing ample legal precedent and scholarly research in the manner of Rosenberg's Constrained Court Theory. It was this fusillade of legal scholarship and forty-seven amicus briefs in support of an individual right to keep and bear arms that gave the Supreme Court the tools Justice Scalia used, and cited, in writing the *Heller* decision.

Federal Second Amendment cases were few and far between, and what legal precedent there was from the Supreme Court did not lend itself to an individual right interpretation of the Second Amendment. But there was ample legal precedent in the way of legal scholarship, at least one favorable case (*Emerson*) from the Fifth Circuit, ample signaling about gun rights in other decisions that were part of the conservative legal movement, and ample precedent in state constitutional amendments that explicitly protected an individual right to keep and bear arms. In sum, if in one of Rosenberg's case studies a mere two cases are "ample" legal precedent, then hypothesis one was supported, because prior to *Heller* there was at least one circuit court case for an individual right interpretation, tangential decisions where the Supreme Court indicated what it would decide if they had a Second Amendment case, state-level examples of an individual right going back to the Founding Era, and a plethora of legal scholarship they could lean on.

## Support from the Legislature and the Executive

- H<sub>2</sub>: Increased levels of keeping and bearing arms will not occur without support for an expansion of individual gun rights from substantial numbers of members of the legislature and the executive.

The judiciary is often unwilling to step outside the political mainstream to make significant social change because it lacks implementation powers, what Rosenberg calls Constraint III. It is more willing to do so, however, when there is political support, even though there are no “hard-and-fast rules for determining” the level of this support (Rosenberg 2008, 31). But there is certainly more, admittedly nebulous, guidance that the Court can use to infer political support, signals that the Court can view as intent that implementation of a decision of theirs will occur from the elected branches of government. Rosenberg listed a few key indicators as signals of support: (1) recently passed legislation supportive of the type of social reform that the Court would be deciding upon, (2) legislation that was seriously considered or debated dealing with similar issues, and (3) support from the executive branch for significant social reform as indicated by an amicus brief. He took pains to note, however, that public support as indicated by opinion polls does not always translate to political support from elites. With *Heller*, we have concrete evidence of both majority congressional support through legislation, ratings of members of Congress by a progun advocacy group, and signing onto an amicus brief. In addition, there is concrete evidence of executive branch support from both a significant policy change within that branch of government and from the vice president signing onto an amicus brief with the majority of Congress.

Unlike *Brown*, which was built on decades of litigation (some success-

ful, some not), there was no long string of previous court cases from which the Supreme Court could draw for *Heller*. But what the litigants knew they had when they filed suit was support from both Congress and the executive branch. A plan by a conservative legal organization to bring a suit against the District of Columbia's handgun ban went back to 2002 (Winkler 2013) after President George W. Bush's new attorney general, John Ashcroft, made the announcement in 2001 in a letter to the NRA that the official position of the administration was that the Second Amendment protected an individual right to keep and bear arms (Halbrook 2004). Finally, an amicus brief in support of an individual right to keep and bear arms written by prominent historian and Second Amendment litigator Stephen Halbrook (who was the chief attorney for *Printz*) was signed by 55 members of the Senate, 250 members of Congress, and Vice President Dick Cheney (2008), which is 55 percent of the Senate and 57 percent of the House, a majority in both chambers.

This was certainly a change of opinion from earlier attempts to use both Congress and the courts to undo the D.C. gun ban. In July 1973, Congress gave the District of Columbia home rule, although it still gave Congress the authority to block laws passed by the city council. The handgun ban went into effect in 1976 after attempts in Congress to block it failed. Even after the Republican wave election of 1994, not much changed. Congressional efforts to remove the gun ban in 1999, 2003, 2004, and 2005 died in the Senate or at Joint Committee (Smith and Carliner 2008).

There are two cases leading into *Heller* in the courts that happened about the same time as the failed efforts in Congress to undo the ban. In *Seegars v. Ashcroft* (2005), which was filed in February of 2003, the plaintiff's suit against the gun ban was dismissed from lack of standing, in short, because his handgun was stored outside the district. In *Parker v. D.C.* (2007), which was filed in April of 2003, six litigants carefully chosen for their optics in the court of public opinion also filed suit to undo the ban. The case would eventually morph into *Heller* as Dick Heller was the only one who made the futile, but legally important, effort of trying to register a handgun, even though the city did not allow registration of new handguns (Winkler 2013). The other five litigants were found to lack standing because, in effect, they like Seegar did not try to break the law first before trying to get it overturned.

Even if there was no action on the ban between the initial handgun ban in 1976 and the first congressional attempt to undo the ban in 1999, it is important to note that at three earlier points in U.S. history, Congress had recognized and affirmed that the Second Amendment protected an individual right to keep and bear arms (Halbrook 1995). One of those points

was between the implementation of the ban and the first attempt to undo it in 1999. The first time Congress recognized that the Second Amendment protected an individual right to keep and bear arms was in 1866, with the passing of the Freedman's Bureau Act of 1866 over a veto by President Andrew Johnson; the act stated that freed slaves:

. . . have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery (emphasis added).

The second time was in 1941 when Congress was giving President Franklin Roosevelt the right to requisition property for the war effort with the Property Requisition Act, which was written to explicitly exclude firearms. It said:

Nothing contained in this Act shall be construed:

1. to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), . . . [or]
2. to impair or infringe in any manner the right of any individual to keep and bear arms.

(Halbrook 2008, 3)

Those two acts may have well been ancient history by the time of *Heller*. Rosenberg's Constrained Court Theory implies, but never explicitly states, that congressional or executive support must be of more recent vintage because he (and others) have long noticed that the push for social change requires a constant momentum. We are perhaps asking for too much specificity from the theory to expect that Rosenberg thought deeply about and tested all these tertiary issues, but in his chapter on courts and women's rights, he notes that "court decisions joined a current of social change and a tide of history; they did not create it" (2008, 265) and he goes onto note that the initial and fast gains of the women's liberation movement with regard to workplace discrimination and other issues (but not abortion) were slowed to a halt by President Reagan's election and a nonsupportive executive branch. From that point on, despite waxing and waning on support of the issue of

women's rights among elected officials, women's issues never again reach anywhere near the prominence they did at the peak of Second Wave feminism in the late 1970s. From that passage, and others, we can infer that the support from the executive and Congress must be relatively recent.

To return to the issue of guns, we do have a more recent expression of congressional and presidential support in the Gun Owners Protection Act of 1986, which discussed the constitutional debate in the twentieth century concerning firearms that resulted in the adoption of the Property Requisition Act of 1941, recognized Congress's power to tax firearms such as with the National Firearms Act of 1934, and to regulate them under its enumerated powers, but which also found that Congress did not have the power to prohibit firearms. The Gun Owners Protection Act's congressional findings are that there exists "the rights of citizens—to keep and bear arms under the Second Amendment to the United States Constitution."

By 2008 and the *Heller* case, the momentum of the issue was in favor of the gun rights groups. Regarding Rosenberg's Constrained Court Theory, when the sitting vice president, attorney general, and a majority of Congress sign an amicus brief urging the Supreme Court to adopt a favorable interpretation, there is certainly support from the executive branch and the majority of Congress. But a test of this hypothesis is complicated by the fact that the *Heller* decision happened in the middle of the 2008 presidential election and that the *McDonald* decision came under President Obama in 2010, who was not nearly as sympathetic to gun rights as President George W. Bush. Also when Rosenberg says "the executive" does he mean just the president? By tracing out some of the history of gun control and the gun rights movement prior to the *Heller* decision, I show that the president himself must be personally invested in using the "sword" of the executive to implement a decision and not just some of his executive branch staff. This is even more important during periods of divided government, during which one party controls the Congress and another the Presidency, as the president must actively work against the opposition party. A president can, via a party platform only, be in favor of a decision or against a decision, but as the de facto head of the party and the leader of the executive branch, he or she must respect the Court's decision and set it as a priority to act on. In two famous examples, President Eisenhower did not personally support *Brown* but sent in troops and enforced the decision anyway, and in the opposite example, we have President Jackson, who apocryphally said, "John Marshall has made his decision: now let him enforce it."

There was a long era of divided government preceding *Heller*, when it was unlikely there would have been a Second Amendment case that inter-



preted the amendment as protecting an individual right. The path to that amicus brief being so fully supported by the Republicans in Congress and by the vice president is not clear-cut because before the late 1990s, Republican support for gun rights was not a given. Prior to the 1960s and the wave of gun control that followed, gun rights were not a particularly partisan issue. There were regional variations in party support for gun control, just as in that same era there were southern Democrats who were segregationists and northern Democrats who supported civil rights. Likewise, support for gun rights varied considerably within the parties and by region. Republican presidents, particularly Ronald Reagan, had mixed records on the issue, passing both gun rights and gun control legislation as governor and as president. President Nixon, when asked about gun control, said on the record that “guns are an abomination,” and he would have liked to ban all handguns (Safire 1999). It is difficult to imagine Nixon supporting gun rights, even though his party may have been home to the nascent gun rights movement in the 1960s. President Gerald Ford’s attorney, Edward Levi, was actively working to ban handguns in urban and suburban areas, saying in an address to a law enforcement conference, “The control of handguns is a terribly difficult problem that generates deeply emotional responses in all quarters. But it is also central to the horrible insecurity affecting so many of our cities” (1975). Former presidents Ford, Carter, and Reagan in 1994 sent a letter to all House members urging them to vote for President Clinton’s assault weapons ban (Eaton 1994).

Certainly from at least 1988 through 2000, there was either a president who was agnostic about gun rights or one who was ardently pro-gun control. President George H. W. Bush was tepid on the issue of gun rights and, despite being an NRA member, sent mixed messages through an executive action banning the import of certain military-style rifles and the signing into law of the Gun Free School Zone Act. As for his successor, President Clinton signed into law the most far-reaching gun control bills since the 1960s (the Brady Bill and the assault weapons ban). Rosenberg was correct to the extent that *Heller* could not have happened in earlier Republican administrations. My conclusion is that it takes more than just the party being in support of the Court; it takes the chief executive himself. Vice President George H. W. Bush had only joined the NRA during his 1988 campaign for the presidency. Politics being what it is, the NRA invested (in an era before super PACs) \$1.5 million in Vice President Bush’s 1988 campaign (Umlauf, Cole, and Zhang n.d.) distributing so many “Defeat Dukakis” bumper stickers that one of his campaign staffers said in a *New York Times* interview that he saw more of them in Michigan than official campaign stickers. The NRA

also ran television ads in twenty states featuring actor Charlton Heston (D. Kopel 1990). It made sense for the NRA to invest against Bush's opponent, Democrat Michael Dukakis, who was a staunch gun controller. As Massachusetts governor, Dukakis had supported a 1976 handgun confiscation initiative in that state, had proclaimed a "Domestic Disarmament Day" in which he urged handgun owners to turn their firearms over to police, and had signed a proclamation that the Second Amendment did not protect an individual right (D. Kopel 1990).

George H. W. Bush later resigned from the NRA in 1995 in opposition to some of its strident rhetoric about members of the Bureau of Alcohol Tobacco and Firearms being "jack-booted thugs" (1995) after the Waco, Texas, raid on the Branch Davidians religious sect in 1993. When president, however, George H. W. Bush placed a temporary ban on the import of certain assault rifles through regulatory power granted the executive branch by the Gun Control Act of 1968, and this cost him the NRA's 1992 endorsement, an endorsement which could have helped his re-election prospects. He also signed into law the Crime Control Act of 1990, a comprehensive crime bill of which the aforementioned Gun Free School Zones Act was part. This act is what spurred the *Lopez* case.

George H. W. Bush was agnostic about gun rights, and it is difficult to believe that a case like *Heller* could have happened under his administration, particularly when he signed into law gun control that the Court rolled partly back. If George H. W. Bush was tepid on gun rights, in Bill Clinton America had a president who was ardently pro-gun control. Although President Clinton never explicitly expressed a rejection of an individual right interpretation of the Second Amendment, Janet Reno, his attorney general from 1993 to 2001, signed an amicus brief for *Heller*, correctly noting that gun control laws were long defended by the Justice Department on the position that the Second Amendment does not preclude laws that do not interfere with the maintenance of a well-regulated militia (Long and Marcus 2008). Reno and her predecessors under George H. W. Bush and Ronald Reagan also took the official position of the government that the Second Amendment protected a collective right that would not allow for the expansion of gun rights via Court decisions. President Clinton's policy decisions show that he also thought that government should regulate the right to a much greater extent and that there should be fewer people keeping and bearing arms. Support for more government regulation is in line with the collective right interpretation of the Second Amendment because in that view, the Second Amendment does not protect an individual's right to own a gun, only the states' right to have militias free from federal government interfer-

ence. In a lame-duck interview President Clinton said, “Should people have to register guns like they register their cars? Do I think that? Of course I do” (Safire 1999).

President Clinton oversaw the passage of several gun control laws. First, he encouraged Congress to pass the dormant Brady Bill, which he signed in 1993. Its background check provision was the subject of the aforementioned *Printz v. United States* case. In 1994, President Clinton also signed into law the Violent Crime Control and Law Enforcement Act, which banned large-capacity ammunition feeding devices (that hold more than ten rounds) and prohibited the manufacture or importation of semiautomatic assault weapons. The act grandfathered in existing firearms, and there was a brisk trade in them, but the ban expired in 2004 under President George W. Bush. Further, the 1994 law increased the price of a dealer’s federal firearms license (FFL) from \$30 for three years to \$200 for that same duration and required dealers to be fingerprinted and the information be provided to local police. Importantly, it also required dealers to comply with local zoning laws if they were in “the business” of selling arms (BATF 2016). This last provision led to a significant dwindling of part-time dealers who sold firearms either as a side job or as a hobby, so that from 1996 to 2006, the number of FFLs went from 245,000 to approximately 49,000, an 80 percent decline (Marks 2006). Another one of Rosenberg’s conditions is that the “Court decision allow for market implementation.” This hypothesis is tested later in this book, but it is important to note that just as Rosenberg detailed how the market implementation of *Roe* was slowed, but not stopped, by abortion providers being increasingly regulated, the same phenomena was occurring with firearms during the Clinton administration.

Also, the 1994 law prohibited any person under a domestic abuse court order from possessing a firearm. This portion of the law did not expire in 2004 and was the source of the *Emerson* case. This avenue of curtailing the keeping and bearing arms was strengthened in 1997 by the Lautenberg Amendment, which prohibited any person convicted of misdemeanor crimes of domestic violence from possessing firearms and ammunition, even if they are in the military. Several post-*Heller* attempts to get courts to rule these provisions unconstitutional have failed. Domestic abusers, even those guilty of misdemeanor crimes, do not make sympathetic clients.

When President Clinton was asked at the conclusion of his two terms why his administration did not pass more gun control, he said it was due to lack of support from Congress. In his autobiography, he partially attributes the 1994 Republican takeover of Congress to the gun control he championed and signed into law:

On November 8th, we got the living daylights beat out of us, losing eight Senate races and fifty-four House seats, the largest defeat for our party since 1946 . . . the NRA had a great night. They beat both Speaker Tom Foley and Jack Brooks, to of the ablest members of Congress who had warned me this would happen. Foley was the first Speaker to be defeated in more than a century. Jack Brooks had supported the NRA for years and had led the fight against the assault weapons ban in the House, but as chairman of the Judiciary Committee he had voted for the overall crime bill even after the ban was put into it. The NRA was an unforgiving master: one strike and you're out. The gun lobby claimed to have defeated nineteen of the twenty-four members on its hit list. They did at least that much. (Clinton 2004 629–30)

When support in Congress for additional gun control evaporated, the Clinton Justice Department oversaw an effort to do an end run around the lack of congressional support for strong gun control by supporting tort litigation intended to force gun manufacturers to agree to put more controls on their products.

President Clinton supported a string of lawsuits in the 1990s by authorizing his Department of Housing and Urban Development to join the already ongoing lawsuits against firearms manufacturers, a strategy modeled after the successful asbestos and tobacco lawsuits some years earlier. Primarily, until the mid-1990s, changes in gun policy came about due to the consequences of elections. Except for the role of the ATF, firearms are mostly carved out of the administrative, or regulatory, state. This is gone into in depth during my examination of Condition III (Court Decisions Allow for Market Implementation). When the Consumer Product Safety Commission was chartered by Congress in 1972, its job was to set safety standards for most consumer products, and there was a fear that the agency would use its powers to implement gun control through its powers to set safety standards. There were fears at the time that regulatory actions from the agency were going to be used to ban guns, or at least heavily regulate them, outside the scope of electoral politics. To prevent the slippery slope scenario from happening, in 1976 the U.S. Consumer Product Safety Commission's authority was amended to specifically exclude firearms after at least one backdoor effort to ban some of them by treating them as unsafe products. This amendment removed the commission's ability to issue regulations and therefore eliminated the use of bureaucratic administrative state regulations as an end run around electoral politics. This is why one occasionally

hears the phrase that “teddy bears are more regulated than guns” in the gun control public debate. This is in effect true, if we are thinking of government safety regulations.

In a similar way that firearms were exempted from federal safety regulation, in 1996, the Dickey Amendment passed as a rider on an omnibus spending bill (otherwise President Clinton might not have signed it) prohibiting the Centers for Disease Control from research on firearms unless the research was related to safety; it specifically said that “none of the funds made available for injury prevention and control at the Center for Disease Control and Prevention may be used to advocate or promote gun control” (Jamieson 2013). The \$2.6 million of their budget that was allocated to firearms research was redirected to studying traumatic brain injuries. The model the CDC used for giving out research grants investigating gun violence was guaranteed to cause political controversy because it would treat the presence of guns in America as a public health problem, like smoking or infectious diseases. In response, a majority progun Congress used its power of the purse to exercise control over the executive branch under our constitutional system of checks and balances.

The issue goes as far back as 1979, when the CDC’s parent agency the U.S. Public Health Service stated that its goal was “to reduce the number of handguns in private ownership, starting with a 25% reduction by the turn of the century” (Bell 2013). The use of constitutional checks and balances, however, did not happen until 1996 after the NRA-led takeover of Congress in 1994, as President Clinton lamented in his autobiography. So what happened to make the change? It was out-and-out political advocacy for gun control on the part of the Clinton administration, through the CDC, with the metaphor of guns as a disease. This is but another example of the gun control stance of President Clinton and another reason why, under the Constrained Court Theory, *Heller* could not have happened in the 1990s, because there was not an executive who would have supported it until President George W. Bush.

### Presidential Support a Must for the Constrained Court Theory

President Clinton’s support for gun control and the ability of the executive branch to limit the keeping and bearing of arms, even without legislation, is important because the issue came up again in the Obama administration during the implementation of *Heller* and *McDonald* (the first decided right before and the latter during his administration), and it shows the level

of executive support for gun control in the two administrations. Language identical to the Dickey Amendment passed in 2011 attached to legislation that funds the National Institute of Health (NIH), which showed congressional support for gun rights. President Obama spoke publicly against the Dickey Amendment and issued an executive order to mandate research anyway when his party was unable to pass gun control laws after the Newtown mass shooting, which showed his support for gun control. The result of that executive order was gun violence research that does contortions to not violate the congressional prohibition on advocating for gun control. The research pointedly and repeatedly highlights the already well-known conclusion that a firearm is the primary risk factor in inner-city homicides, then, like a dangling participle, moves on to advocate for increased social services to inner-city youth as a preventive measure (Sumner et al. 2015). Gun research by the federal bureaucracy is a political football, moving up and down the field in both directions. In 2019, President Trump signed a \$1.4 trillion dollar spending package to avoid a government shutdown; congressional Democrats through their control of the House of Representatives had put \$25 million dollars into the must-pass bill funding gun violence research from the CDC and National Institutes of Health, to the consternation of some conservatives (Hammer 2019).

Even if the president is strongly for or against social change, if Congress adamantly refuses to fund at least one avenue reformers are taking, then change from that avenue is impossible. If Congress does not let significant social change happen and instead defunds an executive branch agency intent on propagandizing people to be against guns as much as they had previously turned people against smoking, what effect could the Supreme Court possibly have with no sword and no purse? Between 1996 and 2018, a (generally) pro-gun Congress prevented two pro-gun control presidents from using their discretionary budget authority inside one of their executive branch agencies from advocating for significant social change, the reduction of civilian firearms ownership akin to the reduction of smoking, which was a move in the opposite direction of what Congress wanted and what the Supreme Court in *Heller* had decided. This whole issue of the Dickey Amendment is additional proof of Constraint II, that **both** Congress and the president need to be supportive of the significant social change that would come from any Court decision. As it relates to Gerald Rosenberg and the Constrained Court and Dynamic Court Theories, it means that any balance of power conflict between Congress and the executive branch, where Congress is not divided and willing to use its power of the purse, means that the Supreme Court is unlikely to make significant social change because the Court will

be unable to overcome Constraint II: that “there is support for change from substantial numbers in Congress and from the Executive” (2008, 36).

### Controlling the Courts: The End of the Gun Tort Litigation and the Appointment Process Brings the Courts in Line

Prior to the tort litigation of the 1990s, lawsuits related to guns were generally the aforementioned suits related to product liability issues, were “Hail Mary” attempts by solitary defendants seeking to get a gun charge dropped, or were lawsuits related to federalism and tangential to the Second Amendment itself. They were not the product of a social reform movement’s litigation strategy, even if the *Emerson* case was used by an enterprising lawyer to get an individual right interpretation of the Second Amendment. The gun control tort lawsuits, which were encouraged and participated in by the Clinton administration, were meant not just to extract money from companies, but rather to obtain money and policy changes in the absence of an ability to pass legislation and get social change through the elected branches. As we saw in the literature review chapter, it is a common theme to turn to the courts when there is no succor from Congress and that in the case of a divided government, as it was during the Clinton administration after the 1994 Republican takeover of Congress, the courts have increased leeway because a divided government is not able to curtail them as effectively. With the victory of George W. Bush in 2000, however, we see that a unified government was able to check the courts by shutting down the tort litigation. Let us explore this path minimally, not only because it will explain how the changeover in Supreme Court justices appointed by President George W. Bush even allowed for *Heller*, but also because it shows how in the absence of support from Congress and the executive, the courts were unable to make significant social change via gun control tort litigation.

In 1999, a settlement was reached with the Department of Housing and Urban Development and Smith & Wesson that promised an end to civil lawsuits against the gun manufacturer in exchange for Smith & Wesson outfitting its guns with trigger locks and the company agreeing to implement “smart gun” technology within two years. Smith & Wesson later almost went bankrupt as consumers spent their money elsewhere and the NRA instigated a boycott that led to a 40 percent drop in sales (Austin 2013) and the closing of two factories (Rudolf 2012). More than a few analogies were made regarding Smith & Wesson’s British owners and the American Revolution, which were only amplified when various public entities suing gun

manufacturers promised to purchase only Smith & Wesson arms for their police forces after the agreement.

But since police firearms typically have a service life of about ten years before they are swapped out for newer models, the contortion of public entity procurement policies to favor Smith & Wesson products over their holdout competitors could not make up the difference in time. Contracts with friendly local government were not enough to cover the loss to Smith & Wesson of citizens not purchasing their guns. The company was teetering on bankruptcy when it was bought out from its British owners in 2001 and the new owners publicly repudiated the agreement, a process made easier by the fact that George W. Bush was then president and his administration failed to enforce the terms of the deal. Administration officials told the *Wall Street Journal* that they considered the agreement nonbinding (Rudolf 2012). Sales rebounded, although it was alleged by the gun control organization American for Gun Safety that new major federal contracts were steered to the company (Rudolf 2012); although there is no way to know this for sure, it appears that, if true, both sides were willing to use questionable tactics. There is little doubt, however, that an Al Gore administration would not have let the new owners of Smith & Wesson off the hook so easily.

Meanwhile, some states, such as New York (individualistic/moralistic), passed laws encouraging lawsuits unless gun manufacturers took similar measures as Smith & Wesson in its agreement with the Clinton administration, while other states passed laws preventing them. The story of the tort litigation is much too involved to summarize here for the purposes of testing the hypothesis about executive support, other than to say President Clinton supported the lawsuits and his successor President George W. Bush did not, which is additional evidence for Rosenberg's Constraint II that support from the legislature *and* the executive is necessary for courts to make significant social change. While President Clinton was able to force Smith & Wesson to the negotiating table, and his potential successor, Vice President Gore, would have not allowed Smith & Wesson to opt out of a legal agreement, it was President George W. Bush's administration lawyers who conveniently found the agreement voluntary in nature. The discretion of the executive branch in the way it "faithfully" executes a law is no doubt a signal to the Court the same way Rosenberg notes that legislation or signing onto an amicus brief can be a signal. The situation is not unlike when President Obama's attorney general Eric Holder made the decision, no doubt in consultation with the President Obama, to not defend aspects of the Defense of Marriage Act in federal court, which eventually led to *Obergefell* and same-sex marriage. Leaving aside the validity of the idea of departmentalism, that all three



branches should be able to interpret the Constitution for themselves, it is an obvious message to a court that if it intended to make a decision to move policy away from the status quo, which would be current (unenforced) law, that at the very least the executive branch would support and implement a decision that removes the portion of the law the president thinks is unconstitutional. For the tort litigation, zero support from the executive branch headed by President George W. Bush precluded significant social change by avoiding a domino effect of gun manufacturers capitulating to the lawsuits and “voluntarily” changing their products and marketing to avoid further legal expenses.

To put the nail in the coffin of the tort lawsuits, President George W. Bush signed into law the Protection of Lawful Commerce in Firearms Act in 2005, another signal of executive and congressional support just three years before *Heller*. That act protects firearms manufacturers and dealers from being held liable when crimes have been committed with their products. It is tangible evidence of Robert Dahl’s cogent point that when courts go outside of public opinion on social issues, the legislative and executive branches act to prevent their encroachment. It passed with bipartisan support, with fifty-nine Democrats and one independent in the House and fourteen Democrats and one independent in the Senate voting for it. It is notable from the perspective of Dahl’s points about the appointment process bringing courts in line with popular opinion that *Heller* did not happen until after President George W. Bush’s two Supreme Court appointments: Justice Alito (replacing the more moderate Justice Sandra Day O’Connor) and Justice Roberts (who replaced the arguably less conservative Chief Justice Rehnquist). After those two appointments, only Justice Kennedy’s swing vote was the wild card.

To specifically support Dahl’s point, the subject of firearms regulation was visual in the confirmation process of Justice Alito, although much less so for Justice Roberts. The replacement of Justice O’Connor with Justice Alito brought the Court in line with President George W. Bush’s solidly pro-gun stance, while the replacement of Chief Justice Rehnquist, at least on the Second Amendment, ended up as a status quo change. Justice O’Connor was, for lack of a better term, a moderate on the Second Amendment, while Justice Alito is a hard-liner and staunchly pro-gun. In a *Vanity Fair* interview (Heilpern 2013) some years after her time on the Court, O’Connor expressed in a demure way her opinion on gun possession. Having used them in the rural lifestyle of her youth, she said, “Living as I do in a city today, I have no occasion to use a gun—none. So, I do not keep one.” Since Mr. *Heller* wanted to keep a pistol in the nation’s capital, a city, for self-defense, her moderate leanings make it clear how she would have voted in

*Heller*. She politely did not second guess the Court's decision in *Heller*, even when the interviewer asked her if she could ever foresee a change in the right to keep and bear arms (this being *Vanity Fair*, the interviewer was not generally supportive of gun rights and wanted to see a diminishment of the right). O'Connor answered, "Well, not unless you amend the Constitution, and that's not likely in present-day thinking. I do not see that we should change the text." When asked about specific policies, she again demurs, but admits, "I do not see the need for a resident of the United States to have an assault weapon." This is markedly different from Justices Scalia and Thomas; in a dissent Thomas wrote on the refusal to review a Seventh Circuit decision coming out of a Chicago suburb, *Friedman v. City of Highland Park* (2015), that the Second Amendment protects the right to own AR-style semiautomatic weapons (Root 2015).

Justice O'Connor's moderate stance is markedly different from pro-gun Justice Alito, whose voting record on the subject of firearms regulation was prominently on display for both detractors and supporters prior to his nomination, and it was a source of controversy during the process. In *United States v. Rybar* (1996), while Judge Alito was member of the Third Circuit Court of Appeals, in a 2-1 decision Alito dissented against upholding the conviction of Rybar for illegally possessing a machine gun under the 1986 machine gun ban. This dissent was not because he thought the law violated the Second Amendment (even though Rybar argued that it did). Alito took this position because of the precedent of *Lopez* (1995), which struck down the Gun Free School Zone Act. This is to say that in the more limited reading of the Commerce Clause the Supreme Court had in *Lopez*, where it said there was no connection between interstate commerce and the presence of a gun near a school, it meant the same logic applied to the 1986 machine gun ban. In his dissent, Judge Alito wrote of the ban that it

might be sustainable in its current form if Congress made findings that the purely intrastate possession of machine guns has a substantial effect on interstate commerce or if Congress or the Executive assembled empirical evidence documenting such a link. If, as the government and the majority baldly insist, the purely intrastate possession of machine guns has such an effect, these steps are not too much to demand to protect our system of constitutional federalism. (*United States v. Rybar* 1996, J. Alito dissenting, cited in E. Volokh 2005)

Given that language, a prominent gun control organization, the Violence Policy Center, said that if Judge Alito were to be on the Supreme Court, the

“Application of Judge Alito’s unusual and extremely restrictive view of Congressional regulatory power could imperil virtually every federal law that currently regulates firearms, ammunition, and explosives” (2005). Justice O’Connor being replaced by Justice Alito was probably essential for the Court in *Heller* to reach the individual right interpretation of the Second Amendment.

Justice Roberts, unlike Justice Alito, was much more of a dark horse with regard to his opinion on the Second Amendment during his nomination process. Moreover, he was replacing Chief Justice Rehnquist, who arguably had about as strong a pro-gun record on the Second Amendment as one could get without actually taking a case and ruling on the meaning of the amendment as protecting an individual right. As chief justice, Rehnquist wrote the majority opinion in *United States v. Verdugo-Urquidez* (1990), a drug and immigration case, in which he explicitly said that “the people” in the Second Amendment is the same as in the First, Fourth, Ninth, and Tenth Amendments, which strongly implied that the Second Amendment protected an individual right to keep and bear arms just as the right to free speech is an individual right. There was significantly less information available about Judge Roberts for both supporters and detractors when President George W. Bush nominated him for chief justice. He was only fifty years old at the time of his nomination and had only two years as a judge. This was perhaps intentional, as this was President George W. Bush’s first nomination and a way to avoid a bruising political fight.

Nevertheless, there were at least a few clues to Judge Roberts’s leanings, in that he was close friends with Rehnquist and was his former clerk and that he supported the *Lopez* decision.

To return to Dahl’s point that the appointment process brings the judiciary in line with the elected branches, it is perhaps a stretch to narrowly apply Dahl’s finding to a specific issue, such as firearms, because presidents do not choose justices based on single issues, but instead choose justices holistically based on a shared ideology. A nominee may be good on one issue but squishy on another, or perhaps be a bit of a dark horse to avoid a bruising nomination fight that would use up a president’s political capital at a time he needs it for another issue. In the case of firearms, however, a change from Justice O’Connor to Justice Alito gave the individual right version of the Second Amendment a good friend on the Supreme Court. To the extent that Chief Justice Roberts replaced Chief Justice Rehnquist, it was a one-for-one swap, at least on the issue of the Second Amendment as an individual right. And time has also shown that Justices Alito and Roberts have not been afraid to continue the Court’s reassertion of a more limited scope of the

Commerce Clause and support of federalism, in addition to support of the right to keep and bear arms.

### Discussion: Road to *Heller* and *McDonald*

The path to *Heller* came under the supportive executive, President George W. Bush, and the pro-gun Congress, that was still largely in place since 1994. First, there was the Protection of Lawful Commerce in Arms Act, which acted as a signal flag to the Supreme Court. President George W. Bush also took some minor steps to expand gun rights that acted in Rosenberg's terms as signals to the Court, such as letting the 1994 assault weapons ban expire in 2004. His carefully crafted re-election position, as stated in the third debate with Senator John Kerry, was that he would sign an extension of the ban if Congress gave him one (OnTheIssues.org 2016). This was something he had to have known would not happen, and the debate moderator even questioned him for being two-faced, albeit not in those exact words. This position of being for-it-while-also-being-against-it allowed him to appear centrist for re-election, and with a wink and a nudge to his supporters, he stayed pro-Second Amendment but "moderate" to the rest of the electorate. It is also notable that he personally did not sign the amicus brief that his vice president did; that would have made a stronger statement indeed.

As president, however, George W. Bush was still pro-Second Amendment. He also signed into law the Disaster Recovery Personal Protection Act, which was intended to prohibit confiscation of legally possessed firearms during a disaster, as happened in some instances during Hurricane Katrina after such an order was signed by New Orleans mayor Ray Nagin, and which could have happened during Hurricane Irma in the U.S. Virgin Islands. There, the territorial governor, Kenneth Mapp, issued an order in which the military was "authorized and directed to seize arms, ammunition, explosives, incendiary material and any other property that may be required by the military forces for the performance of this emergency mission" (Mapp 2017). The Disaster Recovery Personal Protection Act provisions became law in the form of the Vitter Amendment to the Department of Homeland Security Appropriations Act in 2007. In the form of executive action, in January of 2009, just before George W. Bush left office, the Interior Department issued a revised regulation that allowed visitors to bring concealed loaded guns into national parks and wildlife refuges. This was a provision that President Obama's administration allowed to stand and that

the Obama justice department defended in court against challenges that the environmental rulemaking process was not fully followed. I surmise this was supported in court by the Obama administration more as support of their administrative rule-making powers than the actual policy itself.

In leading up to *Heller*, George W. Bush was a supportive executive. The only gun control he passed, per se, was the National Instant Criminal Background Check Improvement Act, signed into law in 2008 in the wake of the 2007 Virginia Tech shooting. The shooter's prohibiting mental health history (prohibiting in that by law he was not eligible to purchase a gun) was not available to the National Instant Criminal Background Check System (NICS), and the system was therefore unable to deny the transfer of the firearms used in the shootings (Bureau of Justice Statistics 2017). This law made it through the same Congress (the 110th) that overwhelmingly supported an interpretation of the Second Amendment as an individual right, so it should not be considered a major gun control law, especially as its primary purpose was filling information gaps in mental health adjudications being reported to the FBI, which administers the NICS, to help prevent those already prohibited from owning firearms from purchasing them.

As mentioned previously, testing Rosenberg's Constrained Court Theory with regard to guns and the element of executive support is tricky due to the change in presidents just as the first of the important pair of decisions was made. Clearly, President George W. Bush winning in 2000 over Vice President Gore, who had consistently supported gun control as a senator and as vice president (OnTheIssues.org 2017), had an effect that led to the 2008 decision, as did the 2004 win over Senator Kerry in that year's presidential election. Senator Kerry had a history of voting for gun control and voted against the Protection of Lawful Commerce in Arms Act, without which the gun control tort lawsuits would have continued (OnTheIssues.org 2004). George W. Bush's first ever policy change of having his Justice Department state that the Second Amendment was an individual right can be seen as nothing other than a green light for the Court to make an individual right interpretation. Congress had also recently passed, and President George W. Bush had signed into law, the Law Enforcement Officers' Safety Act (LEOSA). The LEOSA is a little-discussed and mostly uncontroversial law from 2004 (amended in 2010 and again in 2013 to clarify its language) that allows current law enforcement officers and retired ones who maintain certain training standards to carry a concealed weapon regardless of state or local restrictions. The law uses Congress's authority to regulate interstate commerce to supersede state and local restrictions, and it amended the Code of Federal Regulations regarding commerce in firearms and ammunition.

There are some caveats in which local restrictions still apply, such as laws restricting concealed carry in government buildings, but generally speaking the LEOSA supersedes state and local rules.

This green light for the Court is especially true after the Justice Thomas's earlier signaling in *Printz* (1997) that the Court should define the substantive right protected by the Second Amendment. Commentators have long noticed that the public mood does have an effect on the behavior of justices, and the public's pro-gun mood was expressed in the election and then re-election of George W. Bush and a majority pro-gun Congress. In 1901, Finley Peter Dunne, author of a popular comic of the era called *Mr. Dooley*, once expounded in a thick Irish accent after seeing some piece of news that "no matter whether the constitution follows the flag or not, the Supreme Court follows the election returns" (Maltzman, Sigelman, and Wahlbeck 2004). The *Heller* decision happened right before the 2008 presidential election, and if the Court was following the 2000 and 2004 election returns, *Heller* was a delayed response because organizing lawsuits and taking them through the courts is a time-consuming process. As Rosenberg and others have pointed out, the Court is constrained by a lack of judicial independence (Constraint II) in that it can only decide the cases brought before it, and the process took several years.

During the 2008 presidential campaign, both candidates, Senators John McCain and Barack Obama, claimed to support the *Heller* decision. But whereas Senator McCain had a history of half-hearted support of gun rights (he had an NRA "C" rating), Senator Obama consistently supported gun control. In the U.S. Senate, for example, he had voted against the Protection of Lawful Commerce in Arms Act and supported the D.C. gun ban at issue in *Heller*. This makes evaluating the situation in 2010, when the Court decided *McDonald*, even trickier because when President Obama took office, he was arguably the most anti-gun rights president in modern history. In 1996, when Obama was running for an Illinois state senate seat, he answered a questionnaire stating he wanted a state law to ban handguns (OnTheIssues.org 2016). To make the case that he was the most anti-gun president in modern memory, we need to disassociate candidate Obama from President Obama. While a lecturer at the University of Chicago, Barack Obama had a brief conversation with one of the more well-known pro-gun researchers, Dr. John Lott, who was a visiting professor and fellow at the at the university. Lott's story of the encounter is

Indeed, the first time I introduced myself to him he said 'Oh, you are the gun guy.' I responded 'Yes, I guess so.' He simply responded

that ‘I do not believe that people should be able to own guns.’ When I said it might be fun to talk about the question sometime and about his support of the city of Chicago’s lawsuit against the gun makers, he simply grimaced and turned away, ending the conversation. (Lott 2008)

If we take Lott at his word, then President Obama is indeed the most anti-gun president since President Nixon, even though as a candidate for president, Senator Obama said in an ABC News interview that “I have no intention of taking away folks’ guns” (Harris 2008), which was a comment repeated throughout the campaign. In the 2008 campaign he specifically stated that “I believe that the Constitution confers an individual right to bear arms” (Blackman 2016). A politician’s beliefs, words, and actions are often at variance, as we saw earlier with President George W. Bush’s public support of a renewal of an assault weapon ban his own party was ensuring would not get through Congress. Candidate Obama stated that he believed the Second Amendment protected an individual right and added that he also supported the ability of local and state governments to restrain that right in order to have handgun bans, the same policy at the heart of *Heller*. In his entire political career, Barack Obama only ever voted three times for gun rights. The first was when he was a state senator, and it was for allowing retired cops to carry concealed weapons (possibly because he was seeking the endorsement of the Fraternal Order of Police). The second was as president, and it was allowing the sale of surplus pistols through the Civilian Marksmanship Program (CMP). The CMP is a federally chartered nonprofit corporation tasked with promoting firearms safety, training, and rifle practice. The sale was of outdated pistols that had been in storage since that particular model had been phased out in 1985, and it only happened because it was an amendment tacked onto the National Defense Authorization Act for federal fiscal year 2016, a “must-pass bill” that passed Congress with a veto proof majority (Eger 2016). Even though the law authorized the sale of the pistols, it is unsurprising they were not actually put up for sale until the 2018 National Defense Authorization Act under President Trump, which mandated their sale. The third time President Obama ever expanded gun rights was also as part of an omnibus spending bill, and in this case his administration reversed a decade-long ban on transporting firearms by Amtrak travelers, allowing them to carry unloaded locked weapons in their checked baggage, the same as airline travelers (Dwyer 2012). That latter policy change is hardly controversial.

If increased levels of keeping and bearing arms does not occur without

support for an expansion of individual gun rights from substantial numbers of members of Congress and the executive branch, then we have not falsified this hypothesis, but at this point we have merely clarified that the president must be part of the “executive” in Rosenberg’s formulation. Gun rights did expand after *Heller*, even with a strongly anti-gun president in office, because the Supreme Court issued the *McDonald* decision, which led Chicago and a few of its suburbs to remove their handgun bans. I detail this with much more exactitude in my chapter on Illinois, but meanwhile if the Court was following the election returns, as Mr. Dooley said, it was also following the congressional election returns. The pro-gun majority in Congress increased from 2008 to 2010 with the Republican takeover of the House. This remained true even after the 2012 re-election of President Obama, who again made little issue of gun control during his first term. The pro-gun majority in Congress was solid. The NRA rates lawmakers and candidates on their stances as they relate to firearms on the traditional scale all students know, “A” through “F.” In 2012, in the House there were 242 NRA rated “A” and 30 “B” and “C” representatives to 146 “D” or “F” representatives. In the Senate, there were 46 NRA rated “A” senators, 13 “B” and “C” senators, and 35 “D” or “F” senators (Bloch et al. 2012). In 2014, with the Republican takeover of the Senate, that pro-gun margin increased, and even in the wake of the Newtown school shooting and an extended push for gun control legislation from a lame-duck President Obama, no federal legislation passed. New assault weapons ban legislation never made it past a Senate filibuster. President Obama did, however, take several executive actions, such as federal incentives to improve information sharing on the background check system with states (White House Statement 2016).

At the state level, though, there was considerable gun control and gun rights litigation passed after the Newtown shooting. States take opposing approaches to the issue of gun violence and public safety in schools. The approaches are from two mutually exclusive views on how to deal with gun violence. The first approach is to limit access to the type of firearm used in Newtown, which was an assault rifle, as well as high-capacity magazines to reduce future incidents of mass shootings. The other approach is to liberalize gun laws to allow people to use firearms to defend themselves against potential mass shootings. The cognitive dissonance that both sides of the debate publicly expressed about the other’s approach, if I may editorialize for a moment, is astounding.

The result of this dissonance is that moralistic states such as California (moralistic/individualistic), New York (individualistic/moralistic), and Colorado (moralistic) passed a large amount of gun control that did not violate



a very narrow reading of *Heller* since it was not a complete ban of handguns. Meanwhile, states like Missouri (individualistic/traditionalistic) and Texas (traditionalistic/individualistic) liberalized their gun laws, passing concealed carry for teachers. The separate approaches of traditionalistic and moralistic states to Newtown provides evidence of my refinement of the Constrained Court Theory respecifying public support as described in Condition III from dichotomous (support vs. oppose gun rights) to an ordinal continuous variable. This is strong evidence that states set their own boundaries on gun control and gun rights consistent with their political attitudes. If Elazar's Political Culture Theory can show that pre-existing conditions and culture affects implementation of *Heller* and *McDonald*, it also shows different responses to a highly charged event that precipitated a wave of state-level gun control or liberalization, depending on the state's political culture.

From the perspective of Rosenberg's theory, the reason that the gun control tort litigation failed was because there was not a supportive Congress and executive, at least once George W. Bush took office. With President Clinton in office, courts that came to decisions that supported the municipalities and states suing gun manufacturers had a freer rein to impose their policy wishes because the Clinton administration's Department of Housing and Urban Development was also part of the lawsuits. Any implementation required by the federal government was sure to be forthcoming. This matters at the federal level because even prior to the Protection of Lawful Commerce in Arms Act, thirty-two states (such as Texas, Florida, Pennsylvania, Virginia, Georgia, Michigan, and Ohio) had already passed similar commerce-protecting legislation at the state level (Sebok and Lytton 2004).<sup>1</sup> This freer hand existed because some states did nothing or, like New York, passed legislation encouraging litigation. Even if a lawsuit was precluded in Texas, a decision against a gun manufacturer in New York state would still have consequences for the national level market for the manufacturing and sale of firearms.

The tort litigation rulings that culminated in the Smith & Wesson agreement, and which surely would have continued had Vice President Gore won the 2000 election, was an example of courts, either intentionally or by default, using political divisions to their advantage to create policy change when the elected branches were otherwise too divided to overrule them. If President Clinton's Department of Housing and Urban Development had

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1. In April of 2021, as rhetoric heated up about repealing the federal Protection of Lawful Commerce in Arms Act, the state of Iowa joined the states that have their own state version of the law to prevent tort litigation.

been actively supporting the tort lawsuits, then certainly he would have vetoed any version of the Protection of Lawful Commerce in Arms Act that came to his desk. The actual Smith & Wesson agreement was only a start; activists intended far more. From their own words they wanted to do to the gun industry what had been done to the tobacco industry, which was fundamentally alter the way an otherwise legal product was sold, used, and marketed to reduce its prevalence in society. They wanted to decrease the keeping and bearing of arms via gun makers and dealers self-imposing restrictions on the type of guns they made and how they sold them in order for them to maintain fiscal solvency. Failure to comply with the gun control agenda would result in, according to the words of Housing Secretary Andrew Cuomo (who was in charge of the effort for President Clinton), a “death by a thousand cuts” (Clark 2015), which would bankrupt gun manufacturers. As this story unfolds, note that Andrew Cuomo is a recurring character.

This naturally leads us to discuss the Supreme Court’s ability to expand the keeping and bearing of arms under President Obama, a nonsupportive executive. For the first two years of the Obama administration, little attention was paid to the issue of gun control, although by the end of his second term he would say that his failure to pass gun control laws was his “biggest frustration” (Henderson 2015). The issue even gave the public at least two presidential crying sessions at press conferences, as he felt that strongly about the necessity of passing gun control. Even from a cynical eye it did not appear to be political theater and he looked entirely sincere. Video shows his eyes welling as he addressed the nation about the twenty dead “beautiful little kids” of Sandy Hook Elementary School and again when he laid out his executive actions to attempt to curb gun violence after the Senate ended any attempt at passing gun control; in that press conference he pauses and, going off script, he cries as he says, “Every time I think about those kids it gets me mad. And by the way, it happens on the streets of Chicago every day” (Rhodan 2016).

Still, in February of 2008, as a senator and a candidate for president, Obama was fully in support of the D.C. gun ban at issue in the *Heller* case (OnTheIssues.org, 2016), which was argued just around the corner in March and decided in June of 2008. Senator Obama’s position was for local control of firearms policy, which is not an uncommon position. The Democratic Party platform, with a certain catchy alliteration was, “We believe that the right to own firearms is subject to reasonable regulation, but we know that what works in Chicago may not work in Cheyenne” (Democratic Party Platform 2008). It should be noted that there is no geographic clause in the Second Amendment.

During the first two years of President Obama's term, during which Democrats had control of both the Senate and House, major pieces of legislation, such as the Affordable Care Act (otherwise known as Obamacare), were the subject of at least a year-long debate. Other major pieces of legislation, such as a package of Keynesian economic stimulus and the Dodd-Frank Wall Street Reform Act, also took priority. President Obama was still characterizing himself as a centrist on the issue of the Second Amendment, and it is unclear what gun control laws he would have signed had Congress presented him with them. Had he moved strongly to minimize the effects of *Heller* after taking office, he certainly could have, especially since the Democrats had a filibuster-proof majority in the Senate from 2008 until the special election in Massachusetts after the death of Senator Ted Kennedy, which was won by a Republican who was seated in January of 2010.

President Obama clearly had priorities other than gun control, likely re-election and trying to maintain his party's slim majorities in Congress. Through the 2012 election he was still citing keeping President Bush's expansion of concealed carry in national parks and allowing Amtrak travelers to check guns in their luggage as evidence of a centrist view on guns. After 2010 and the Republican takeover of the House, any gun control legislation President Obama proposed would have had to be muted enough to pass the lower house that was, on balance, quite opposed to gun control. Therefore, even after his re-election by a comfortable margin, by 2014, when his party lost the Senate, his attempts at gun control were relegated to executive actions.

From the perspective of Dahl and the regime theorists that hold that the appointment process brings the Court in line with the president's positions, the process did start to work. President Obama's first-term appointment to the Court in 2009, Justice Sotomayor, voted against the expansion of gun rights in *McDonald* in 2010. She was replacing Justice Souter, who voted against the majority in *Heller*. In her confirmation hearing she said she would recognize the precedent of *Heller* from the previous year, but that recognition of the precedent did not preclude her from voting with the liberal minority in the case that came to the Court to not incorporate the Second Amendment against state encroachment. Nonincorporation would have left the Second Amendment in a sort of limbo, preventing federal handgun bans but allowing pretty much everything above that ground floor. The appointment process continued to pull the Court back in line with President Obama's views with the 2010 appointment of Justice Elena Kagan, who replaced Justice Stevens, who had dissented in *Heller*. Her nomination was opposed by the NRA for her work on gun control during the Clinton

administration. Meanwhile the largest gun control organization, the Brady Campaign, supported her nomination for the very same reason (Zimmerman 2010). As the deputy director of the Domestic Policy Council, Kagan had helped implement the Brady law, the assault weapons ban, and various gun control executive orders (Sargent 2010).

The appointment process had brought a one-for-one replacement of justices not supportive of gun rights, and had the Republican Senate confirmed Judge Merrick Garland after the death of Justice Scalia, the process would have continued apace to undermine or even reverse *Heller*. Judge Garland was a bit of a dark horse on the Second Amendment, as his voting record on the issue was limited to one vote. But it was a key vote that showed his hand, as he was the chief judge of the U.S. Court of Appeals for the D.C. Circuit, and while there he voted to have the entire appeals court reconsider a 2-1 decision that had invalidated the handgun ban in Washington, D.C. This was for an “en banc” review of the D.C. Circuit’s ruling that invalidated the handgun ban in *Parker v. District of Columbia* (2007), one of the lead-up cases to *Heller*. In short, he wanted the D.C. Circuit to have a second bite at the apple to undo a 2-1 pro-gun decision.

With Hillary Clinton’s loss, NRA supporter President Trump nominated Judge Gorsuch, a pro-gun rights originalist who later joined Justice Thomas in a dissent when the Court did not grant review of the Ninth Circuit case *Peruta v. California* (2017) that left in place a law requiring “good cause” to receive a concealed carry permit. When Justice Kennedy announced his retirement, his eventual replacement nominated by President Trump, Judge Brett Kavanaugh, had perhaps the clearest pro-gun rights record on the Second Amendment of any prior nominee. In his D.C. Circuit Court dissent on the decision in *Heller II* (2011), filed after the District of Columbia banned assault rifles, he wrote that the courts should expand the protection found in *Heller* of semiautomatic handguns in common use to semiautomatic rifles in common use, like the popular AR-15 and its many clones, which in common parlance are often called assault weapons. I mark the choice of words to highlight that Judge Kavanaugh went so far as to note in his dissent that he was skeptical of the “rhetorical term ‘assault weapon’” (2011, 40–41). Rather than apply intermediate or strict scrutiny, Judge Kavanaugh argued that whether a gun law is constitutional or not should be “based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny” (2011, 5), which is a test that might favor some gun control as a matter of policy, but is also one that would not relegate the individual right to own a gun found in *Heller* to a secondary position relative to other government objectives, such as crime control. With Justices Gorsuch

and Kavanaugh on the bench, we can see Dahl's foundational work about the replacement of justices in action.

The situation on the gun control tort litigation, which had a pro-gun Congress but an anti-gun president, and the situation post-*Heller*, where there was also a pro-gun Congress but an anti-gun president, is analogous to Swedlow's (2009) case study on spotted owl injunctions from the Ninth Circuit during the mid-1990s, which coincidentally happened during the same time period as the gun control tort litigation lawsuits. Swedlow found that "judicial interpretations of statutes, regulations, precedent, and facts allow judicial policy making if these interpretations are accepted by the legal and political culture when Congress and the presidency are too divided to overrule them." In Swedlow's case, social reformers were able to create change through the courts because the elected branches were too divided to overrule the Ninth Circuit's reformulation of administrative rules related to species protection. While it was not my intention to provide another example of Swedlow's potential reformulation of Constraint II (that the courts can make social change if the political branches are too divided to oppose it), it is logical to show that he was correct via another example. Although to be fair to Rosenberg, he might question if the change is "significant" per his theory, as a "changing the way a single bureaucracy functions would not meet this definition" (2008, 4). Still, the consequences of divided government for judicial independence is such that it allows for greater independence from the political branches.

During extended periods of divided government, a stronger form of judicial review becomes possible. Without a stable coalition controlling the elected branches, both parties have an incentive to turn to the courts to resolve political issues, while judges are less afraid of institutional retaliation if they make unpopular decisions. Unlike under unified government, presidents and legislators are unwilling and unable to coordinate an assault on judicial independence, and each party will fiercely defend the judiciary from encroachments by the other party. (Pickerill and Clayton 2004, 241–42)

But despite Swedlow's point, the fact remains that aside from *McDonald*, the Supreme Court did not take advantage of the elected branches being divided on the issue of guns to further expand the right to keep and bear arms beyond incorporation in *McDonald*. Despite a plethora of cases, the Court declined to hear any other Second Amendment case for more than a decade to help clarify the nascent jurisprudence it had created in *Heller* and

*McDonald*. The political branches are still sorting out the aftermath, and the Court, except for one remanding of a case from Massachusetts about stun guns, has stayed silent on the issue except for a pair of dissents on denial of certiorari. It only took a case at the end of 2019 about a New York City's handgun permit system. This was more than ten years after *Heller*, and only when they had a supportive executive in President Trump and a majority pro-gun Senate. In the stun gun case, a threatened woman used a stun gun on her children's estranged father, a weapon that was illegal in Massachusetts (individualistic/moralistic) as a dangerous and unusual weapon that was not protected by the Second Amendment. She was charged with a crime for possessing it. Unanimously, the Supreme Court rejected some of Massachusetts's arguments in favor of the stun gun ban as inconsistent with *Heller*. The Supreme Court sent the case, *Caetano v. Massachusetts* (2016), back to Massachusetts's courts so they could consider other arguments, but prosecutors decided to just drop that prosecution and agreed to the entry of a formal not guilty finding. In another case, explicitly acknowledging the Supreme Court's guidance in their decision, the Massachusetts high court later ruled the stun gun ban unconstitutional in *Ramirez v. Commonwealth* (2018).

Given the large amount of jurisprudence related to the Fourteenth Amendment and incorporation of the Bill of Rights, it is difficult to believe that the conservatives on the Supreme Court, when presented with *McDonald* and still confident of a 5-4 pro-gun majority, would leave the right to keep and bear arms in a sort of limbo and only protected against federal government encroachment, as Justice Sotomayor desired. The Court, however, also declined in any Second Amendment case to issue decisions with sweeping changes; the majority of the Court took an incremental approach. The Court had the "purse" on their side with a pro-gun Congress, but they did not have the "sword" on their side with a pro-gun executive during the Obama administration. While in *McDonald* the bulk of the text deals with the incorporation of the Second Amendment, the majority opinion also recognized the controversial public safety implications of their decision, and it made allusions to "state experimentation" with firearms laws. They readily acknowledged that "incorporation will lead to costly litigation" against states and municipalities. The Supreme Court knew it was creating the conditions for a hail of lawsuits, but ironically, they subsequently did not grant certiorari on any of them for a decade. The lower courts are thus divided on the nascent Second Amendment jurisprudence (Lund 2016). The lower courts in dealing with the Second Amendment, just like the 5-4 *Heller* and *McDonald* decisions in the Supreme Court, are a product of a divided public, culture, and elected government. This is a continuation of an

older phenomenon; Melnick (1994), writing at the time of the 1990s period of divided government, said that “over the past two decades the federal judiciary has mirrored the political system for a while in an important way: it is seriously divided internally” (35).

On one hand, *McDonald* was the first time since 1969 and the Warren Court that the Bill of Right protections have been incorporated against the states, but on the ground, in action, it had little substantial effect. Certainly, a newly incorporated amendment would seem to be an important event, but the “Court in *Heller* was willing to maintain various longstanding prohibitions, even though those precedents were set before the Second Amendment was recognized as an individual right” (Blackman 2011).

*Heller* and *McDonald* also did not provide clear boundaries on the new Second Amendment rights they expected to flower forth. The Supreme Court did not give a standard of review: either strict scrutiny like it does for fundamental rights such as the exercise of free speech, or some middle level of scrutiny like in regard to gender discrimination, or even rational basis scrutiny. Scrutiny standards do not apply to the Second Amendment well. The first part of the two-prong strict scrutiny standard, the highest level applied by the courts to government actions or law, is automatically satisfied because public safety and the reduction of gun violence, the theoretical goal of any gun control law, is naturally a compelling state interest. Moving on to the second prong, it is just a matter of debate on the degree of whether a particular gun law or regulation is narrowly tailored to achieve the result of the reduction of gun violence. Therefore, it is not difficult for a court to agree that a law is narrowly tailored when the only gun laws that were specifically made unconstitutional by the *Heller* and *McDonald* majority were complete handgun bans and onerous storage requirements. When it comes to intermediate scrutiny, the first prong of an important government objective—the reduction of gun violence—is easily achieved, and again, a gun control law would naturally be substantially related to that important government objective. If it is easy enough to achieve those standards, then rational basis review is not a barrier to any court whatsoever in finding that a particular gun control law is a legitimate government policy. In the text of the *Heller* decision, this nebulous lack of guidance was acknowledged:

Since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U. S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the

historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

*Heller* itself only gave a simple test of the constitutionality of gun laws. There is an anchor that total bans are not allowed due to the individual self-defense purpose of the Second Amendment, and that guns protected are “in common use,” like handguns and, theoretically, as Justices Thomas and Scalia point out in their dissent of certiorari in the Highland Park assault weapons ban case, the “roughly 5 million AR-style semiautomatic rifles” Americans own. But, again, that was about it, although Justice Scalia provides a bit more guidance in the decision’s dicta:

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.

With the paucity of guidance in *Heller*, courts have frequently turned to Justice Breyer’s dissent. This is one example where the dissent does more than just set up a potential overturning of a decision at a later date or provide an outlet for the losing side to play republican schoolmaster, but it is instead an example where a dissent had a tangible impact on policy despite its not being the majority opinion. Justice Breyer, looking at Founding Era laws regarding storage of gunpowder and other firearms safety laws (colonial Boston had a ban on gun carriage inside of buildings), recommended a sort of sliding scale, what he called a “judge-empowering ‘interest-balancing approach’” that approximates intermediate scrutiny, where courts examine the level of burden placed on the right. The closest approximation of how this already plays out would be how courts examine restrictions placed on abortion, although this was never mentioned. Justice Scalia’s majority opinion in *Heller* explicitly rejected this approach: “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.” Nevertheless, Justice Scalia, who passed on in 2016, some eight years after *Heller*, lived long enough to see just this “judge-empowering interest balancing approach” be just the kind of guidance that lower courts, not eager to overturn democratically passed gun control laws, would turn to. Justice Scalia purportedly hated balancing tests (Levinson 2018), and thus it is ironic that his decision, which gave no level of review, led to judges using the guidance in a dissent because “intermedi-



ate scrutiny gives them the comfort of applying familiar formulas” (Rostron 2012, 757).

Further evidence of judges using Justice Breyer’s dissent as a default comes from Ruben and Blocher’s landmark textual analysis of Second Amendment decisions between 2008 and 2016, which notes that a large majority of those cases did not involve original historical analysis, that is, the use of originalism, and that 7 percent of challenges applied a rational basis review, despite Justice Scalia explicitly rejecting it in the opinion (Ruben and Blocher 2018).

Only two kinds of gun control are clearly not permitted under *Heller* and *McDonald*, and that is that handgun bans and restrictive storage laws, such as the one D.C. had prior to *Heller* that mandated that the gun either be disassembled or in a safe. The Court only really made clear that the Second Amendment protects a “right to possess and carry weapons in case of confrontation” inside the home. The result of a lack of clear standard has been that lower courts have had to go it on their own; “Some courts have applied strict scrutiny, some have applied intermediate scrutiny, and many have just avoided the question altogether” (Persky 2010).

## Hypothesis H<sub>2</sub> Is Supported

While there was an expansion of keeping and bearing arms after *Heller* and *McDonald*, and many states did liberalize their gun laws so there would be more keeping and bearing of arms, other states simultaneously passed more gun control laws. From the perspective of testing Rosenberg’s Constrained Court Theory with my more specific hypothesis that increased levels of “keeping and bearing arms” will not occur without support for an expansion of individual gun rights from substantial numbers of members of the legislature and the executive; the hypothesis has not been disproven. In scientific terms, a hypothesis can never truly be validated, but the topic of guns can be added to Rosenberg’s list of other topics where significant social change cannot come through the courts. I have also shown that the null hypothesis, that significant social change can come without the legislature and the executive, was not supported. There was not significant social change as a result of *Heller* and *McDonald* due to a divided government, a Congress that was pro-Second Amendment, but an executive, President Obama, who was not a proponent of the Second Amendment. When there was a pro-gun Congress and a pro-gun president, George W. Bush, we saw the two Supreme Court judicial appointments (Roberts and Alito) that led to *Heller* being pos-

sible, but by the time George W. Bush left office to be replaced by President Obama, the momentum ceased and in some places was rolled back. While the Court had decided not to leave the Second Amendment in limbo without incorporation, the direct and practical effects of *Heller* and *McDonald* were limited; a few handgun bans and storage laws were undone, and tangentially a state stun gun ban, but they did not lead to any appreciable increase in keeping and bearing arms. These few laws that were undone—the D.C., Chicago, and suburban Chicago handgun bans and storage laws—are the only actions directly attributable to the Court. It was if, by analogy to *Brown*, only the schools in Topeka, Kansas, had been integrated, while the rest of the South remained segregated. States with a traditionalistic culture, like Texas, did take the opportunity to pass laws that led to more keeping and bearing of arms, meanwhile, moralistic states such as California and Colorado passed more gun control and further restricted the right to keep and bear arms. As long as they did not outright ban handguns, they did not violate the Supreme Court's interpretation of the Second Amendment.

What remains to be seen is if a solid pro-gun majority on the Supreme Court asserts itself on the gun issue. With the replacement of moderate Justice Kennedy with Justice Kavanaugh (a solid “Second Amendment is an individual right” justice) and the replacement of Justice Ginsburg with Justice Amy Coney Barrett (reported to be a pro-gun candidate, as she dissented from an opinion upholding federal and state bans on firearm ownership by a man who had pleaded guilty to one count of mail fraud), we could perhaps see a few grants of certiorari and a 6-3 decision or two. The Court did take its first Second Amendment case to be heard in the fall of 2019, but after New York marginally changed the law in question about the public carriage of arms, it was essentially mooted, and they declined to weigh in further. After President Biden took the Oval Office, we still could see the Court take up several cases and roll back gun control laws with a solid 6-3 pro-gun voting block, but given past unwillingness to swim upstream against an executive branch controlled by a pro-gun control president, it is not a likely proposition.<sup>2</sup>

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2. Although in late 2021 the Supreme Court heard the case *New York State Rifle & Pistol Association v. Bruen*, which concerns whether New York may condition the right to carry a firearm on an official's finding of “proper cause,” the final ruling was issued just as this book was going to press. The Court decided that the “may issue” system of concealed carry permitting in New York violated the Second Amendment. This will lead to further litigation in the other states with “may issue” systems, and thus, will be a further test of Dynamic and Constrained Court Theories.

## Public Support

- $H_3$ : Increased levels of keeping and bearing arms will not occur without support for an individual right to keep and bear arms from some citizens or low opposition for an individual right to keep and bear arms from all citizens.

To test this hypothesis, we have two options. The first is that there must be support for an individual right to keep and bear arms, or there must be low opposition from all citizens. On the surface, we can easily say there is majority support for an individual right to keep and bear arms. Based on reliable polling data from Gallup taken just before the *Heller* case, a majority of Americans, 73 percent, believed that the Second Amendment protects an individual right to bear arms and only 20 percent believe that the Second Amendment only guarantees the rights of state militia members to own guns (Jones 2008). Yet while the public is “pro-gun” in the vague sense that it supports an individual’s right to keep and bear arms, it is also “pro-gun-control” in that it also supports a fair number of gun control laws, both historically (Winkler 2013), at the time *Heller* was decided (Bennett 2008), and indeed currently. Nationwide, some 49 percent of the public thinks gun laws should be stricter (Saad 2013), and by some polls, a majority, 55 percent, think gun laws should be stricter (Swift 2015). These gun control laws would restrict and limit the keeping and bearing of arms. In some cases, fully 86 percent favor a universal background check law, prohibiting person-to-person sales or transfers (Newport 2015). Yet even in the wake of high-profile mass shootings such in Newtown in 2012 and Las Vegas in 2017, at least at the national level, no gun control is passed. How do we explain the discrepancy in such a way that makes sense? Whether he realized it or not,

Rosenberg was touching on some deeper issues from political science and economics to help formulate his Constrained Court Theory.

Political scientist Morris Fiorina (2013) said he could never quite understand, in his studies of gridlock and polarization, why if there are large majorities that supported a particular policy (he specifically mentions some forms of gun control going back to at least 1964), that they were never passed into law. He found the answer to the question in what is called “issue intensity” in democratic politics. Issues of concern facing the public are not all weighed as equally important, and if there is an intense minority, combined with a multiplicity of issues about which the public is concerned (such as immigration, the economy, and climate change), then a vocal minority can have an outsized influence on policy outcomes. While a high percent of the public may want a particular gun control policy, they also do not care very much about getting that gun control policy passed into law, given other issues. An intense and vocal minority of gun owners will organize and vote against a politician for voting for a gun control law, whereas the general public may not care either way. When we look at polling data that show what Americans worry about the most, the primary concern on these open-ended questions is typically something related to jobs, the economy, and health care. Guns, as an issue, barely register.

Notwithstanding that a particular politician may not personally support gun control, the result is that politicians, whose primary goal is reelection (Fiorina 1989), would prefer not to take action when they get little negative consequences from the majority, if any, but are certain to get negative consequences from an intense and vocal minority. In three polls of registered voters during 1999–2000, Gallup found that 63–65 percent of the respondents considered a politician’s views on guns as just one of many factors in their voting, though a smaller amount, some 11–15 percent, would only vote for a candidate who shared their views on guns. Those same questions were asked again in 2015, and by then just a bare majority at 54 percent considered guns as one of many factors, but a full quarter of voters, 26 percent, would only vote for a candidate who shared their views on guns (McCarthy 2015). The result of this “intense minority,” which has only become stronger post-*Heller*, is that nothing happens unless the majority takes more of an interest.

A logical question then is how sure are we that the “intense minority” is not those strongly in favor of gun control as opposed to those strongly in favor of gun rights. To answer that, we have to turn to behavioral economics, where there is a phenomenon closely related to the one of issue intensity, called “dispersed costs and concentrated interests.” A vocal minority

intensely interested in a particular issue is why, for example, there is a quota on the amount of sugar that can be imported into the United States (Roberts 2005). An intense minority of those involved in agribusiness who would be financially harmed can get politicians to put a limit to the amount of sugar that can be imported into the country, while consumers do not care much that they only have to pay a few cents more for any item they purchase that uses sugar. Those dispersed costs, the few cents extra, are not worth the average consumer getting upset about, and they flow to the concentrated interests of those that benefit from the quotas. Gun owners have concentrated interest in the guns they already possess, which is keeping their financial investments as well as the ability to use them; meanwhile, statistically, few who live outside a life of crime will ever be a victim of gun violence, and non-gun owners have no financial stake in the outcome. Granted, there are gun owners who want gun control and non-gun owners who do not, but speaking in generalities, the reason there is an urban/rural divide on guns is that rural people are more likely to own firearms. The figures vary by survey, but only about 30 percent of urban residents own guns, while about 60 percent of rural residents do (Blocher 2013).

According to the Pew Research Center, supporters of stricter gun laws are less likely to contact elected officials (Oliphant and Gramlich 2017).

Americans who believe gun laws should be *less* strict are *more* likely to contact public officials on the issue than those who think gun laws should be stricter or are about right (22% have ever done so, compared with 15% of those who favor stricter laws and 10% of those who think laws are about right). Among gun owners, 19% of those who want less strict laws have contacted a public official in the past year, compared with 9% of those who want stricter laws.

It is gun rights advocates who use the rhetoric “from my cold dead hands,” like NRA president Charlton Heston did, when the question of when they will give up their guns is raised. There is undoubtedly passion on the side of those who are strongly in support of gun control. After all, President Obama publicly cried twice about it on national television, but gun control advocates are not pledging they would fight to the death about the issue.

The aforementioned poll showing 78 percent support for an individual right interpretation of the Second Amendment was specifically undertaken by Gallup in February of 2008 due to the *Heller* case, which was argued in March. If we trust the poll, then the Supreme Court was not too far ahead

of the public's opinion when it issued the decision. But due to a plethora of different types of polls, with different results depending on whether general questions are asked or if the questions were on specific gun control policies, polling data are presented holistically, giving preference to time series trends. Given that the *Heller* case was about a handgun ban, a time series conducted by Gallup since 1959 is the most illustrative (Swift 2015). Figure 5 is largely self-explanatory and shows a distinct trend toward the Supreme Court's side in the *Heller* case, namely that the public should be able to own handguns rather than just the police or other authorized persons. Still, there is a substantial minority, 27 percent, who feel there should be a handgun ban. This is ample evidence there is not low opposition from *all* citizens to an increased right to keep and bear arms, as roughly a third of the public believes there was nothing wrong with the D.C. handgun ban and that it should apply nationwide.

One other time series poll by the Pew Research Center (2017) may be useful in testing the hypothesis. The question in this time series is "What do you think is more important—to protect the right of Americans to own guns OR to control gun ownership?" (see figure 6).

The data show that in 2008, the year of *Heller*, 42 percent of Americans felt that gun rights were more important than gun control, moving to 52 percent in 2016; meanwhile 55 percent of Americans thought that gun control was more important than gun rights in 2008, moving to 46 percent in 2016. Opinion converged from the year 2000, in that a full 66 percent of Americans thought it was more important to control guns. The Supreme Court has provided legitimization to Americans who have long held the view that the Second Amendment protected an individual right. But without a poll specifically asking if the lack of a formal opinion from the Supreme Court had an effect on respondents' opinions on gun control vs. gun rights, and a follow up post-*Heller* with the same respondents, we will not be able to know for sure. What we can say for sure is that in regard to the hypothesis based on the Constrained Court Theory, there is majority support for the decision.

Polling data show that there was majority support for the Supreme Court in *Heller*, which only continued to move in a direction sympathetic to their decision by the time *McDonald* was decided two years later. Further, neither decision provoked a public opinion backlash among the portion of the public that was neutral to the idea of the Second Amendment as an individual right. That is to say, because of the Supreme Court cases, no activists suddenly came out against the Second Amendment as an individual right. Rather, after both cases, the public trended toward supporting

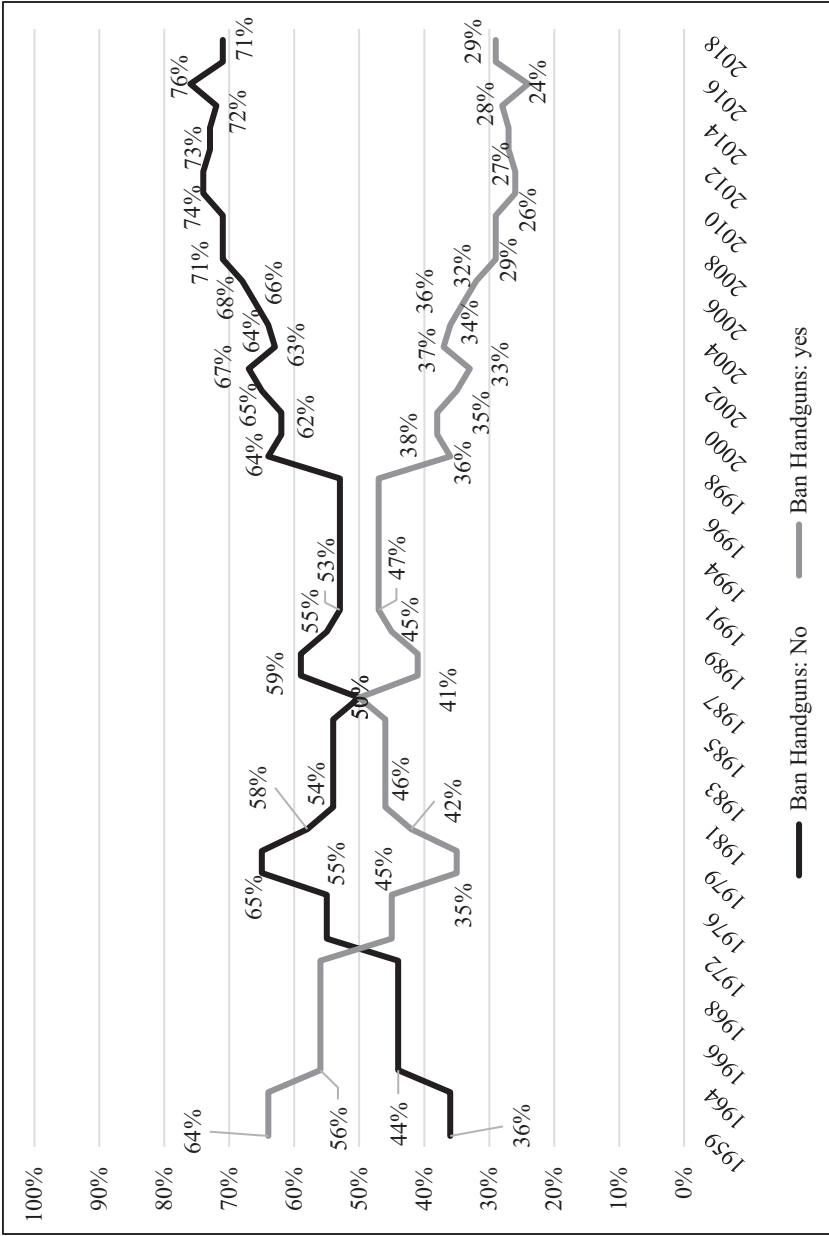


Figure 5. Gallup Poll Results—Support for ban on the possession of handguns. (Source:Anthony Cooling)  
 Support for ban on possession of handguns, 1959–2018

Do you think there should or should not be a law that would ban the possession of handguns, except by the police and other authorized persons?

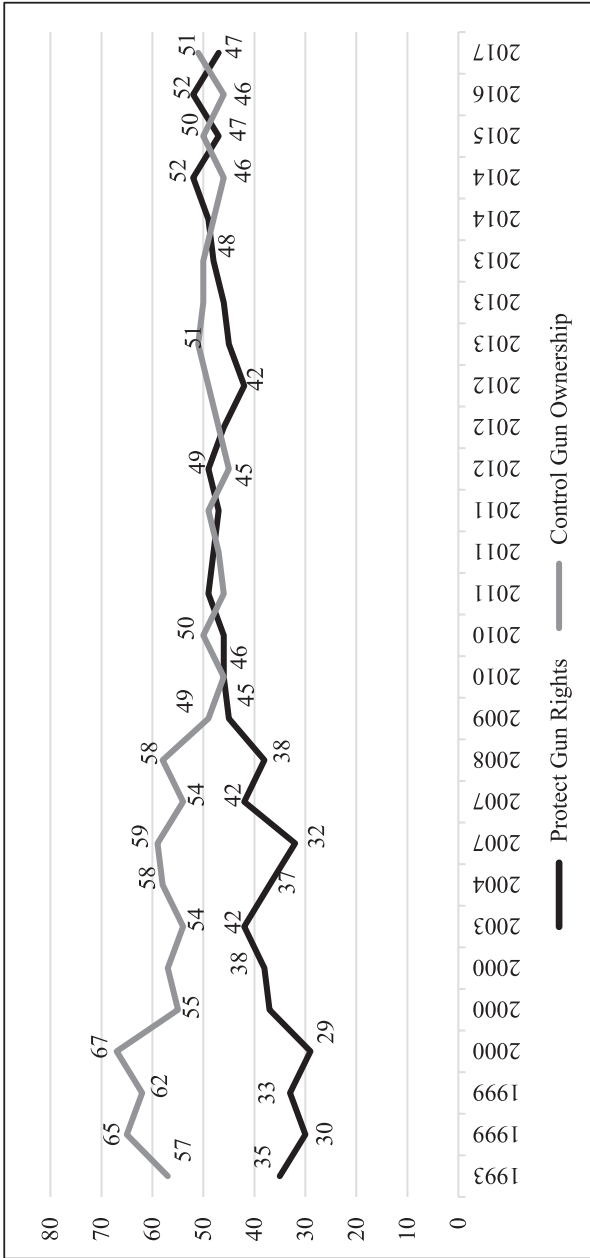


Figure 6. Pew Poll Results—Control gun ownership or support for gun rights. (Source: Anthony Cooling.)  
 Pew gun control vs. gun rights—% of registered voters who say it is more important to control gun ownership than protect gun rights



gun rights over gun control, even if polling data simultaneously show that the public may strongly support specific gun control provisions. Supporting specific gun control policies is in not direct opposition to the Court, and the “intense minority” of gun owners, and our constitutional design that slows policy change, are why those policies have not passed into law. There remains, however, a significant minority (roughly one-third of citizens) who opposed the Supreme Court in this matter, although, due to the phenomena of “dispersed costs and concentrated interests,” this dispersed minority is not as intense in its opposition to an expansion of gun rights. Further, the dispersed minority opposed to the Court does not have a favorable Court decision to lean on when influencing public opinion. The “intense minority” on this issue are proponents of gun rights who want to see an expansion of keeping and bearing arms and who have a solid majority in the field with them.

### Public Support through Firearm Ownership and Use

Given that gun owners form an “intense minority,” there is perhaps no better indicator of public support than actual ownership of a firearm. This measure, using ownership data, would not work for other cases in *The Hollow Hope*; few people get married more than one time or two times in their lives or have multiple abortions. Unlike an abstract support of women’s rights, people who own a gun, unlike a person who expresses support for same-sex marriage or feminism in an abstract sense, has a physical tangible object they spent money to purchase.

Granted, there are persons who are for gun control who own guns and those who are against gun control who do not own guns. Due to the aforementioned phenomenon of dispersed costs and concentrated interests, however, a gun owner is more likely to publicly support an expansion of the right to keep and bear arms. Buying a gun, or at least not getting rid of one inherited from a deceased relative, is an explicit declaration of support for an individual right to keep and bear arms. In the United States, nobody buys a gun for participation in a government militia, although they might for a private militia. Unlike in Switzerland, where citizens keep government arms in their home, aside from those of law enforcement officers every gun in every home is for personal individual use and, thus, is an expression of support for an individual right to keep and bear arms.

Getting actual data on firearms ownership to measure this aspect of public support is tricky. There is no paucity of statistics about guns, but owner-

ship rates are measured by anonymous surveys because gun rights advocates have prevented the government from creating databases. At the federal level, registration of the serial numbers on guns is not required except for certain types of fully automatic weapons. The NRA and other gun rights organizations have long opposed registration, considering it a camel's nose in the tent that would eventually lead to confiscation of firearms. I decline to engage in an explanation of the merits or flaws of that argument but suffice to say that the gun rights groups have largely been successful in preventing registration, at least at the national level. Unlike in some countries, like England, there are no federal databases about who (legally) owns guns and no database in any state on what guns are owned by whom. An owner database that does not specify who owns what could be amalgamated from various sources, provided the gun owner did not just inherit or make a gun, what some are calling a "ghost gun" (Caron 2017). The "ghost gun" situation is slightly overwrought. While a person may make a single gun without a traceable serial number, there are still other investigative means to track down the vintage. Moreover, guns produced before 1968 were not required by law to have serial numbers (although most do via manufacturing protocols).

As for databases of gun owners, even if the Firearm Owners Protection Act of 1986 prevents a registry of guns linking them to their owners, there are other databases, such as one of every multiple sale report: buy two guns at the same time, and your name and address are permanently recorded in a database as the initial owner of those weapons. This is an effort to prevent trafficking. Further, every gun purchased through a dealer has a BATF Form 4473—Firearms Transaction Record—attached to it, which is kept by the dealer for twenty years. Should the dealer close up shop, even after twenty years the sales log they maintain must be sent to the BATF for permanent storage. In sum, if the government really wanted to put together a fairly inclusive database of gun owners, it could, and this is without even tracking other consumer transaction data such as credit card purchases.

There is no nationwide database on gun ownership. We cannot measure who owns what, so getting a feel for the firearms market, besides production and sales data that will be explained later, we are forced to turn to survey data. Again, longitudinal data are best. The General Social Survey (GSS) finds that 47 percent of households had guns in 1975, while it was 31 percent in 2014 (Smith and Son 2015); Gallup shows a rate of 49 percent in 1961 and 43 percent today (Gallup 2017). While some of the decline in "household ownership" is sure to be due to demographic changes such as more single-parent households, which were 4.4 percent of households in 1960 and 8.3 percent in 2018 (Taylor 2019), it is also likely there are also

more guns per household as well as more gun owners overall. Someone is buying those guns, even as the nation becomes increasingly more urban; 73.7 percent of the nation was urban in 1980 up to 80.7 percent urban in 2010 (Census Bureau 2016).

Surveys on firearm ownership are always of dubious exactness because the same type of gun owners who fear government confiscation of their guns is less apt to report ownership of a gun when called on the phone and asked about it. This could easily explain a small swing, and the GSS has tried to make a correction for this. Its estimates, after correction, are a 35 percent household ownership rather than 31 percent for 2010 and 2014 (Smith and Son 2015), which is not so different from the Gallup survey. This explains, in my opinion, the household ownership rate difference between the well-known polling organization, Gallup, and the far less well-known General Social Survey. Looking at other long-term polls, we get results more in line with Gallup. NBC News and the *Wall Street Journal* have conducted a poll that has had gun household ownership as a question since 1999, and they showed 44 percent in 1999, varying slightly over time to an all-time high of 48 percent (2017). Three other recent one-shot surveys, likely stimulated by the GSS data, also show a household ownership rate in the 40s, with the same caveats about “no opinion” answers. CNN has a 40 percent household ownership, and 9 percent no opinion (2016). Quinnipiac University, in a poll of registered voters, had a 25 percent personal ownership rate, a 46 percent household ownership rate, and a 4 percent no answer rate (Polling Report 2015). Pew has a 30 percent respondent gun ownership rate and a 53 percent rate for guns in the home (Parker et al. 2017). Interestingly from the last survey, “a third of adults say they do not own a gun and cannot see themselves ever doing so,” which represents that consistent minority of people who will continue to oppose expansion of the right to keep and bear arms.

Illinois itself is a special case where we can get much more specific data. It is one of the few states that requires a license to own a gun, like a driver's license. Since 1968, all legal gun owners must have a firearms owners identification card (FOID). While it is possible to have a FOID card without owning a gun and having a FOID card is not legally required for temporary usage of a gun at a range, the number of FOID cards in Illinois is still a valid way to measure the number of individual (not household) legal gun owners in that state. The Illinois State Police manage the program, and they occasionally make the numbers available in a press release. They do not put the data on their website, and one must obtain it through a Freedom of Information Act request, especially after a 2011 law that made the names and iden-

tifying information of applicants and recipients of FOID cards no longer public information (Public Act 097-0080). From various press reports: In 2011 there were 1.3 million FOID cards in Illinois (Outdoor News 2011), in 2012 that number had risen to 1.4 million (Erickson 2012), by 2013 that number had increased to between 1.5 and 1.6 million, making them about 11 percent of the state's population (O'Connor 2013; Kacich 2013), and by 2017 that number had risen to more than 2.1 million, a 1 million increase since 2010 (McCoppin and Briscoe 2017). If the Illinois population is, as estimated by the census in 2017 to be about 12.9 million, that makes individual gun owners about 16.2 percent of the population. According to that last report from the *Chicago Tribune*, with only about 11,000 FOID cards revoked a year, a suspended FOID card for various reasons (such as a domestic abuse conviction) rarely results in a visit by police to see that the guns are removed (either to their custody or that of another legal owner). Police also do not come check to see if a person's guns are removed prior to a FOID card expiration. Cards issued after June 1, 2008, are valid for ten years, while cards issued prior to June 1, 2008, were valid for five years. Because a FOID card eventually expires and must be renewed, there are more than likely not a sizable number of Illinois residents who have guns sitting at their homes but do not have valid FOID cards. The continued existence of FOID card is still up in the air because in *People v. Brown* (2018), the Illinois Second Judicial Circuit ruled the FOID Act unconstitutional in regard to the licensing and taxing requirement to be in possession of a firearm or ammunition in your own home. That case, and others like it, are being appealed and are working their way through the courts.

On that issue of prohibited persons, we also have a fairly decent source for the level of gun ownership in the state of California through a report to the legislature that the state's Department of Justice recently put out on its Armed and Prohibited Persons System. This system, in operation since 2006 and the only one of its kind in the country, identifies persons who through the courts have lost their right to legally own guns due to a crime or a restraining order. These people are then referred to the state Department of Justice to see about the seizure or transfer of their guns. According to the report, the reason there is a backlog of more than 23,222 armed and prohibited persons in the state is due to the increase in the individual level of gun ownership in California from 2008 to 2019 of "927,686 to 2,516,836" (7), a 171 percent increase. It is possible that the increase is due to the effectiveness of surveillance and system reporting, but we can partially discount this cause because the report itself says as much. The Department of Justice says that its funding level has not kept up with the increase in gun ownership

(which naturally leads to more revocations), thus they say there is a backlog of cases. The second reason is that the report shows an increase in gun sales in the state from 400,000 guns per year in 2008 to 900,000 in 2017. This means that based on population estimates from the census, the percentage of the population that owns guns in California increased from 3.4 percent to about 8 percent by 2019 (Gutowski and Lehman 2019), which is a 135 percent increase. This number is likely an undercount, as it excludes people who have never registered their guns, private sales, and inheritances. Regardless, the data do still show that even in a state with the strictest gun laws in the nation, keeping and bearing arms is increasing, and significantly so, despite the strict regulatory environment.

Over time, household gun ownership in America has remained either stable, only marginally declined, or, depending on the survey, increased marginally. This is despite large demographic changes in what constitutes a “household” and an increased urbanization of the populace. In a survey of the surveys, so to speak, what we do not see is any precipitous declines nor any large increases. In Illinois, where the law requires all legal gun owners to get a permit, allowing for reliable individual-level data, we see a fair-sized increase over nearly a decade, and similarly in California, where all guns must be registered with the state, we also see a large increase. This ownership data show that the “intense minority” of gun owners is either holding steady or increasing. When combined with the polling data on policy indicating that 72 percent of people do not support bans on handguns, and slightly more than half of the people (52 percent) think it is more important to protect the right of Americans to own guns than to control them, it means we have majority public support for significant social change through the Court.

If ownership of a firearm can be legitimately construed as support for an individual right to keep and bear arms, then we must also consider the “bearing,” not just the “keeping,” of arms part of the Second Amendment as well. While the Court in *Heller* and *McDonald* restricted itself to just the keeping of a firearm in the home for self-defense, over the past several decades states have made moves to allow citizens to legally bear them outside the home. Getting a concealed carry permit is also a strong expression of support for an individual right to keep and bear arms; a citizen with a permit is not figuratively supporting gun rights in an answer to a public opinion survey. A citizen with a concealed carry permit deliberately sought out and obtained the legal right to bear a weapon in public. Therefore, we should also look to the spread of concealed carry as another measure of public support.

As in the case of firearms ownership, numbers are either impossible

to come by (because some states require no permit to carry a concealed weapon) or difficult to come by, as permit data are not always published. But first, let us start detailing the spread of concealed carry before we begin to look at numbers.

There has been quite a shift when it comes to concealed carry. Southern states were the first to prohibit the carrying of concealed weapons before the Mexican-American War, and then a century later they took the lead in rolling those prohibitions back again. Granted, many of the antebellum gun law were related to the maintenance of slavery as an institution of white supremacy, and that included disarming free blacks where possible (Johnson 2014), but the prohibitions on concealed carry were more an attempt to solve the problem of “honor violence” that was prevalent among the back country and hill folk of the South (Cramer 1999). These prohibitions on concealed carry were eventually held up in various courts as not violating the Second Amendment. Quoted in *Heller* is *State v. Chandler* (1850), which encapsulates the thinking of the era. When the Louisiana Supreme Court held that citizens had a right to carry arms openly but not concealed: “This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.” The laws from this antebellum period did not set up a permit system where some citizens, such as peace officers, could carry concealed. Rather they were across-the-board prohibitions. By the 1920s and 1930s, many states rolled back the across-the-board bans of concealed carry and adopted codes after a model law, “A Uniform Act to Regulate the Sale and Possession of Firearms,” pushed by the National Conference of Commissioners on Uniform State Laws and supported by the National Rifle Association, which prohibited unlicensed concealed carry (Cramer and Kopel 1995). This law recognized there were circumstances when at least some civilians would have a legitimate need for concealed carry, so there were provisions for a sheriff, police chief, or judge to grant permits. These new state statutes were broadly discretionary; the law might specify certain minimum standards for obtaining a permit, but the decision about whether a permit should be issued was not regulated by express statutory standards, so they were “may issue” at the behest of a local authority. In at least some instances, particularly in the South, the laws were intended to disarm blacks, and such laws were also widely flouted by blacks who sought protection from white mob justice, for their individual self-defense, or for criminal activity, because in 1920 “the black homicide rate in many southern cities exceeded the exceptional murder rate in today’s black underclass” (John-

son 2014, 118). The reason we know that these concealed carry prohibitions were widely flouted, as Douglas Blackmon shows in *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008), is because of surveys on the reasons many blacks were caught up in the South's convict labor system (as many as 200,000). Paperwork of their charges lists prohibited concealed carry of a weapon as the convict's crime more than things like idleness or using obscene language. There is no doubt that the concealed carry prohibitions were selectively enforced. The Fourteenth Amendment forbade any state to deny "the equal protection of the laws," so these new "may issue" statutes were aimed at blacks and thus not written in overtly racial terms. Instead, the South created racially neutral laws. Cramer (1999) and Cramer and Kopel (2010) explored the court case *Watson v. Stone* (1941) in which there is an open admission by the court that Florida's permit system law was, in its own words, "never intended to be applied to the white population."

By the mid-1980s, which is the start of the modern concealed carry movement, slavery, dueling by back country hill folk, and a legal framework for the maintenance of white supremacy were not impediments anymore. But the rising tide of crime from the 1960s that continued onward until the 1990s was a problem. While one avenue that states took to deal with gun crime stemming from the crack epidemic was to pass gun control laws, other states took the approach of letting citizens carry concealed weapons to defend themselves. The best way to view this change is visually, and because a gun rights blogger by the name of Jeff Dege at a website called "Progress in Right-to-Carry" (2017) has sourced the changes over time in national media and academic sources, we can see the spread of concealed carry in a series of maps. In the year that the Gun Owners Protection Act was passed, 1986, there were eight states that had "shall issue" permitting systems (where all citizens who qualify are required to be issued a permit), twenty-five that had "may issue," systems (permits are issued at the discretion of government authorities), sixteen that had no permit allowed, and one state (Vermont) that had unrestricted carry (permitless). Vermont is an outlier, particularly as a northeastern state, and its permitless status is a coincidence of both Vermont's particularly worded state bill of rights, a state court case that read that bill of rights broadly in *State v. Rosenthal* (1903), and that Vermont is rural state with little crime overall.

Historically, the permissiveness of "may issue" varied greatly by state; in states like New York only the politically connected were issued a permit, while in other "may issue" states like Texas, ordinary citizens without political connections were more likely to get permits, at least within the limits

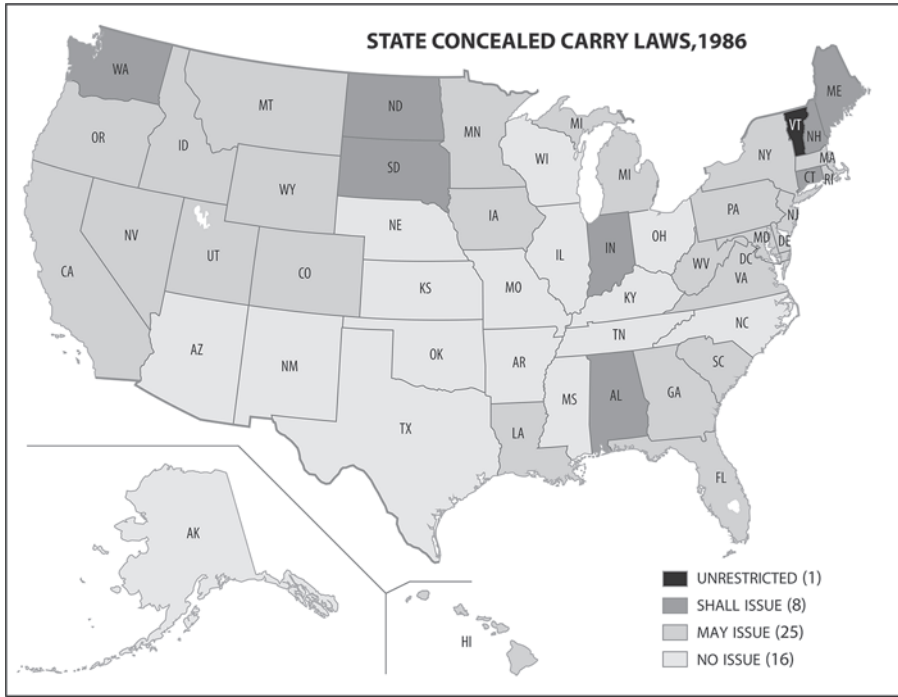


Figure 7. Right to carry map—1986. (Source:Wikicommons and Robert Cronan.)

of racial segregation when it existed. Martin Luther King Jr., who received legitimate death threats, applied for a concealed carry permit in 1956 in Alabama, a “may issue” state at the time, and was denied. While the licensing requirements, training requirements, and costs vary considerably across “shall issue” states, the discretion of officials was eliminated; a permit had to be granted if the prospective permit holder met the requirements.

In 1987, Alabama and Florida moved from “may issue” to “shall issue,” and that trend continued and then accelerated. By 2008 and the *Heller* decision, there were two unrestricted permitless states, thirty-seven “shall issue” states, nine “may issue” states, and only two “no issue” states, Illinois and Wisconsin.

At the same time *McDonald* was decided in 2010, Arizona had gone to “unrestricted carry” and Wisconsin Republican governor Scott Walker, after his 2010 re-election, kept a campaign promise and used the Republican majority in that state’s legislature to pass concealed carry in 2011. By 2012, four states had gone to unrestricted carry, thirty-seven were “shall





issue” to permitless carry (Gutowski 2019; Murphy 2019; Kobin 2019). Just as this publication was going to press, nineteen states had moved to permitless carry, with Iowa doing so in April of 2021, and with a bill to do so in Tennessee having passed the legislature with the governor indicating he will sign it. The remaining eight “may issue” states (such as New York, California, Hawaii, and Massachusetts) tend to be very restrictive in their “may issue” system, requiring that citizens have “good cause” to carry a weapon. Usually, individual self-defense, without some exigent danger or death threat, is not considered a “good cause,” and, likewise, neither is a profession that puts one in danger. Obviously, those states have been subject to numerous lawsuits attempting to replicate the effects of what has happened in Illinois, but courts have overall been reluctant to overturn restrictive “may issue” laws. In an oddity that could only possibly come about through the gun issue being played out through the courts rather than through legislative deliberation, the very controversial open carrying of firearms is allowed by some courts under nineteenth-century legal precedent in the spirit of *State v. Chandler* from 1850, while the less controversial (to modern Americans anyway) practice carrying of concealed firearms is restricted, also under the same nineteenth-century legal precedent in the spirit of *State v. Chandler* from 1850. For example, in *Peruta v. California* (2017), the Ninth Circuit took a circumlocutional approach and left California’s “may issue” for “good cause” system in place because the carrying of a concealed weapon is not protected by the Second Amendment, but a complete prohibition on “bearing arms” would be a violation of the Second Amendment. The fact that there is at least some legal ability for citizens to openly carry firearms makes the state’s regulation system in compliance with *Heller* and *McDonald*.

Surprisingly, despite a solid 5-4 pro-Second Amendment majority in the Supreme Court, it did not grant certiorari in June of 2017 in *Peruta*, which elicited a rare dissent on certiorari from Justices Thomas and Gorsuch. We do not know why members vote the way they do in requests for certiorari unless they tell us, but perhaps some of the Court’s other pro-gun justices were hoping that a legislative fix from Congress and the executive would be forthcoming in the form of a national concealed carry reciprocity law. Indeed, introduced in January of that year was H.R. 38, the Concealed Carry Reciprocity Act of 2017, legislation that had been sitting around in various forms for many years. It passed the House on a roll call vote of 231–108 and was sent to the Senate Judiciary Committee (Congress.gov n.d.), where it died under threat of filibuster. Some variation of this law, if one would ever pass, would make it so permit holders from “shall issue” states would be legally able to carry concealed weapons in “may issue” states, while



### Hypothesis H<sub>3</sub> Is Supported

The Constrained Court Theory is construed so courts can be successful in creating significant social change if “some” citizens support the courts or if there are low levels of opposition from “all” citizens. Based on public opinion polling, there is support for an interpretation of the Second Amendment as an individual right to keep and bear arms from a majority of Americans. The polling data are clear, and this is still true even if there is also a majority support in polling data for various forms of gun control. These various proposed gun control policies, such as universal background checks, do not pass into law (at least at the national level) due to the “intense minority” of gun owners. One thing in political science is clear: politicians only pay attention to the organized (Fiorina 1989), and the pro-gun lobby is nothing if not dedicated and organized. What there is not, however, is “low opposition from all citizens.” And while it could be considered tautological to use implementation data (number of gun owners and concealed carry permit holders) simultaneously as both evidence of social change and evidence of public support, the trend prior to *Heller* and *McDonald* was already more citizens supporting an individual right interpretation of the Second Amendment by literally keeping and bearing arms. Post-*Heller*, the trend of increasing numbers of gun owners and permit holders continues, as does a deregulatory pattern in some states with regard to permit requirements. There will never be low opposition from all citizens; by virtue of upbringing, outlook, and ideology, there is a sizable minority, a solid one-third of the public, that is against the keeping and bearing of arms. This minority is being overridden by the majority at the national level, but in certain states such as California, those against the expansion of a Second Amendment right to keep and bear arms have majority control and are doing the same thing at the state level as is happening to the nationwide anti-gun minority: having their policy preferences overridden.

Hypothesis H<sup>3</sup>: “Increased levels of ‘keeping and bearing arms’ will not occur without support for an individual right to keep and bear arms from some citizens or low opposition for an individual right to keep and bear arms from all citizens” is not falsified. We have conditions that have been met that will allow significant social change through the Court, even if the significant social change we see in the form of the spread of concealed carry is from the elected branches of government and not directly tied to Court, the sole exception being the case of Illinois.

## Incentives and Market Forces

Rosenberg's Constraint III is that courts lack the tools to readily develop appropriate policies and implement decisions and therefore that they cannot simply order significant social reform. But this weakness is not like a silver bullet to a werewolf. There are ways around this weakness, such as if the Supreme Court orders lower courts to comply, as they have authority over them, or if they can convince other actors to carry out the reform. Considering that one party to a case wants the social reform (why else bring the case?), if that party to the lawsuit has the ability to implement it, they might do so. It ends up being the elected branches of government on the side of the status quo more often than not, but once the decision is made, the executive branches (federal and state collectively) may use the decision as cover for social reform that it either takes no issue with or even supports, but which but they know they could not get democratically, "for the willingness to change may predate court action" (Rosenberg 2008, 32).

Even though both parties to a lawsuit may not have implementation powers, courts can effectively outsource their decision to third parties, as entities on the same side of one of the parties to the lawsuit have the power to affect significant social reform if the law allows for it. To return to the issue of abortion, the case study of Rosenberg that most closely aligns with this one about firearms, we can see that the free market was that third party to outsource implementation. The elected branches of government were not going to open abortion clinics nor force doctors to perform abortions, since neither of those implementation options were or are politically feasible. All the Court had to do was get the rest of the government out of the way, let the market decide, and then keep market regulation *de minimus*.

Here are the corresponding subsection qualifiers of the Constrained

Court Theory's Constraint III about public support being necessary for courts to make significant social change, reworked as positive hypotheses:

- H<sub>3a</sub>: Positive incentives are used to gain support of jurisdictions to expand citizens' ability to keep and bear arms; or
- H<sub>3b</sub>: Negative incentives are used to override opposition to an expansion of citizens' ability to keep and bear arms; or
- H<sub>3c</sub>: Market forces are allowed to allow for an increase in citizens purchasing arms to keep and bear and likewise to use in a legal manner or;
- H<sub>3d</sub>: Officials simultaneously convince citizens they have no choice but to implement the policies that allow for an increase in the "keeping and bearing of arms" and that such policies are a way to gain more resources.

In this case, I examined whether jurisdictions used *Heller* and *McDonald* as a top cover for liberalization of restrictive gun control laws, and if in doing so they received outside resources.

On the eve of the *Heller* decision, the gun rights advocates had met two necessary conditions for Court effectiveness. First, they had precedents for interpreting the Second Amendment as an individual right in state constitutions from the time of the adoption of the national Constitution until the present day, three supportive laws from Congress, and scholarly support to argue for their favored interpretation of the amendment. It is also true that for sixty-nine years prior to *Heller*, the Court had refused to take any case whatsoever on the Second Amendment, and lower courts, taking this as a cue (or at least acquiescence), set out to render the amendment moot. There was, however, at least one circuit court case in *Emerson* that gave an individual right interpretation because of the conservative legal revolution from the work of groups such as the Federalist Society (Hollis-Brusky 2015).

Second, the reformers brought their case to the Court with widespread support for an individual right interpretation of the Second Amendment from Congress and the executive, as a majority of members signed an amicus brief in support of the "Standard Model" as well as majority public support. Going into *Heller*, 73 percent of Americans believed that the Second Amendment protected an individual right. There may not have been widespread indifference in the public and from politicians because roughly one-third of the public wanted (and still wants) to ban handguns, but given the 5-4 conservative makeup of the Court, victory was, if not certain, at least not unexpected because of Justice Kennedy's swing vote. Kennedy had voted

with the conservative majority in earlier cases that dealt peripherally with the Second Amendment, such as *United States vs. Verdugo-Urquidez* (1990), where the Court said the “the people” in the Second Amendment is the same as in the First, Fourth, Ninth, and Tenth Amendments, in *United States v. Lopez* (1995), which held the federal Gun Free School Zones Act of 1990 was unconstitutional, and in *Printz v. United States* (1997), which held that certain interim provisions of the Brady Handgun Violence Prevention Act (that local sheriffs conduct background checks) violated the Tenth Amendment to the United States Constitution.

One key constraint remained to be overcome for the Supreme Court to be effective in creating significant social change, and that was implementation of their decision. But here the Court had an easier path than in some of Rosenberg’s other case studies, such as *Brown*, because a free market was able to implement the decision for them. Public officials do not implement the keeping and bearing of arms the same way we would expect that after *Brown* local officials would permit black students to attend a white school. From that perspective, certain hypotheses in this case are easily tested. They are

- H<sub>3a</sub>: Positive incentives are used to gain support of jurisdictions to expand citizens’ ability to keep and bear arms;
- H<sub>3b</sub>: Negative incentives are used to override opposition to an expansion of citizens’ ability to keep and bear arms; or
- H<sub>3d</sub>: Officials simultaneously convince citizens they have no choice but to implement the policies that allow for an increase in the “keeping and bearing of arms” and that such policies are a way to gain more resources.

There has not been any example of any federal, state, or local officials offering incentives to change a gun law to allow more keeping and bearing of arms. For example, Congress did not authorize any special funds to Washington, D.C., if they quickly complied with *Heller*, or the withdrawal of funds if they did not comply, nor have D.C. officials liberalized their gun laws in an effort to obtain funds. Congress had made several attempts, through its control of D.C., to modify the city’s gun laws prior to the *Heller* case, but these did not succeed (Smith and Carter 2008). Neither the state of Illinois nor the federal government provided any incentives to Chicago or its suburbs regarding the handgun bans at issue in *McDonald*. I cannot find a single example where, like the federal government convincing states to raise their drinking age to twenty-one to receive federal highway funds, in which

any state or local gun laws were changed in response to positive or negative incentives coming from elected officials.

The closest that we come, when discussing incentives, are two situations. The first deals with nonprofit advocacy and the second is state pre-emption laws. To start, Rosenberg clarifies that the source of the incentives, which are usually defined as money or the retraction of it, can be proffered from “either public or private” sources (2008, 32). Although other incentive examples that Rosenberg identified that are nonbudgetary in nature, such as projects or moves to new areas by a business, they are still monetary in nature and are more like indirect graft than direct revenue transfers from one budget to another. Naturally, when we think of public sources, we think of disbursements of tax dollars, aka Hamilton’s “purse,” but the private sources he mentions are funds from tax-exempt nonprofit organizations. In *The Hollow Hope*’s case studies on the courts and women’s rights, he goes into detail about the monetary incentives provided to feminist organization such as the National Organization for Women (NOW) from the Ford Foundation and similar nonprofits. But he also he cites Burger (1980), who appraised the status of women’s litigation at the peak of second-wave feminism and noted the “relatively impoverished state of feminist groups.” This impoverishment, Rosenberg surmised, is partially to blame for the failure of the courts to make significant social change with women’s rights; there were not enough inducements, and even the increase in funds and membership to feminist groups could not be directly tied to court decisions.

Similarly, gun control organizations regularly receive large donations from such groups as the Joyce Foundation, which from 1993 to 2011 had donated \$54 million in funds to gun control groups (Merrion 2011). Likewise, it is with this logic of self-interest that some of the largest donations to the NRA come from the gun industry, their corporate partners, so to speak. For example, one major U.S. gun company donates \$2.00 to the NRA for every gun sold (Ruger Firearms 2016), and shooting and hunting supply company Midway USA “rounds up” every sale a few cents and sends that money to the NRA to the tune of at least \$10 million (Violence Policy Center 2013). Without comparing and contrasting budgets from gun control and gun rights organizations, I cannot say which side spends more money. The incentives, or funds, may bear fruit in a politician’s (re)election bid, but it is debatable if they sway public opinion to any measurable degree. The funds do, however, support academic research from both sides of the debate as well as pro-gun and anti-gun litigation efforts. After all, it was the Institute for Justice (IJF), founded in 1991 as a “conservative version of the



NAACP Legal Defense Fund” (Winkler 2013, 48), that paid for *Heller* to happen. But what these groups do not do is offer inducements to governments to change their laws to increase or decrease the keeping and bearing of arms, which would be bribery and quite illegal. We cannot say, when testing the Constrained Court Theory, that private inducements from nonprofits can contribute to significant social change.

With regard to private dollars possibly offering inducements to politicians to change laws, there have been some circumstances where this might have occurred (in a legal way) if the inducements had been high enough. So far they have not, at least that we can prove, as some of the details take place behind closed doors. There have been small cases in which a firearm manufacturer has refused to sell its products to a city or state for use with the law enforcement officers, but given market alternatives, this provides no real leverage. There are a few high-profile cases in which firearms-related companies have threatened to move from one state to another if a gun control law passes. We know from many other examples in other industries that corporations can leverage the threat of a significant impact to a state or local economy to induce legal or regulatory change or to maintain the status quo. It is not a secret that car companies prefer to build factories in southern states because of their labor laws and that states, counties, and cities regularly bid for businesses with incentives like tax breaks. This is a new and rare phenomenon in the field of firearms, and it is interwoven with the politics of gun control.

Along those lines, Beretta USA (the parent company is Italian) threatened to leave Maryland if the state passed the proposed strict gun control laws after the Newtown school shooting. Colt likewise threatened to leave Connecticut for the same reason. After the governor of Maryland, Democrat Martin O’Malley, signed the Firearms Safety Act of 2013 into law, Beretta moved a plant and its three hundred jobs from that state to Tennessee (Miniter 2014; Huston 2013). Colt’s impending Chapter 11 bankruptcy (which came in 2015) more likely than not prevented them from making a move as well, but we do not know for sure. Beretta’s move was an issue in the governor’s race, as O’Malley’s lieutenant governor supported the act, and he was running against NRA-endorsed Republican Larry Hogan, who ended up winning. After his win, though, Governor Hogan did not advance a repeal of the most onerous restrictions and only worked at the margins to advance gun rights.

In another prominent example, Kahr Arms, which was headquartered in New York State, had purchased land in Greely, Pennsylvania, in 2013 to expand its operations. Kahr Arms moved to Pennsylvania in totality in July

2015 after passage of the strict gun control of New York's Secure Ammunition and Firearms Enforcement (SAFE) Act by Governor Andrew Cuomo. This is same Andrew Cuomo that threatened firearms companies with death by a thousand cuts as the head of the Department of Housing and Urban Development when he was part of the Clinton administration. There is much more on Andrew Cuomo later. The move was, according to Kahr's vice president of sales and marketing, partially due to ideological reasons and partially for practical ones.

In yet another example, Magpul, which makes high-capacity magazines for guns, publicly threatened to leave Colorado if it passed restrictions on guns in 2013 after the 2012 Aurora, Colorado, movie theater mass shooting. In the case of Magpul, it was about \$80 million a year in business and 250 employees (Holden 2014), and it was an issue in the (ultimately successful) re-election campaign of Democratic governor John Hickenlooper, who signed the aforementioned gun control bills into law (Forsyth 2014). Magpul moved to Wyoming and Texas, where pro-gun governors Republicans Matt Mead of Wyoming and Rick Perry of Texas both publicly courted the company and offered inducements to facilitate the move (Campbell 2013; Hancock 2014). In a final example, Remington Arms Company, in a letter to New York governor Andrew Cuomo, threatened to leave the state if microstamping legislation passed into law (Lovett 2012). The New York law was never passed, but we do not know what effect the Remington threat had on Governor Cuomo because if the threat was successful in swaying Governor Cuomo, he would have no incentive to ever admit as much. There surely are smaller examples of small businesses "voting with their dollars" that do not make a splash in the national press. One small case out of Seattle, Washington (and there are likely many more), is when a \$25 tax was passed on all sales of guns and up to 5 cents on each round of ammunition, a large local gun shop just moved outside the city limits; the city had expected to receive close to half a million in tax revenue but made much less, somewhere between \$100,000 and \$200,000 (Springer 2017).

In the case of Magpul, we have a deliberate political choice, unrelated to the economics of the situation, to move to other states. Magpul's CEO said that his selection of Texas and Wyoming was based on factors that included "individual liberties and personal responsibility" (Richardson 2014). In the cases of Beretta, Colt, and Remington, the reasons were both economic and political. Maryland's law contained provisions that would have prohibited the company from producing, storing, or importing many of the products it sells around the world, such as the 9 mm handgun that was the standard sidearm of the U.S. military from 1985 until 2017 (when a new procure-

ment process switched models and manufacturers). Those provisions were changed in the final bill, but Beretta's general manager said that the "possibility that such restrictions could be reinstated left the company worried about maintaining a firearm-making factory in Maryland" (*Fox News* 2014). For Remington and the microstamping issue, it was certainly mostly economic. Microstamping is when etchings are engraved onto the tip of the firing pin and the breech face of a firearm with a laser. These etchings are transferred to the cartridge case using the pressure created when a round is fired. In short, it is a ballistics identification technology that may or may not be workable on a large scale, but either way, it is prohibitively expensive for manufacturers to make handguns that meet the law. By comparison, the only state to pass a microstamping law was California in 2009, which predictably triggered lawsuits by the National Shooting Sports Federation (NSSF) and the Sporting Arms and Ammunition Manufacturers Institute (SAAMI).

In 2018, the whole microstamping issue was tied up in state and federal courts, with prospects looking grim for the NSSF. California's Supreme Court ruled in June of 2018 that "impossibility can occasionally excuse noncompliance with a statute, but in such circumstances, the excusal constitutes an interpretation of the statute in accordance with the Legislature's intent, not an invalidation of the law" (*National Shooting Sports Foundation v. State of California* 2018, 4). Essentially, the California Supreme Court agreed with the gun makers' assertions that the microstamping requirements are impossible, but then went on to say that it is not unconstitutional to pass laws that are impossible to comply with. To wit, the attorney general of California, Xavier Becerra, said, "Today's ruling confirms that California can create *incentives* for the gun industry to make products that serve the public's needs" (Thanawala 2018, emphasis added). Clearly, the incentives sword cuts both ways. How much of the new handgun market in California is an incentive for gun makers remains to be seen. The law allows for pre-2013 gun models to still be sold, but all new gun models introduced in California must have microstamping technology. Moreover, microstamping is not so much something the firearms consumer needs, as no desire for it has been forthcoming from those who purchase firearms, but rather a supposition of something the California government believes the firearms purchasing public needs. Meanwhile, the Ninth Circuit Court of Appeals ruled that microstamping requirements do not offend the Second Amendment. The dissent noted that if manufacturers cannot comply, then it is an effective ban on new handguns, and that no new handgun model has been sold commercially in the state since it went into effect (*Ivan Pena v. Stephen Lindley* 2018).

Two of the world's largest gun makers, Smith & Wesson and Ruger, simply declared that they would rather lose the California market than comply with the law. Given the expense of investing in the technology to meet requirements in California (requiring microstamping in multiple areas of the gun) to get their products on the state's list of approved handguns, which would be unnecessary in the rest of the world, as no other jurisdiction on the planet requires such technology, it is a logical economic choice to cede the lost sales to either the used gun market, to those making pre-2013 models, or to a manufacturer that may comply. So far none have, and none likely ever will. Part of the debate surrounding microstamping is that while the manufacturing technology is not currently among the techniques available to gun companies, it is still possible for gun companies to bring in this technology from other fields at great expense, although, regarding the argument of the plaintiffs in the case, it may not be possible for the technology to be brought to market with the type and specifications that California's law requires. It is doubtful metallurgy experts were consulted in the drafting of the law.

These companies were "voting with their feet" for ideological and economic reasons. Even using the moves as a negative incentive, as per the Constrained Court Theory, there is no direct evidence to say that the Court's decision in *Heller* created the extra-judicial effects other than the statements by the CEOs of Magpul and Kahr Arms that they wanted to move to states that supported individual rights. For Magpul, they threatened to move if Colorado passed strict gun control, but Colorado decided to enact the law anyway. Magpul moved, and the law stayed on the books. This is despite the recall election of the two key Democratic legislators whose support was crucial to its passage (Healy 2013). And New York's SAFE Act is in no danger of repeal; Kahr Arms moved to Pennsylvania only after the law was passed. It is possible that the *Heller* decision's terms that "arms in common use" were protected by the Second Amendment may have had some influence on the various companies, but the Court was not looking to these companies to implement its decisions in *Heller* and *McDonald*.

The second close approximation of negative and positive incentives is that forty-two states have passed firearms pre-emption laws that prevent local jurisdictions from passing their own firearms ordinances (Everytown for Gun Safety 2018). Only California, Connecticut, Hawaii, Illinois, Massachusetts, Nebraska, New Jersey, and New York allow local officials to pass firearms-related laws with some caveats. Illinois has a pre-emption law but only for assault weapons laws, which grandfathers in existing assault weapons bans and which does not allow home rule municipalities and cities to

create new ones to expand on them (Kopel 2018b). This is ostensibly to make it so citizens do not have a patchwork of laws to deal with, but such laws are not “positive or negative incentives” in the manner in which Rosenberg tested his Constrained Court Theory, as the incentives are defined as monetary. Besides, if a city in a state with a pre-emption law did pass a local ordinance, as has happened, the law finds itself disposed of in court. It would be a stretch to say that pre-emption laws are positive or negative incentives, per the Constrained Court Theory.

## Market Forces

- $H_{3c}$ : Market forces are allowed to allow for an increase in citizens purchasing arms to keep and bear and likewise to utilize them in a legal manner

Hypothesis  $3_c$  has a wealth of data to examine. Any social change by the Court would occur the same way that *Roe* provided a legal market for abortion, sold as a commodity to women that allowed for significant social change. There must be minimal government interference with the buying and selling of guns as well as with their legal use, such as at gun ranges for target practice. The government must restrict itself to setting the rules for the marketplace, which it already does for any other legal commodity with minimal interference; thus, the particularly worded “allowed to allow for” phraseology in the hypothesis. For example, the use of restrictive zoning has been used to keep alcohol stores away from elementary schools, but alcohol is still readily available. Similarly, interference with the free market would have to be such restrictive zoning that it keeps firearm shops or gun ranges out of a jurisdiction entirely. Also, as “the power to tax involves the power to destroy,” as Chief Justice John Marshall famously said in *McCulloch v. Maryland* (1819), taxes or insurance requirements are kept to a reasonable level on the product.

Granted a black market in guns keeps determined criminals armed the same way illegal abortions provided an outlet prior to *Roe*, but we must look at legal market conditions if there is to be significant social change as a direct result of the Court. While there are barriers to the sale and purchase of firearms, the political fight to maintain a healthy legal market had already been won (or compromised to) by pro-gun reformers long before *Heller* was decided. This is true, at least when it comes to governmental interference, although the actions of private companies to deny or restrict access to

firearm companies of their services (deplatforming) is a newer development that is still evolving.

As mentioned previously, in 1976 the U.S. Consumer Product Safety Act was amended to specifically exclude firearms after a backdoor effort to ban them, which removed the ability to issue regulations to limit the keeping and bearing of arms and, therefore, the use of the administrative state to make an end run around electoral politics. This meant that one major path to a creeping tide of regulatory restrictions was cut off. A parallel example would be anti-abortion regulations that on their face are solely for the health and safety of the women receiving abortions, but which also have an intended side effect of reducing the number of abortions. Such a tide of safety regulations was experienced by abortion providers after *Roe*, the details of which Rosenberg explains were mostly a way to oppose the Court. Along the same line of reasoning, and out of the limelight, Second Amendment reformers between 1994 and 2003 pushed numerous range protection laws. The number of states that had range protection laws went from eight to forty-seven (NRA-ILA 2003). These laws were aimed at keeping local noise ordinances from being used to close existing gun ranges as well as the use of occupational health and safety regulations dealing with lead from bullets. An example of one such law is South Dakota's:

The use or operation of a sport shooting range may not be enjoined as a nuisance if the range is in compliance with those statutes, regulations, and ordinances that applied to the range and its operation at the time when the initial operation of the range commenced. The use or operation of a sport shooting range may not be enjoined as a nuisance due to any subsequent change in any local regulation or ordinance pertaining to the normal operation and use of sport shooting ranges. However, if the usage or design of the range results in a significant threat to human life or private habitations, a nuisance is constituted and an injunction may prescribe appropriate relief. (South Dakota Code 21-10-28 n.d.)

These laws usually deal with existing ranges to keep an increasingly urbanized population and suburban sprawl from closing them. But they do not deal with the opening of new ranges, and because the Illinois range protection law only deals with civil liability related to sound emissions, the City of Chicago was able for a number of years to prevent the opening of a new range after *McDonald*, but the city eventually lost to the NRA in the Seventh Circuit (*Rhonda Ezell v. City of Chicago* 2017). Range protection laws, if we

were to have a comparison to one of *The Hollow Hope* cases, would be akin to a law that prevented a state from restricting abortions to hospitals with their expensive health and safety features, instead of in clinics as an outpatient procedure where they usually take place. Rosenberg noted that most hospitals after *Roe* did not offer abortions, but the relatively deregulated market allowed for a 39 percent growth of specialty clinics (Rosenberg 2008, 196). The existence of these range protection laws is another avenue where activists who are opposed to the keeping and bearing of arms are curtailed and that smoothed the way for the Court to make significant social change.

Additionally, with the passage of the Protection of Lawful Commerce in Arms Act (PLCAA) during the George W. Bush administration, lawsuits against firearms manufacturers that were not related to product liability (such as a faulty trigger) were severely restricted. Therefore, efforts to change the way guns are sold and marketed through tort litigation were also cut off from those who would oppose the Court's decision. Similarly, the Firearms Owners Protection Act (FOPA) of 1986 reformed some of the more onerous restrictions placed on the sale of firearms from the Gun Control Act of 1968. The 1968 act, passed after the MLK and JFK assassinations, put an end to the mail order of firearms, the way Lee Harvey Oswald had ordered a military surplus rifle via the mail. In that 1968 act, there were also import/export restrictions and prohibitions on ownership from classes of citizens, such as those dishonorably discharged from the military. While the Bureau of Alcohol, Tobacco and Firearms still has wide latitude, the more onerous restrictions from the 1968 act were rolled back in 1986, making for a semiregulated market not unlike what Rosenberg details in his case study on abortion.

Online interstate sales guns are now legal provided they are shipped from one gun dealer to another and the prospective owner passes a background check (via the Brady Law) before picking it up. Depending on the state, there may be a waiting period between when you purchase a gun and when the dealer can legally hand it over to you, and some waiting periods are longer than others. They range from ten days in California, three days for any gun in Illinois, to most states having no waiting periods, like in Texas.

The waiting period laws are explicitly a "cooling off" period, which are intended to prohibit crimes of passion, but they apply to the first gun a citizen purchases as much as the second or third. Assuming someone is bent on murder, if they already own a firearm the cooling off period is an impractical check. The Ninth Circuit, however, upheld California's ten-day waiting period in *Silvester v. Becerra* (2016), which was appealed to the Supreme Court (Banes 2017) but was not granted certiorari. Another restriction on

the market in firearms is “one gun a month” laws, intended to limit the black market sale of arms, where a straw purchaser (a legal owner) buys a gun and sells it to a prohibited owner. But only three states have such laws: California, Maryland, and New Jersey. South Carolina repealed theirs in 2004 and Virginia in 2012 (Sherfinski 2012). The District of Columbia’s was struck down in court in 2015 (Marimow and Hsu 2015).

The Firearms Owners Protection Act of 1986 also allowed for legalization of ammunition shipments through the U.S. Postal Service (a partial repeal of the Gun Control Act of 1968) as well as the removal of the requirement for record keeping on sales of non-armor-piercing ammunition. The Gun Control Act of 1968 required federal licensing for individuals who sold ammunition and required that a record be kept on all handgun ammunition sales by retailers. In 1986, the director of the Bureau of Alcohol, Tobacco and Firearms supported eliminating the record-keeping requirement: “The Bureau and the [Treasury] Department have recognized that current record-keeping requirements for ammunition have no substantial law enforcement value” (Judiciary Committee, 1985–1986, cited in NRA 2019). The ammunition restrictions were removed with little opposition. Most importantly, the Firearms Owners Protection Act gave federal protection to the transportation of firearms through states where possession of those firearms would otherwise be illegal. In a compromise, the Firearms Owners Protection Act also contained a provision that banned the sale to civilians of machine guns manufactured after the date of the act. This compromise restricted sale of machine guns and fully automatic guns to the military and law enforcement. This created an artificial shortage of those that were legal for civilians to own, leading in 2017 to prices in the neighborhood of \$20,000 to \$140,000, depending on make and model, but it left the sale of virtually all other firearms in common use intact.

## Taxing Power

One can imagine a hypothetical situation in which a strongly antiabortion/prolife Congress theoretically could, rather than make abortion illegal, put a \$10,000 tax on one, essentially placing it out of reach of almost all citizens.

For there to be keeping and bearing of arms, taxes or insurance requirements should be kept to a reasonable level on the product. The idea of a steep tax or price controls on guns to limit the keeping and bearing of firearms is not a new idea. The oldest reference I can find to this government policy is when Henry VIII put price controls on “handgonnes” and cross-



bows to encourage practice with the traditional English longbow (Harsanyi 2018). Handguns of Henry VIII's era were miniature one-shot cannons on a short pole that the user fired with a lit match. At the time, a longbow was a superior weapon but one that required years to master, and Henry VIII wanted Englishmen to master it. The price controls were abandoned as the handgun and crossbow were too practical and popular.

In the American context, the tax issue keeps popping up. "In 1926, Virginia passed a registration requirement and a prohibitive tax on firearms that was later ruled unconstitutional" (Halbrook 1995). Congress in the 1930s, rather than get into the controversial issue of whether it had the ability to ban fully automatic guns or not, passed the National Firearms Act of 1934, which required a \$200 federal tax stamp and required fingerprinting and federal registration for certain devices, such as silencers (sometimes called suppressors) and fully automatic weapons. Without inflation, a \$200 tax in 1934 would amount to \$3,850 in 2020 dollars (Inflation Calculator n.d.). This had the effect of putting fully automatic weapons out of the reach of all but a few. The NRA, at the time still a hobbyist organization, protested the original proposal to fingerprint all owners and create a federal registry. The attorney general at the time, Homer Cummings, said of the law, "We certainly do not expect gangsters to come forward to register their weapons and get fingerprinted, and a \$200 tax is frankly prohibitive to private citizens" (Harsanyi 2018, 227).

The tax does not apply to law enforcement, and it has not increased since 1934, but the Firearms Owners Protection Act of 1986 and its limiting of legal ownership of fully automatic guns to only those produced before the passage of the act essentially renewed the 1934 National Firearms Act's limitation on the keeping and bearing of fully automatic weapons. Rather than ban automatic weapons, market conditions were manipulated, which limited supply such that legal fully automatic weapons became prohibitively expensive.

President Gerald Ford's attorney general, Edward Levi, in an address to a law enforcement executives conference, proposed a large tax on low-cost firearms. He was quite specific:

A graduated tax could be designed to bring the price of every handgun up to some specified level. For example, a \$25 handgun could be taxed \$75, a \$75 handgun could be taxed \$25, and a \$90 handgun could be taxed \$10 to make the cheapest available handgun cost no less than \$100. If enforcement efforts cut off the development of a black market in cheap handguns, economic forces would quickly

make it unprofitable for anyone to manufacture “Saturday night specials.” (Levi 1975)

Controlling for inflation, \$25 in 1975 is about \$120 in 2020, which is what one would expect to pay for a low-end used, but still perfectly serviceable, self-defense handgun; \$100 would be about \$480, what one would pay for a high-quality new gun (Inflation Calculator n.d.). Had Levi’s proposed law passed, manufacturing improvements making for cheaper but higher-quality firearms would have negated the law’s effects unless the proposed law’s provisions were pegged with inflation.

For a further example of using the taxing power to, in simple economic terms, have people respond to the negative incentive of a tax to reduce the keeping and bearing of arms, in 1993, then first lady Hillary Clinton proposed a 25 percent national tax on all firearms (Americans for Tax Reform n.d.). This idea was recycled by then presidential candidate Senator Elizabeth Warren, who said in an editorial in *Medium* that as president she would work with Congress for a 30 percent tax on firearms and a 50 percent tax on ammunition, in her words, “both to reduce new gun and ammunition sales overall and to bring in new federal revenue that we can use for gun violence prevention and enforcement of existing gun laws” (2019). An attempt to make these taxes into law was H.R. 5717, the Gun Violence and Community Safety Act of 2020. Taxes like these, though, have little chance of passage without more gun control supporting politicians gaining office.

Such taxes, while they might not prevent gun ownership, would certainly reduce it to an extent. Similarly, hefty fees to get concealed carry permits are designed to have the same effect. For instance, Virginia sets a \$50 cap it charges residents to pay for the cost of processing a background check on a concealed carry applicant. This cap prevents counties and courts from charging more, either as a source of revenue or as a disincentive to reduce the number of permit holders. Meanwhile Illinois has no such cap, and it has concealed carry permit fees that total \$160 for residents and \$300 for nonresidents.

Here is an example of how this use of the taxing power would play out today, although on the periphery of this nationwide story. In 2016 Northern Mariana Island, a U.S. territory, put a \$1,000 tax on all handguns after its 1976 ban on handguns was struck down in the U.S. District Court that same year (Chan 2016). But the tax was quickly struck down in the courts the same year it was enacted. Ramona Manglona, chief judge of the U.S. District Court for the Northern Mariana Islands, wrote in his decision, “The individual right to armed self-defense in case of confrontation . . . cannot be regulated into oblivion” (Sullum 2016).

For the most part, taxes and fees are kept minimal or the same as any other legal product. There are a few exceptions, but none so high that they are in the \$1,000 range of the Northern Mariana Islands example. As for federal taxes, there is only one. In 1937 Congress, at the request of the gun industry, passed the Pittman-Robertson Act, which put an excise tax on firearms, ammunition, and later archery equipment. This is a 10 percent or 11 percent tax, depending on the item, but the proceeds go to wildlife management and restoration, and it was passed to help alleviate the effects of overhunting that happened prior to the era of modern land management. It was, and still is, supported by the firearms community. Other than state and local sales taxes found on every other item, with few exceptions, there are no other special taxes on firearms or ammunition that deter the keeping and bearing of arms. As of 2016 at least, at the state level, only Alabama, Pennsylvania, and Tennessee imposed special taxes on gun or ammunition purchasers or dealers. Pennsylvania and Tennessee dedicate the revenue these taxes generate to background checks and wildlife resource management, respectively. In Alabama, there is a “license tax” on gun dealers that ranges from \$100 to \$150 (Pinho 2013). But Cook County, Illinois, in 2013 and Seattle, Washington, in 2015, both enacted a \$25 tax that applies to all firearm purchases in the county. Both went even further, and in 2016 also put a 1- to 6-cent tax on each round of ammunition. As most boxes of ammunition hold fifty rounds, this amounts to at least half a dollar as much as three dollars, hardly a deal breaker when a box of 9 mm ammunition pre-tax already costs about \$20 at Walmart. The Cook County and Seattle taxes are “violence taxes” (akin to “sin taxes” on alcohol or tobacco), an effort to do some of what the tort litigation was intended to do, which is to use the free market in firearms to pay for some of the negative externalities of firearms. Their other goal, like a tax on sugary soda drinks, is to be a disincentive nudge to reduce consumption. But at \$25 they are not high enough to really deter sales of guns. The Seattle tax was upheld against the NRA’s challenge in Washington State’s high court as a revenue-generating tax (*Washington Times* 2017) rather than a “poll tax” on the Second Amendment. Either way, residents of Seattle and Cook County can, and do, travel outside their respective jurisdictions. When I resided in Lake County, Illinois, just north of Cook County, I heard several radio advertisements from gun shops in Lake County pitching their stores as a way to avoid the Cook County tax. However, in a limited decision in late 2021, the Illinois State Supreme Court decided that the Cook County taxes violate the state constitution’s uniformity clause because nothing in the ordinance indicates that

the tax proceeds generated are aimed at reducing gun violence. A uniformity clause is intended to prevent preferential tax treatments.

## Insurance Requirements

Lastly, there are no insurance requirements for those who own firearms or who carry concealed weapons, with the insurance intended to be a disincentive the same as a prohibitive tax. They are occasionally proposed; a typical example was put forth by New York representative Carolyn Maloney that called for a \$10,000 fine for those who do not obtain the dictated special insurance (Pappas 2013), but it never went anywhere in Congress. Firearms trainers, however, actually recommend to those who use their state's concealed carry law that they voluntarily buy liability insurance for themselves through groups such as the U.S. Concealed Carry Association (USCCA), for a cost of roughly \$22 to \$47 a month (USCCA 2017), to deal with the legal expenses of using a concealed firearm, should they have one.

Some legal issues crop up with concealed carry insurance, but so far only in the state of New York. This has important implications for the rest of the nation, as New York City is the financial capital of the United States and many large insurance companies are headquartered in the state. The NRA's "Carry Guard" insurance, which was similar to the USCCA insurance mentioned above, was banned in the state of New York after the work of activists who called it "murder insurance" found a sympathetic governor who had the state's Department of Financial Services look into the business. That sympathetic governor was none other than Andrew Cuomo. The activists insisted that such insurance created a moral hazard of unintentionally emboldening a concealed carry licensee to use the weapon when he may otherwise not have done so. As a result of Governor Cuomo's efforts, a \$7 million fine was levied against two companies, Lockton and Chubb, for underwriting the Carry Guard program in violation of New York law (NY Dept. of Financial Services n.d.). The premise behind the fine (through a consent order) was that New York state law does not allow insurance to cover illegal acts. But such a determination of illegality for the use of a weapon by a concealed carry holder is not made until after a jury trial or plea deal, or a lack of one if the holder is not charged with a crime. For the regulators, being charged with a crime was enough to make the insurance coverage a violation of the law, since the insurance would have already kicked in to provide bail money, attorney consultation fees, and other expenses. New York state also found

that the NRA did not have the proper license to market the Carry Guard program.

### More Guns Than People

Within the aforementioned guidelines (such as background checks, de facto bans on machine guns for all but the wealthy, minimal fees and taxes, some waiting periods, internet sales of guns facilitated through dealers, and legal protections for gun ranges in most states) there is a strong legal market in arms and places to practice using them. This relatively free market in arms (except for machine guns) has allowed the keeping and bearing of arms to flourish. The National Shooting Sport Federation (NSSF) says, “In 2016 the firearms and ammunition industry was responsible for as much as \$51.3 billion in total economic activity in the country” (NSSF 2017). That would be from the firearms and ammunition industries and would include manufacturing, sales, and repair. According to the Congressional Research Service, there are roughly twice the number of guns per capita in the United States as there were in 1968, when the last major regulatory change to the firearms market happened: “from one gun per every two persons to one gun per person,” which comes to more than 300 million guns in all (Krouse 2012, 9). The actual number of guns in the United States is likely higher than 300 million. According to the annual Small Arms Survey, which was done as an independent research project at the Graduate Institute of International and Development Studies in Geneva, Switzerland, of the 857 million civilian-held firearms worldwide estimated in 2017, 393 million are in the United States, more than those held by civilians in the other top twenty-five countries combined. The United States has 4 percent of the world’s population, and its civilians hold almost 40 percent of the world’s firearms (Karp 2018).

A gun produced with at least late nineteenth-century technology, if left in a cool dry place such as a dresser drawer, will not rust and will last almost indefinitely. The same is generally true of the ammunition that feeds it. Only in high temperatures or humidity does gunpowder start to break down chemically, and if stored properly it will also last indefinitely. Also, industry self-regulation makes sure that modern ammunition is safely useable in those older arms today. Given that fact, there are almost certainly more guns than people in America, as the U.S. population is approximately 326 million (Census Bureau 2017). The number of guns produced in America went from 5.5 million in 2010 to 10.9 million in 2013, with only 400,000 of those

exported; meanwhile some 3.6 million guns are imported per year (BATF 2016)b. According to the FBI, in 1999 there were 9,138,123 background checks on the instant background check system (NICS), but by 2016, there were 27,538,673 (FBI 2017). Gun manufacturing and sales is a flourishing business.

With the Protection of Lawful Commerce in Arms Act protecting manufacturers from lawsuits, they have only continued to produce more firearms. Modern manufacturing materials and methods mean that firearms can be produced cheaper and of better quality. Some examples of these methods are the use of polymers, or high-tech plastics, popularized by the Glock pistol (the Glock was not the first polymer framed gun, just the first commercially successful one), another is computer numerical control (CNC) machines, which are automated milling devices that make industrial components without direct human assistance, and a third is metal-injection molding (MIM), in which small gun parts are made when powdered metal is mixed with a binder material and then injected into a mold and hardened with heat. A gun, while not a luxury good, is still not a cheap item, but the middle range guns of today, at approximately \$500 new, are as good as the expensive luxury guns of a few decades ago and have features that would have to have been specialty ordered in the mid-1990s. Manufacturing improvements have also happened with the production of ammunition. Production data for the number of rounds of ammunition manufactured is sketchy, but there are about 10 billion rounds produced every year (Miniter 2014a). By looking at tax receipts that the Department of the Interior keeps on the Pittman-Robertson excise tax, however, we can get a reasonable estimation of change over time. Sales were stable from the 1990s through 2007. In 2000, receipts were about \$68 million. In 2007 they were \$107 million, but by 2012 they were \$207 million (Miniter 2014a). The excise tax on ammunition is a percent of the total cost of a box of ammunition, usually 10 percent, and as copper has become more expensive, those costs are passed along to the consumer and thus tax receipts have gone up. But that is still a \$100 million-dollar jump during the Obama administration, when the threat of gun control most recently loomed large. Inflation was only a small adjustment for those years eight years at about 2 percent per year.

There were only two other times in U.S. history when there was more access to guns and ammunition than today. The first was after the Civil War, when Union troops were allowed the option of keeping their arms in lieu of back pay, and Confederates returning home were allowed to keep theirs as a gesture of good will. The second time was in the immediate aftermath of

World War II, when world military surplus arms and ammunition flooded the U.S. market and guns were available through mail order, and when returning GIs brought them home as war trophies. Manufacturing improvements simultaneously kept prices down while meeting the strong demand that took place during the Obama administration, where the threat of gun control legislation led to a bit of a run on the market, particularly after the Newtown shooting when President Obama and others sought to reimpose an assault weapons ban. In economics terms, guns are “normal” goods that do not depreciate or degrade over time without use, and they keep their value, if not appreciate in value over time (if not fired). This means that the market in arms is responding to normal supply and demand incentives. Manufacturers are responding to the profit incentive by producing more and better guns at a cheaper price to meet the current demand. Likewise, manufacturers respond to the loss incentive and would not produce so many if they did not sell.

Clearly, the market in arms is healthy, although that market cannot be ascribed to the Court’s decisions in *Heller* or *McDonald*. The political battles by gun rights activists were already fought and mostly won prior to the cases, and they were to protect gun manufacturers from tort liability with the Protection of Lawful Commerce in Arms Act, to protect gun ranges from excessive occupational health laws and noise ordinances, to protect guns from excessive taxes, to protect gun owners from excessive insurance requirements, and to keep guns away from the authority of the Consumer Product Safety Commission. The passage of forty-two state pre-emption laws, which prevent local gun control laws, means that in the end, as things currently stand, guns are protected from anything other than moderate to minor regulatory burdens (such as the instant background check). These had all been won in the political arena even before the Supreme Court got involved. The only real restrictions in place are on automatic weapons, where the limited supply of those legal to own (as per the policy compromise of the Gun Owner’s Protection Act) has caused the prices on them to far exceed the ability of an ordinary American to pay for even one, let alone multiple, and this has greatly reduced the number of people keeping and bearing automatic weapons. It should also be noted, just as a matter of textual analysis, that the Second Amendment applies, per *Heller*, only to arms that one can “bear,” or carry, and this would thus exclude *reductio ad absurdum* weapons such as tanks but, in theory, not machine guns or shoulder-fired rocket launchers, although there is a question of whether the latter are ordnance, which are not protected, or “arms,” which are protected, under the Second Amendment.

## Internet-Facilitated Commerce

Internet-facilitated sales of firearms is a large expansion of the marketplace. Like eBay or Amazon, online sales sites like GunsAmerica facilitate dealer-to-user sales and person-to-person sales. To comply with federal law, though, when using these sites, a seller must ship the sold firearm from, and to, a federally licensed firearms dealer, and the purchaser must pass a background check before picking up the purchase at the receiving dealer's location. Gun buyers can browse thousands of new and used guns and have a purchase sent to his or her neighborhood dealer for pickup, which is a significant boon to the marketplace. This internet-facilitated sale of arms is even more prodigious than the Sears catalog of the past, when guns could be purchased through the mail. Direct sales through the mail have been illegal since the Gun Control Act of 1968; that Lee Harvey Oswald had purchased through the mail the Italian military surplus Carcano rifle that was used as part of the assassination of President Kennedy in 1963 was the likely instigation for the prohibition. The exception to the dealer background check requirement is direct peer-to-peer sales inside the same state that do not trigger interstate commerce legal entanglements under the Gun Control Act of 1968, which make it illegal to transfer a gun to someone across a state line without going through a federally licensed dealer. Some states, however, require any transfer of a gun to go through a dealer with a background check. California is one such state.

Direct sales, gifts, loans, or inheritances of firearms among close family members are not controversial *per se* and there are legal exceptions to the background check requirements, as is the case with California's transfer law. ArmsList, a site that allows users to advertise for person-to-person sales within the same state, has created some debate and lawsuits, as it facilitates gun transfers among nonrelated individuals. But the legal responsibility for both seller and buyer falls on the individual in each case, and ArmsList thus has survived several efforts to shut it down. As the law stands, if you have reasonable cause to believe the person to whom you are transferring a gun is prohibited from owning one, you are committing a felony, as is owning said gun by the prohibited person. Likewise, making a "straw purchase" is also a felony. A straw purchase is buying a gun directly for someone else without intending to be the owner of the gun.

Peer-to-peer transfers of firearms is where the black market thrives. According to research interviewing offenders in the Chicago area, the majority get guns from their "social network," that is, friends and persons known to them, but generally not from the various legal sources available to them



(Cook, Parker, and Pollack 2015). The firearm is legally purchased with a background check, but after a series of transfers, it eventually enters the illegal market. The difficulty with prosecuting a straw purchaser is that a federal prosecutor must prove that at the time of the purchase the legal purchaser did not intend to be the owner. Information is scarce about how often these are taken to court, but an investigative report shows that in one state, Minnesota, there were only eight such prosecutions between 2005 and 2015 (McKinney and Rao 2015).

There are three things, however, that keep peer-to-peer sales of firearms without a background check a relatively small portion of the legal firearms market. The first is that gun shows typically do not allow any nonlicensed sellers to set up booths. The second is that you run afoul of federal law if you make a habit of buying and selling guns without a license. The ATF states that “you will need a license if you repetitively buy and sell firearms with the principal motive of making a profit. In contrast, if you only make occasional sales of firearms from your personal collection, you do not need to be licensed” (U.S. DOJ-ATF 2016, 1). The third reason is that a potential buyer of a gun from ArmsList does not have the virtually unlimited selection that comes from other avenues for gun buyers, and all sales must be within the same state. In short, like any classified advertisement, one has to be lucky in that someone nearby just happens to have for sale what you are looking to purchase.

But the possibility of peer-to-peer gun purchases without a background check is why some gun control organizations and some politicians have called for universal background checks. To do the topic full justice would require in-depth discussion to understand both the objections to universal background checks and the legal framework in which such a law would operate. The typical objections are that making universal background checks for all gun transfers is onerous and that laws already cover the crimes involved with wrongfully buying and selling guns. Importantly, a federal system of universal background checks would require national registration to be effective, and federal registration is prohibited by the Firearms Owners Protection Act of 1986. As already mentioned, however, some jurisdictions have universal background check laws that vary in the level of exemptions they allow for transfers without a background check, such as a transfer to a gunsmith for repairs, loaned usage at a gun range, or gifts between close family members. These states are Colorado (moralistic), Oregon (moralistic), Washington (moralistic/individualistic), California (moralistic/individualistic), Connecticut (individualistic/moralistic), New York (individualistic/moralistic), Rhode Island (individualistic/moralistic), and Washington, D.C. (no political culture designation) (Michel 2013, Kiely et al. 2018).

## Threats to the Market: Deplatforming and Corporate Gun Control

An avenue of countermobilization (backlash) taken by activists is activist-led deplatforming of gun companies and corporate gun control. This is the biggest threat to the market in firearms today, not governmental regulation of the marketplace. Deplatforming is different from the New York state example (see chapter 7) because that was government-led, even if at the behest of activists and perhaps the most anti-gun state governor in America. The deplatforming and corporate gun control that is happening is a new phenomenon to the gun control issue, but it is not entirely unprecedented. It is similar to other friction areas in society in which, for example, activists seek to get investors and investment funds not to put money into an oil company's stock. It bears remarking that this is a "free market" response on the part of gun control activists, with corporations moving to protect their image from social media mobs, and gun rights activists trying to make such companies take in mind the motto of "get woke, go broke" by taking their business elsewhere and sometimes setting up parallel institutions.

The pressure, however, often provokes a government response in kind, such as in the aforementioned case of Louisiana's withholding its business from Citigroup and Bank of America. This bears discussing, as I believe it is part of a new wave of activism on the part of the gun control movement after it has been stymied in the political arena, at least at the federal level. This discussion will be limited because the state of affairs is still unfolding.

A survey of the recent developments will bear fruit. The situation really started about February of 2018, when Citigroup made a new policy that "prohibits the sale of firearms to customers who have not passed a background check or who are younger than 21. It also bars the sale of bump stocks and high-capacity magazines. It would apply to clients who offer credit cards backed by Citigroup or borrow money, use banking services or raise capital through the company" (Hsu 2018). Fifth-Third Bank is also discreetly exiting the banking sector for gun-related business. JP Morgan Chase said it would limit business with gun companies (Gutowski 2019). Also, in February of 2018 Dick's Sporting Goods and Walmart, following the Parkland, Florida, mass shooting, started a corporate policy of banning gun sales to people under the age of twenty-one (Bomey 2018), with Walmart eventually stopping the sale of all handguns and certain calibers of ammunition common to handguns and AR type weapons in 2020. Dick's stopped selling AR-15 style weapons (Bomey 2018) and ordered the current inventory to be destroyed (NRA 2018) and by 2019 stopped selling guns altogether in 125 of its stores (Barrett 2019). By 2020, they had pulled guns out of 440 stores;

with 827 stores Dick's is the largest sporting goods chain in the United States (Zhang 2020). According to the law professor Eugene Volokh, writing contemporaneously with the closing of sales to legal adults, these moves run afoul of some state age discrimination laws and will be likely hashed out in court to the detriment of anti-gun activists.

Volokh was prescient. By August 31, 2018, the Oregon Bureau of Labor & Industries had found that Walmart illegally discriminated against a patron, Hannah Brumbles, who at eighteen years of age wanted, in full compliance with federal and state law, to purchase a long gun that Walmart would not sell to her under its new policy. It remains to be seen how many states will eliminate the contradiction with their antidiscrimination laws by passing their own laws to raise the legal age to purchase a long gun to twenty-one. It is already federal law that you must be twenty-one to purchase (but not legally own) a handgun. Republican governor Rick Scott of Florida signed into law raising the age to twenty-one to purchase a handgun, prompting an NRA lawsuit (Giaritelli 2018; Lee 2018). The courts are unlikely to undo the prohibition. Alcohol and tobacco sales bans against those under twenty-one have long been in place, and the NRA's attempt through the courts to get eighteen-to-twenty-year-old adults the right to purchase a handgun under the Second Amendment (a prohibition from the Gun Control Act of 1968) came to naught in a Fifth Circuit case (*NRA et al. v. BATFE et al.* 2012).

In April of 2018, Bank of America created a policy that "will stop lending money to gun manufacturers that make military-inspired firearms for civilian use, such as the AR-15-style rifles that have been used in multiple mass shootings" (French 2018). Before long, pro-gun members of Congress, such as Republican senators John Kennedy from Louisiana and Kevin Cramer from North Dakota, were also applying counterpressure by introducing legislation (S821, the Freedom Financing Act) to prohibit large banks from discriminating against gun buyers and sellers (Gutowski 2019) and pressuring the regulators at the Consumer Financial Protection Bureau to act: "If you're going to turn us into a nation of red banks and blue banks, you're making a mistake. Do not come crying to use when you screw up and you want the American taxpayer to bail you out," said Senator Kennedy (Neill 2018). The use of the Consumer Financial Protection Bureau is ironic, as a many Republicans want to get rid of the institution.

Corporations are inclined to listen, at least as long as one party or the other has the majority in at least one of the branches of Congress. Idaho senator Michael Crapo, chairman of the powerful Senate Banking Committee, has sent strongly worded letters decrying the policy to top execs at Bank

of America and Citigroup. There are other tit-for-tat verbal exchanges, with high-ranking corporate executives trying to play off both sides, saying they respect the Second Amendment but want to do something to keep guns out of the wrong hands. If the corporations think they can just make a few rhetorical flourishes with some business practice changes and pacify activists on both sides of the issue, it is not working. Democratic Party lawmakers have moved to pressure banks into more gun-restrictive policies, Republicans are pressuring banks for an end to gun-restrictive policies, and the National Shooting Sports Foundation is lobbying for legislation to ban the practice altogether. As recently as April 10, 2019, a House hearing meant to examine the financial stability of global banks was derailed when the majority party, the Democrats in this instance, wanted to debate the various gun policies instituted (or not) by the major banks. JPMorgan Chase's CEO, Jamie Dimon, defended the bank's lending to firearms manufacturers because it did not institute policies like Bank of America, and the bank took particular heat because it partially owns Remington, which had recently declared bankruptcy. Meanwhile, the minority party, Republicans, took the opportunity to attack Bank of America's CEO Brian Moynihan (Williams 2019).

Wells Fargo is trying to placate everyone after it issued a \$40 million line of credit to the gun company Sturm, Ruger & Co, saying in a letter to activists that it does "not believe that the American public wants banks to decide which legal products consumers can and cannot buy," and separately that "Wells Fargo wants schools and communities to be safe from gun violence, but changes to laws and regulations should be determined through a legislative process that gives the American public an opportunity to participate and not be arbitrarily set by a bank" (Gutowski 2018).

Perhaps more effectively than the legislative process, the free market is also responding in kind to Dick's Sporting Goods, with at least three prominent gun makers severing ties with the retailer. Mossberg, maker of the arguably the most popular shotgun in the world, had the CEO say in press release, "Make no mistake, Mossberg is a staunch supporter of the U.S. Constitution and our Second Amendment rights, and we fully disagree with Dick's Sporting Goods' recent anti-Second Amendment actions" (NRA 2018). Dick's sales fell 4 percent when compared year-to-year from 2017 to 2018, with CEO Edward Stack admitting that the gun policies are part of reason for the decline, although he said that the majority came from other causes (Prang 2018). Later, the CEO did not mince words and admitted that sales were flat and that the "negative reaction" to their policy could affect future earnings, but this was only when a fuller examination was conducted showing that revenue had declined 6.1 percent and not fully

recovering that decline over two years (Williams 2018; Zhang 2020). To be fair, the company remained profitable by lowering overhead costs, and its stock price has not suffered much (Knighton 2018; Zhang 2020). The CEO admits that his decisions have led to the closing of their entire chain of thirty-five Field & Stream stores across eighteen states, which along with the loss of gun sales amounted to about \$150 million lost in 2018, or about 1.7 percent of their annual revenue, a loss that he says was “worth it” (Gutowski 2018; Novy-Williams 2019). Note, the CEO runs Dick’s by virtue of it being founded by his grandfather, and he is thus insulated from reactions to his decision making.

What is notable is that Walmart instituted a similar corporate gun control policy, and it had the best quarterly results in a more than a decade in 2018. The difference between Dick’s Sporting Goods and Walmart was that the CEO of Walmart was not repeatedly on major news shows lobbying for more restrictions on guns, hiring a gun control lobbyist firm to aid them in their efforts (NRA 2018), and becoming, in the words of *Wall Street Journal* writer Sara Germano, “the Corporate Face of Gun Control” (2018).

Silicon Valley corporate media giants are getting in on the action as well through deplatforming, although this is a continuation of practices that had been going on for quite some time below the radar of anyone except political activists. As far back as 2007, Craigslist banned all gun-related ads. More recently, YouTube, Reddit, and Facebook have placed various speech-related restrictions on firearms unrelated to preventing illegal sales and other illegal actions but that restrict perfectly legal actions, such as the home manufacture of firearms. In July of 2018 Google banned apps that facilitate the legal sale of firearms, accessories, or alterations, and around the same time Amazon placed restrictions on what firearms-related items can be sold or advertised, such as on magazines that hold more than ten rounds. By August of 2018, Shopify, after already placing restrictions on what gun-related items can be listed for sale, without explanation dropped the Defense Distributed account (French 2018; Gutowski 2018b; Baumann 2018). Defense Distributed, in addition to selling milling machines, tooling, software, and accessories for firearms, is the writer of the 3D printer code for the Liberator pistol that can be created by a \$2,000 3D printer machine. 3D printing is a process of taking a digital three-dimensional model, essentially a blueprint, and turning that digital file into a physical object through instructions sent to a computer that, layer by layer, fabricates that object out of polymer.

The pistol is named after the World War II Liberator pistol, a small stamped metal single-shot pistol intended to be deployed to resistance groups or via air drops in occupied Europe or to islands occupied by Impe-

rial Japan. The theory was that this pistol would be used to kill an unsuspecting enemy soldier and get the deceased's more effective weapon, but more importantly for this issue, the psychological warfare goal behind the pistol was to make it so no enemy soldier could tell which civilian was or was not armed. A few of the World War II Liberators ended up in occupied territory (Greece, India, China, and the Philippines) with no discernible effect (McCollum 2019). Of the roughly half a million of these made during the war by General Motors, most of them were melted down or dumped in the ocean after hostilities ceased.

Ideologically, the libertarian idea behind the new 3D printed Liberator is to make it for twenty-first-century politicians as if the original Liberator had been put to wider use in World War II: no one can tell which civilian had a gun because they are plentiful and easy to make, optimistically making gun control unfeasible. The "manifesto" section of the website (no longer found online, but archived) said, "In a world where 3D printing becomes more ubiquitous and economical, defense systems and opposition to tyranny may be but a click away" (Greenberg 2012). In a precursor to later Silicon Valley deplatforming, the crowdfunding site Indiegogo froze the account, but through Bitcoin and PayPal the company was able to accomplish its work.

Unsurprisingly, the gun and the goal behind it created quite a stir. In 2013, President Obama's State Department sent a letter to Defense Distributed that its plans for distributing the Liberator might violate federal law, and that same year the State Department used International Traffic in Arms Regulations (ITAR), which are the rules to implement the Arms Export Control Act, to restrain the company from distributing the final design online (Doherty 2015). Note, the design does work, as various YouTube videos show (CNN: 3D Gun Printed and Fired). There have since been other designs, but it is the Liberator pistol that is at the center of the controversy.

International Traffic in Arms Regulations (ITAR) are generally used to prevent the sale of U.S. military technology overseas, and usually applies items to such as guidance systems for missiles. Their use to prevent the online distribution of a 3D printed plastic pistol was unprecedented, especially considering the worldwide gun market that produces superior firearms, no discernible demand for the unwieldy and inefficient Liberator, and a pre-existing black market for more conventionally produced arms. In 2015, Defense Distributed sued the State Department. Although it was already a conceptual stretch to use ITAR to impose a ban on the distribution of unclassified computer code, the head lawyers in the case, noted law professor Josh Blackman and *Heller/McDonald* lawyer Alan Gura, sued not on Second Amendment grounds, but on First Amendment grounds, mak-

ing the case that computer code was information and that information was speech under the Supreme Court precedent of *Sorrell v. IMS Health Inc.* (2011). The NRA stayed largely silent, reiterating its support for the 1988 Undetectable Firearms Act (Doherty 2018). That law passed in response to the surging popularity of the polymer framed Glock pistol. Some wrongly feared that a Glock could make it through security, especially after a line in the 1990 movie *Die Hard II* about a fictional Glock pistol made of porcelain that does not show up on X-ray machines. The real Glock pistol, however, has a fair amount of metal parts, including the barrel and ammunition, without which it will not fire. Making a gun at home has always been legal in the United States; home hobbyists have access to tools, machinery, and ready-made industrial parts that surpass those of nineteenth-century entrepreneurs like Samuel Colt, who designed and built the first mass-produced small arms. The plastic Liberator pistol, which has a hardware store nail in it as a firing pin, which still uses conventional ammunition, and which is clearly visible as a gun on an X-ray machine, is in compliance with the 1988 law. That the pistol uses a nail and needs commercial ammunition is also proof that the vision of a world where gun control is meaningless through 3D printing is an idealistic dream.

When the Trump administration settled the case in August of 2018, it might not have been because of President Trump's pro-gun agenda, because he tweeted out that "looking into 3-D Plastic Guns being sold to the public. Already spoke to NRA, does not seem to make much sense!" The settlement was more likely because, as Alan Gura has pointed out, the government was not likely to win on the merits of the case, and this allowed the case to be settled without deciding on the merits (Doherty 2018). Not that the issue went away, because after the settlement, eight states and the District of Columbia promptly sued the Department of State to prevent the release of the code (*Washington v. U.S. Dept of State*). The states are Washington (moralistic/individualistic), Connecticut (individualistic/moralistic), Maryland (individualistic/traditionalistic), New Jersey (individualistic), New York (individualistic/moralistic), Oregon (moralistic), Pennsylvania (individualistic), and Massachusetts (individualistic/moralistic). A federal judge extended the ban on the files being online for download, but considering the nature of the settlement, Defense Distributed decided to just sell them through the mail, with the price being whatever the asker was willing to pay (Prestigiacommo 2018), because as long as the files are not online, they are not being "internationally published" (Grossman 2018) and they are, therefore, being legally distributed.

Not that 3D printers are common enough that it matters for much other

than principles. The file to make the Liberator pistol, and other pistols, is accessible on other websites through reuploads and is widely available. In a perfect example of the Streisand Effect, prior to the 2013 State Department ban, the file was downloaded in 2013 at least 100,000 times (Greenberg 2013). The Streisand Effect is a phenomenon, in the form of an amusing irony, in which an attempt to hide, remove, or censor a piece of information has the unintended consequence of publicizing the information more widely. In 2020, a printer to make the Liberator costs about \$2,000, which in the American gun market will buy you about four new Glock 9 mm pistols. So, if one wants a gun, it makes little sense to make a Liberator.

Because of the Liberator case, ITAR came under increased scrutiny as an impediment to American gun manufacturers' ability to compete in an international market, as selling even minor items overseas requires expensive and complex regulatory compliance. A National Shooting Sports Foundation spokesman said in an interview on the matter:

U.S. manufacturers are hamstrung by the overly restrictive license requirements under [current law] . . . lengthy delays in the licensing process, and certain cases requiring congressional notification, cause U.S. firearm and ammunition exporters to lose business. (Hall 2018)

Civil and criminal penalties under the Arms Export Control Act are severe. A gunsmith who makes and markets internationally a flash hider or sound suppressor is the "manufacturer" of a "defense article" and must pay a \$2,250 annual registration fee with the State Department, and a hunter going on a safari to Tanzania must register the temporary "export" of his firearms in a State Department database (Cox 2018). Related to this situation, President Trump's administration loosened the regulatory burden on arms regulations in 2018, eliminating the fee and transferring more control to the Department of Commerce (Lederman 2018). The theory behind the decision, aside from the politics of it, is to build a higher fence around a smaller yard, that is, restricting the export of American small arms overseas is not as important as, for example, restricting the export of F-35 electronic components. The change in rules allows American gun makers to sell more small arms internationally, including AR-15-style rifles, in a streamlined process.

Without changing the Arms Export Control Act, there is much that can be done via the executive branch to loosen the ITAR burden on arms makers. It was President Obama who, unable to pass gun control after the Newtown school shooting, signed an executive order to strengthen ITAR (Obama 2013), which allowed the export control over technical data already



in public domain. ITAR was written before the internet, but President Obama's change was to have anything available on the internet be considered "exported." Already in the public domain are items such as the plans for a 3D printed gun and less controversial technical data on firearms and ammunition. This is why the Defense Distributed case was fought on First Amendment grounds, as the Obama administration rules were a massive prior restraint on free speech because all firearms technical data would have to be authorized before it could be released, making online communication essentially impossible, or at least very difficult.

### Capitalism Is about Profit AND Loss

As in Rosenberg's case study on abortion, the market allowed for implementation of the Court's decision. Unlike in Rosenberg's case study on abortion, however, where abortion clinics were created to respond to market demand, since hospitals often did not provide abortion services, there was already a robust arms market in place. Gun manufacturers keep making profits, and despite some slip in sales after the 2016 election when the NRA-endorsed candidate, Donald Trump, won (sales were ramping up in anticipation of a Hillary Clinton win), there have not been major losses due to an oversupply.

Gun companies can, and do, go bankrupt, such as when Colt filed for Chapter 11 in 2015 before it was rescued by investors. But this was due to competition and bad management in not reading the marketplace properly (Sharma 2015; Bauman and Best 2015) rather than a "firearms bubble" bursting. The same time Colt was going bankrupt, with its bread-and-butter profit-making weapon being the AR-15 rifle, a dozen or more competitors began to produce their own versions. Occasionally, a "negative incentives" lawsuit may be involved with a bankruptcy, as was the case with Jimenez Arms. In January of 2020, Everytown for Gun Safety (a nonprofit gun control group funded primarily by Michael Bloomberg) and Kansas City, Missouri, sued the manufacturer for intentionally and negligently aiding illegal gun trafficking, the "intentional" and "negligent" parts being exceptions to the PLCCA. According to the lawsuit petition by Kansas City, Jimenez Arms sold thirty-two pistols directly to one individual who was not a licensed dealer, a federal crime. It was, however, the third time the company had gone bankrupt since 1970 (having been bought out and renamed each time). The previous bankruptcy was due to a 2003 lawsuit in California about a defective firearm design related to a safety switch's function. At the time of its 2020 bankruptcy it had \$1 million in debt and assets under

\$50,000 according to its Chapter 7 petition filing (The Firearms Blog—Will P. 2020). While it is likely that the company would not have declared bankruptcy without these lawsuits, it also brought them upon itself. Another bankruptcy in 2020 by noted arms manufacturer Remington was related to their large debt and sales that couldn't make up for liquidity issues the company had. It wasn't their first bankruptcy; the last one was 2018. Although the arms maker was being sued because one of its models was used in the Newtown school shooting, it is fairly certain that although the lawsuit certainly did not help matters, the bankruptcy was not a direct result of the lawsuit, as the company had hundreds of millions in debt accruing from decades back. As part of their restructuring, the company settled to be free of liability for the future investors, mostly other gun makers, who parceled off portions of the company. By 2021 Remington ammunition was again coming off the assembly line, with certain popular models of guns soon to be produced again. These bankruptcies, related to lawsuits or not, are not enough to say there is any sort of trend, especially with more financially adept gun makers picking up the slack in a highly competitive industry that is constantly innovating and bringing new products to market.

If the free market is described as supply and demand, where actors respond to profit and loss incentives, then we currently have a large and growing supply of guns that will continue to grow as companies keep making money supplying a steady and increasing demand for guns.

## Resistance of Washington, D.C., to Court Orders

The result of *Heller* in Washington, D.C., is a bit of a special case that deserves its own discussion because D.C. is a federal jurisdiction and does not have a political culture type derived from Elazar's theory.

First, a little background, directly from the *Heller* decision, as to the law prior to the decision:

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device. (2008, 1)

With regard to those laws, the Court held that the handgun ban and the trigger lock requirement (as applied to self-defense) violate the Second Amendment, which they interpreted as protecting an individual right separate from service in a militia, and that Mr. Heller must be allowed to register for a permit to possess his handgun in his home.

As was noted above for the entire nation as well as the city of D.C., there is not much to discuss with regard to incentives for the following hypotheses, derived from the Constrained Court Theory's Constraint III, that significant social change will not occur without public support:

- H<sub>3a</sub>: Positive incentives are used to gain support of jurisdictions to expand citizens' ability to keep and bear arms; or

- $H_{3b}$ : Negative incentives are used to override opposition to an expansion of citizens' ability to keep and bear arms; or
- $H_{3c}$ : Market forces are allowed to allow for an increase in citizens purchasing arms to keep and bear and likewise to utilize them in a legal manner; or
- $H_{3d}$ : Officials simultaneously convince citizens they have no choice but to implement the policies that allow for an increase in the keeping and bearing of arms and that such policies are a way to gain more resources.

The only example of negative incentives, both public and private, that apply in the case is that the House of Representative approved the District's FY2005–2006 budgets with a provision to prevent the city from enforcing the requirement that guns be kept unloaded and disassembled; but these were dropped in conference with the Senate before final passage and not brought up again (Smith and Carter 2008).

This is not to say that there are not guns in D.C., which has a problem with gun violence; 1,870 illegal firearms were seized in 2016 (D.C. Metro PD 2017). But even though there is a free market solution to implement *Heller* for law-abiding citizens, there are many hoops to jump through to comply with D.C. law to make a gun legal to have in the home for self-defense. That officials were not prompted by positive or negative incentives, other than through threat of continued lawsuits by activists, to comply with the Court's demands meant they significantly delayed implementation. Elected officials in D.C. merely reformulated their regulations to comply with the letter of the Court's decision, but certainly not the spirit of it, in that they did not use the Court's decision as cover to liberalize their gun laws. After *Heller*, the mayor complied as minimally as possible, as has every successive mayor of D.C. since *Heller*. They made the legal ownership of a handgun a byzantine labyrinth of red tape and bureaucratic obstruction. One enterprising reporter for the *Washington Post* went through the process and wrote about it in a book called *Emily Gets Her Gun* (Miller 2013), a clever play on the title of the Irving Berlin musical *Annie Get Your Gun* about famous sharpshooter Annie Oakley. Emily Miller details the five-month-long and \$500 process required in D.C. for acquiring a legal handgun. Please note that the \$500 does not include the cost of the gun itself, which can only be purchased from an approved list of acceptable makes and models. The city required a vision test, a ballistics test, that all documents be notarized, a dispensation to only possess the caliber of ammunition for the type of gun you own, and five hours of mandatory training to include one hour of live fire. This is in

addition to other bureaucratic hurdles that are minor but without which an applicant cannot move forward in the process.

Because the *Heller* decision allowed for a lower level of balancing of rights against restrictions (courts have favored either rational basis or intermediate scrutiny), it led to a second lawsuit by Alan Gura, known as *Heller II*. This suit was dismissed in 2011 by the D.C. District Court, with the Supreme Court not granting certiorari. In January of 2015, newly elected D.C. mayor Muriel Bowser, at an interfaith summit, said to the crowd, “You have a mayor who hates guns.” She went on to say, “If it was up to me, we wouldn’t have any handguns in the District of Columbia. I swear to protect the Constitution and what the courts say, but I will do it in the most restrictive way as possible” (DeBonis 2015). This led to *Heller III* (2015). *Heller III* had mixed results and at best might be called a cup-half-full victory for gun rights activists. The summary is as follows:

1. The requirement that long guns be registered—upheld.
2. The requirement that one must appear in person to register any firearm and be fingerprinted and photographed—upheld.
3. The requirement that the firearm be brought to the police department as part of its registration—struck down.
4. The imposition of registration fees of \$13.00 for firearms and \$35.00 for fingerprinting—upheld.
5. The requirement that registrants take a firearms safety and training course—upheld.
6. The requirement that registrants pass a written exam—struck down.
7. The prohibition on registration of more than one gun per month—struck down.
8. The expiration of the registration within three years, necessitating re-registration—struck down.

The process to obtain a permit is still as byzantine as ever, but now D.C. has concealed carry throughout the District. It was a “may issue” jurisdiction, but is now a “shall issue” jurisdiction, albeit with all the aforementioned restrictions, such as live fire training and having every document notarized. In July 2017 in *Brian Wrenn, et al. v. District of Columbia*, the D.C. Circuit Court placed a permanent injunction against the District’s “just cause” requirement to obtain a permit to carry a concealed weapon. The court refused an appeal that the whole appeals court rehear the case.

The attorney general of the District of Columbia also announced that the District would not appeal to the U.S. Supreme Court. Also, because D.C. is so traveled by residents of other states, the status of “shall issue” would apply to nonresidents also. Due to the 2017 decision, there were 1,896 permit applications in 2018, whereas prior to the court ruling only 123 people had active permits and the police department denied 77 percent of applicants for not having “good reason” to carry (Picket 2018). It goes to show that the continued litigation by gun rights advocates did eventually bear some fruit, even with a city administration opposed to it, although Mayor Bowser did accede to the Court’s authority. But bringing D.C. up to par with the majority of the nation with regard to its residents’ ability to keep and bear arms is not significant social change.

The decision in *Wrenn* was 2-1, and the en banc appeal was denied. In a perfect example of Dahlian political science, where the president’s appointments bring the Court into line with popular opinion, the reason the District did not appeal the decision to the Supreme Court was because there was at the time newly confirmed Justice Neil Gorsuch instead of a Justice Merrick Garland (or an even more liberal appointment from losing presidential candidate Hillary Clinton) and they did not want to jeopardize the “shall issue” laws in other states, even though the Supreme Court had declined to take up similar cases in the past. District of Columbia attorney general Karl A. Racine said in a statement:

I continue to believe the District’s “good reason” requirement is a common-sense, and constitutional, gun regulation. However, we must reckon with the fact that an adverse decision by the Supreme Court could have wide-ranging negative effects not just on District residents, but on the country as a whole. (Vespa 2017)

District of Columbia mayor Muriel Bowser, who admitted that she hates guns, also said the decision that was ultimately made was in the city’s best interest to maintain the rest of their gun law framework.

What is important to know is that while the “good reason” part of our concealed carry law was invalidated by the courts, all of the rest of the requirements related to carrying a concealed weapon are in place, and so opening up the case and taking the chance at the Supreme Court actually puts us and the remainder of our concealed carry law also in jeopardy. (Vespa 2017)

During the press conference where the above statement was read, Attorney General Racine also said that if the city were to appeal to the Supreme Court and lose, it would affect similar gun regulations elsewhere, including in Maryland, New Jersey, and New York, and he acknowledged that he had received several phone calls from elected and unelected officials in other jurisdictions worried about the effect of a Supreme Court ruling against the city.

In summary, regarding D.C., there were no incentives, either positive or negative, and market forces were a red herring. Restrictive zoning or regulations were not used in D.C. to prevent the practice of shooting firearms, and even they had been, there were opportunities to buy guns in neighboring jurisdictions. In fact, D.C. got its first gun store and nongovernment range in 2016. The owner said, “The government hasn’t really given me any flack, it hasn’t been an easy process but it hasn’t been difficult. It is just tedious” (Gutowski 2016). There may be some lessons learned for D.C. from the city of Chicago, which in 2014 lost to the NRA and other activists when trying to prevent the opening of gun ranges and stores. The *Benson v. City of Chicago* case was consolidated into *Illinois Association of Firearm Retailers v. City of Chicago*. That latter case challenged five aspects of Chicago’s law: the ban on any form of carriage of weapons; the ban on gun stores; the ban on firing ranges; the ban on self-defense in garages, porches, and yards; and the ban on keeping more than one gun in an operable state.

## Backlash

Prior to mid-2018, the only thing approaching backlash was Chicago’s and D.C.’s slow implementation of *McDonald* and *Heller*, but there were two new avenues that anti-gun activists took. The first was financially attacking the NRA through government regulations, and the second was pressuring corporations to institute gun control policies.

Backlash is described by Rosenberg in *The Hollow Hope* as “political damage to a social reform movement that results from litigation.” While he does use the phrase “backlash” and subsequent scholars do, it is more aptly called “countermobilization” when speaking about the phenomena in Rosenberg’s language. “Successful litigation for significant reform runs the risk of instigating countermobilization” (Rosenberg 2008, 425). His case studies show that litigation efforts prompt opponents to mobilize. In particular, this was extensively the case due to the litigation efforts of same-sex marriage advocates, which resulted in numerous state-level laws and constitutional amendments defining marriage as between one man and one woman, in addi-

tion to the Defense of Marriage Act. But Klarman (2011), and the ultimate result of the same-sex marriage debate, shows that rights-based litigation campaigns can, at times, push policy forward even when they spark countermobilization, particularly if they use a mixed strategy of protests, political mobilization, and legal mobilization, as used by the gay rights movement (Keck 2014). This last point by Keck is key. The same-sex marriage advocates, either by accident or on purpose, had learned the lessons Rosenberg taught and did not fall for the “fly paper” Court. They attacked their opposition on many different fronts. The last edition of *The Hollow Hope* came out in 2008, and at that point the same-sex marriage movement was stuck on a treadmill. Keck lays out in detail the multilevel movement that pushed the needle forward such that the Court felt comfortable issuing the *Obergefell* decision in 2015.

*Heller* and *McDonald* themselves did not spark a countermovement. The gun rights movement has gained social legitimacy and appears to be winning the cultural debate in much the same way the same-sex marriage movement did. Countermobilization, however, has occurred in new and novel ways, even though the gun control movement was already well organized prior to *Heller* and *McDonald*, having pushed President Clinton and Congress to enact in 1994 the assault weapons ban, the last major national-level gun control law passed. This is a key way I am distinguishing this backlash from Rosenberg’s case studies. The Court’s decisions did not spark, like the same-sex marriage debate, the creation of groups that were intent on protecting traditional marriage or, like after *Roe*, how the right-to-life movement went from nascent to part of the Republican Party’s coalition. Therefore, we can exclude that part of the definition of backlash. The cases did not prompt opponents to mobilize because they were already mobilized. There is a committed minority, roughly one-third of the populace, that remains strongly against gun rights and would like to ban most, if not all, guns. There was also not an apathetic majority (low levels of opposition from all citizens) who were sparked to mobilize and fight against more keeping and bearing of arms. And while there is, depending on the particular policy issue, a majority for one aspect of gun control or another, the gun rights movement has successfully framed any gun control as an attack on gun rights in total. The result is that “in most of the country, firearms possession is thinly regulated at best” (Keck 2014). Prior to 2018 and the attack via the financial industry of the NRA, and of corporate gun control, the closest thing there was to backlash were some of the city ordinances passed by D.C. after *Heller* and by Chicago after *McDonald*, the latter of which will be detailed in the state-level review of Illinois.



The obvious question, then, is what about the gun control that has passed at the state level after *Heller* and *McDonald* and what was the impetus for national-level backlash that started nine years after *Heller*? Virtually every single time there is any newsworthy mass shooting, such as Columbine or Newtown, gun control advocates quickly seize the opportunity to push an already existing agenda of increasing regulation on firearms. Kingdon, in his seminal book *Agendas, Alternatives, and Public Policies* (2011), perhaps offers the best political science explanation of this process. The gun control movement has a ready supply of policy ideas that sit on the back burner, what he calls “the short list of ideas” (138) that are waiting for a “widespread feeling” and a “tipping point” and a “growing realization” that the “national mood” is ripe for implementation of the policies. What put those policies to the forefront was not an adverse reaction to the Supreme Court cases, or even lower court cases, that expanded the right to keep and bear arms, but rather an emergency. This was so aptly put in the words of Obama White House chief of staff and later Chicago mayor Rahm Emanuel, shortly after the 2008 election, as “You never let a serious crisis go to waste” (Kingdon 2011, 235). Kingdon calls this an “unpredictable window” in which gun control advocates can respond to the crisis to push for more gun control. He says, “To the extent that some policy domains are affected by crisis, for instance, the timing of the crisis—an airline crash, the collapse of the Penn Central, an Arab oil embargo—is uncontrollable and only partially predicable,” but a policy entrepreneur uses the crisis as a “lever” to enact their policy change (189–90).

Terrible mass shootings by either terrorists, the mentally ill, or an evil person will certainly occur every few years, but they are entirely unpredictable in their timing. As you read this book, know that right now, such an event is being planned out by the eventual perpetrator. No man knows the hour or place another mass shooting or assassination will occur, yet every time a mass shooting happens, the crisis opportunity is seized to try to enact gun control policies that have been sitting on the back burner, even though the policies often would have done nothing to prevent the particular mass shooting that created the unpredictable window in the first place. This pattern has been followed in every high-profile mass shooting that has happened since the Court’s decisions, such as ones by terrorists in both Florida and California, the two by mentally deranged individuals in Colorado and in Connecticut, and the largest one in U.S. history in Nevada at a country music festival. This is no surprise to those who have studied the history of gun control in America in the twentieth and twenty-first century, such as Winkler (2013). Modern gun control is responding to a crime or crisis of

one kind or another, from Prohibition Era gangland shootings leading to the National Firearms Act in 1934 to the assassinations of President Kennedy and Martin Luther King leading to the Gun Control Act of 1968, to the assassination attempt on President Reagan eventually leading to the Brady Bill, and the crack epidemic of the 1980s and early 1990s leading to the assault weapons ban. It is also clear that, sadly, mass shootings are regular enough that they are not a crisis moment anymore, but they do still have the effect of temporarily causing a minority of the public to care about the gun issue. It is best in these instances to ignore the barrage of media articles saying something like “[fill in the blank] demands action now” and that “this time it is different” and to look instead at scientific polling data, as media articles often drive the agenda as much as report on it. In February of 2018, the number of respondents in an open-ended Gallup poll question who said that “the most important problem facing the country today is the gun issue” did not even hit 0.5 percent. Gallup polling in March of 2018, right after the Parkland mass shooting, had 13 percent of respondents saying it was the main issue, but by August of 2018 it had dropped to 2 percent (Gallup n.d.), which is about where it historically stays.

So even though opposition to the gun rights movement was already well organized prior to *Heller*, no major pieces of gun control legislation have passed nationwide since 2008 and the *Heller* decision, nor has any gun rights legislation for that matter. State- or local-level gun control laws, however, were passed as a result of politicians taking advantage of an “unpredictable window” caused by a high-profile shooting. Even the city of Chicago, when it did pass legislation after *McDonald* (which I will detail in my case study on Illinois), was doing exactly what D.C. had done, which was comply to the minimum extent possible to prevent implementation..

When there was backlash, it was after the Parkland mass shooting. Gun control advocates, stymied on the national stage, broadened their tactics from just looking at more gun control laws. After meetings with gun control activists, there occurred what might be called policy entrepreneurialism on the part of our recurring character Andrew Cuomo, at the time the governor of New York, whose desire is to play the heavy in the backlash, or counter-mobilization, movement against the gun rights movement. Cuomo’s use of his state’s regulation of the financial industry to go after the NRA did not cease with eliminating the market for concealed carry insurance in New York. The anti-gun group Everytown for Gun Safety met with New York officials in September of 2017, and it was only a month later the New York Department of Financial Services (DFS) began an investigation of Carry Guard (McCullagh 2018). Despite almost a two-decade relationship, the

NRA's insurance company Lockton responded by abruptly ditching the NRA as a customer in February of 2018, as did two other insurance companies, Chubb and Lloyd's.

Things moved quickly after that, and the NRA was denied access to financial services in the otherwise free marketplace through regulatory intimidation. By July 20, 2018, the NRA filed suit in federal court against Cuomo, a member of his administration in charge of the DFS, and the New York State Department of Financial Services itself for engaging in a viewpoint discrimination campaign against the NRA (*NRA v. Andrew Cuomo* 2018). In November of 2018, a judge in the First Circuit allowed the *NRA v. Cuomo* suit to proceed.

There is little doubt about the animus the governor had toward the NRA. This can be seen through his own words from press releases, videos, Facebook posts, tweets, and the text of letters sent to banks and insurers. These are quoted in the NRA's complaint and were taken by the court as factual. Judge McAvoy in the case had plenty to cite. To kick off his 2018 re-election campaign Cuomo said:

I am directing the Department of Financial Services to urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities who often look to them for guidance and support. (2018)

Further, a mailer for Cuomo's campaign says, "If the NRA goes bankrupt, I will remember them in my thoughts and prayers" (Cole 2018), an obvious allusion to the "thoughts and prayers" that are given, and mocked, after a mass shooting. Making it unambiguous, on Facebook the governor wrote, "The regulations NY put in place are working. We're forcing the NRA into financial jeopardy. We will not stop until we shut them down" (McCullagh 2018). As Cuomo was moving to the left in a primary campaign against a more liberal challenger, this braggadocio was almost certainly purposeful, and he won re-election in 2018.

Cuomo's financial campaign appears to be modeled after a 2013 Obama administration effort called Operation Choke Point. From the outset, the operation was "ostensibly a joint effort by various regulatory entities—the Department of Justice (DOJ), Office of the Comptroller of the Currency, and Federal Deposit Insurance Corporation (FDIC) most prominent among them—to reduce the chances of Americans falling victim to fraud in a variety of 'high-risk' industries, predominantly payday lending" (Mur-

ray 2014). But what started as an effort to go after scammers ended up as government pressure on banks to stop doing business with legal, although politically disfavored, businesses. There is not that much to report on the program, which according to the *Washington Post* reporting was “shrouded in secrecy” (Zywicki 2014). But what happened during the operation, which was revealed after intense congressional scrutiny ended in 2017 (Murray 2017), was that the Department of Justice and bank regulators put pressure on banks and third-party payment processors to refuse banking services that pose a “reputational risk” to the bank. The list of services were gun and ammunition sales, escort services, online gambling, get-rich-quick programs, purveyors of racist speech or writings, and payday loans, again, all of which were legal, albeit politically unpopular. A 2014 article revealed that the NRA had been tracking the results of Operation Choke Point and listed numerous examples, aggregated from the news media, of banks cancelling their relationships with firearms businesses due solely to the company’s line of work (NRA-ILA 2014). Despite the congressional scrutiny, it is likely that the election of President Trump accounted for the ending of the program. Assistant Attorney General Stephen Boyd, in a letter to the chairman of the House Judiciary Committee, Robert Goodlatte, wrote,

This responds to your letter to the Attorney General dated August 10, 2017, regarding Operation Choke Point, a misguided initiative conducted during the previous administration. We share your views that that law abiding businesses should not be targeted simply for operating in an industry that a particular administration might disfavor. Enforcement decisions should always be made based on the facts and applicable law. . . . All the Department’s bank investigations conducted as part of Operation Choke Point are now over, the initiative is no longer in effect, and it will not be undertaken again. (Boyd 2017)

While Operation Chokepoint ended with the election of President Donald Trump, that was at the federal level, and Governor Cuomo is working at the state level. There is also little doubt about the effectiveness of his campaign. Insurance companies dropped coverage for the NRA after costly fines the NRA contended were politically motivated. Quoted anonymously, “one community banker from Upstate New York told *American Banker* magazine that in light of the apparent ‘politically motivated’ nature of the DFS guidance, ‘[i]t’s hard to know what the rules are’ or whom to do business with, because bankers must attempt to anticipate ‘who is going to come into disfavor with the New York State DFS’ or other regulators” (Volokh 2018).

Similar leverage was being applied to banking institutions, which although nationwide, obviously had large presences in New York State since New York City is the hub of the financial industry in the United States. According to its IRS Form 990, the NRA receives about \$163 million in membership dues per year, so it needs a large financial institution to accommodate its work, the kind of large financial institution that will have a footprint in New York City. It remains to be seen whether the court agrees that it was viewpoint discrimination.

As a result of Governor Cuomo's leverage, the NRA's longtime insurer ended its contract and ended negotiations to renew the contract. In the complaint, the NRA says their insurer of the past seventeen years, "stated that it was unwilling to renew coverage at any price." The NRA stated that it "has encountered serious difficulties obtaining corporate insurance coverage to replace coverage withdrawn" and that "multiple banks" balked at doing business with it "based on concerns that any involvement with the NRA—even providing the organization with basic depository services—would expose them to regulatory reprisals." When asked about the lawsuit, Governor Cuomo refused to comment except to say it was a "futile and desperate attempt to advance [the NRA's] dangerous agenda to sell more guns" (Dickinson 2018). The IRS Form 990 also shows that the NRA had \$46 million more in expenses than revenue in 2016 and was relying on a \$75 million fund balance to remain operational (ProPublica 2018). The NRA was also in internal turmoil in 2016, as former NRA president Oliver North and NRA first vice president Richard Childress called for an investigation of what they called lax financial management of the organization by longtime executive vice president Wayne LaPierre, to include claims of lavish personal spending by its top executives, public allegations of which are tied to the New York lawsuits.

As a normative claim, this is a dangerous precedent above and beyond any defunding of a similarly large and equally ideological nonprofit, such as Planned Parenthood, from *taxpayer* dollars. Although the official view of the American Civil Liberties Union is that the Second Amendment protects a collective right (ACLU n.d.), the organization filed a brief in support of the NRA's viewpoint discrimination case. In an August 2018 blog post, its legal director David Cole wrote,

If Cuomo can do this to the NRA, then conservative governors could have their financial regulators threaten banks and financial institutions that do business with any other group whose political views the

governor opposes. . . . The First Amendment bars state officials from using their regulatory power to penalize groups merely because they promote disapproved ideas. (Cole 2018)

Mr. Cole is entirely correct that should it be successful, this model could be applied by others with ideological leanings not in alignment with Governor Cuomo. Already we can see this occurring in the state of Louisiana, where the attorney general, Jeff Landry, withheld \$600 million from Citigroup and Bank of America, which had instituted corporate gun control policies at the behest of gun control activists. In his own words, Attorney General Landry stated:

Citigroup and Bank of America, like, unfortunately some big corporations are trying to become the social police, they put out policies trying to restrict American citizens' ability to legally access firearms. They both have somewhat different policies, but they basically would not extend financing to gun manufacturers or retailers, some of whom may sell guns legally to persons under 21. At the same time that [Citigroup and Bank of America] put these policies out, the state of Louisiana was looking for underwriters for a \$600 million infrastructure project here. And [Citigroup and Bank of America] applied for us to evaluate them to be one of the underwriters, and in a very strong statement, conservatives in Louisiana said no, we are not going to do business with corporations that infringe or restrict our citizens' right to legally access firearms. (Hawkins 2018)

Governor Cuomo's efforts are a beam of light shining on the fact that courts have no implementation powers and elected officials and administrators can put up high insurmountable roadblocks to courts' efforts to create significant social change. Even if the NRA succeeds in federal court with the assistance of the ACLU, the regulatory inquisition has cost it tens of millions already and there are multitudinous ways the NRA can be a victim of low-level harassment by New York's Department of Financial Services. What is different from Rosenberg's point on backlash is that this is not counter-mobilization against the decisions themselves but rather against the social movement itself. If anything, the situation is more akin to Keck's points about how mobilization of activists in general can be sparked by courts. A culture war is a constant game of parry and thrust between adversaries on multiple fronts, and the courts are only one battlefield.

Governor Cuomo's campaign of targeted harassment did bear fruit. In January of 2021, between the lawsuit and the coronavirus situation, which scuttled fundraising, the NRA declared bankruptcy and planned to incorporate in Texas, moving out of New York due to the state lawsuit. The legal fight, however, continued. If the legal campaign succeeds completely, it will be a precedent leading to the picking of other, more vulnerable targets.

## Conclusion on the National-Level Testing of the Constrained Court Theory

It is possibly a tautology to use evidence of more people keeping and bearing arms after *Heller* and *McDonald* as evidence of the success of the Court. But a clear consilience from looking at the spread of concealed carry, the number of arms Americans purchase every year through a robust market in arms, the passage of federal laws protecting that market in arms (PLCCA), the failure of the gun control tort litigation, the lack of any federal gun control being passed since the 1994 assault weapons ban, and public opinion polling on support for the Second Amendment as an individual right shows that the Court was only riding a wave rather than creating one. Figure 10 is a conglomeration of three of Gallup's longest-running time series polling on guns that were part of the "public support" analysis, which helps illustrate this conclusion.

While the number of households with firearms has declined slightly (prior to an uptick in 2020 not captured in the survey that is discussed later), this is more likely due to demographic change than other causes, as there are far more single-parent households. The percent of those who would not ban handguns and assault weapons has steadily declined. Perhaps the only countertrend is the Gallup survey that shows that those who would make our gun laws stricter, rather than less strict, has after a long decline increased after *Heller* and *McDonald*, but it was at a nadir when the decisions were made.

Rosenberg's case studies make clear that the Court is ineffectual in creating change by itself, but as he says:

Perhaps only when political, social, and economic forces have already pushed society far along the road to reform will courts have any inde-



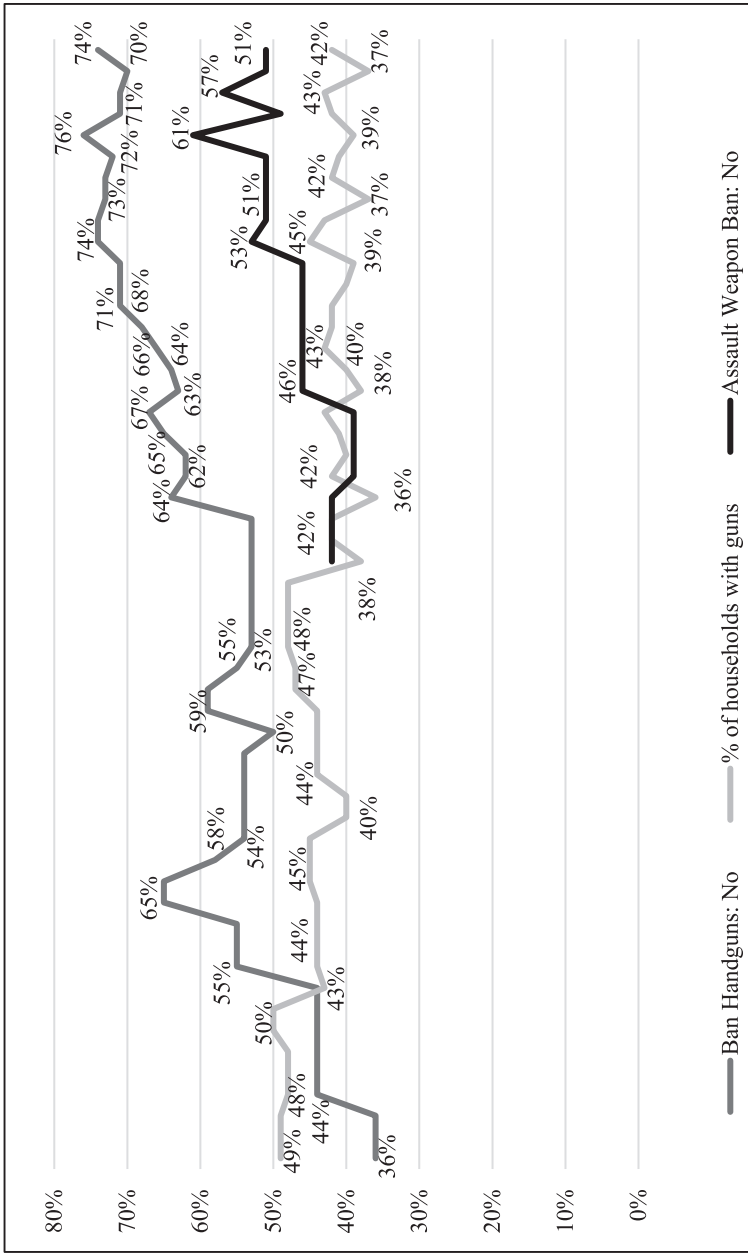


Figure 10. Amalgamation of Gallup polling on gun topics. (Source: Anthony Cooling.)

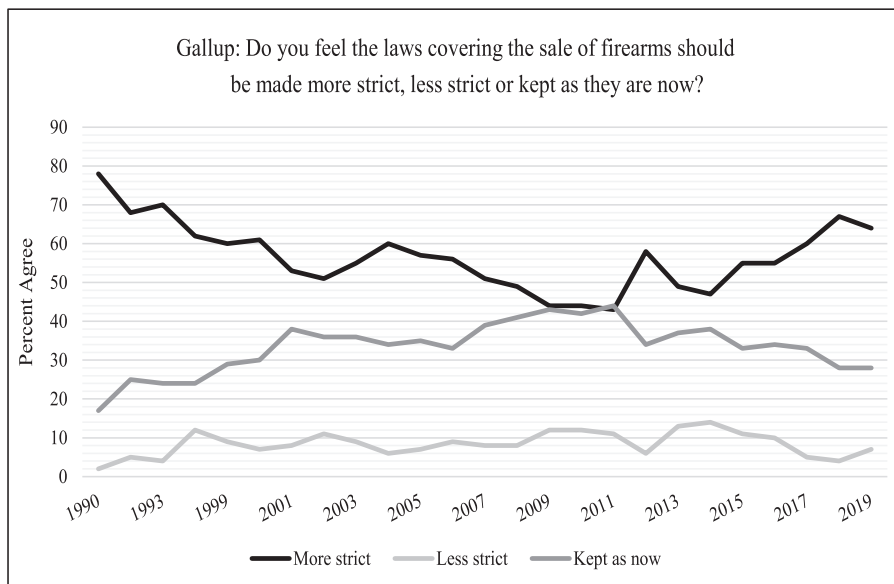


Figure 11. Gallup question of strictness of gun control. (Source: Gallup.)

pendent effect. And even then their decisions may be more a reflection of significant social reform already occurring than an independent, important contribution to it. (2008, 5–6)

This is not to say that the Court and lower courts did not have an effect. The Supreme Court provided legitimacy to a long-held view, and at the time of *Heller* a view held by 73 percent of Americans, that the Second Amendment protected an individual right. As for on-the-ground change prompted by the decision, it is minimal. The Seventh Circuit brought concealed carry to Illinois and the D.C. Circuit brought concealed carry to D.C., but even when the Supreme Court weighed in, on the New York pistol case, it decided the case was moot, and on the Massachusetts stun gun ban, the justices rejected the state's arguments for keeping the ban and remanded the case. Subsequently, the state merely dropped the prosecution of the woman charged with violating the ban, requiring another case to challenge the ban before it was struck down in April 2018. Other stun gun bans have been repealed in various jurisdictions, invalidated, or legislatively repealed before the Supreme Court remanded in *Caetano v. Massachusetts* (2016). This was in Michigan (*People v. Yanna* (Mich. Ct. App. 2012); New Jersey; Wiscon-

sin; the District of Columbia; the Virgin Islands; New Orleans; Overland Park (the second-largest city in Kansas); and Annapolis, Baltimore, Anne Arundel County, Baltimore County, Harford County, and Howard County (all in Maryland). But stun gun bans remain in effect in Hawaii, Massachusetts, New York, Rhode Island, Philadelphia, Wilmington (the largest city in Delaware), and smaller towns (Volkh 2009; Volkh 2017).

Only because the actual policy goal of the Court was the elimination of the handgun bans and storage laws can we say that the decision of the Court had very little direct influence. Overall, it did not ask for too much from other political actors. *Heller* and *McDonald* were extraordinary cases to have more symbolic significance than actual immediate doctrinal import. *Brown* had no direct implications for private racial discrimination, but it amplified the moral principle of colorblindness. Michael Dorf points out that likewise, *Obergefell* was “only” about the state denial of the right of same-sex couples to marry, but it had much broader implications for all types of discrimination by sexual orientation (2018, 14). The Court’s decisions did have a measurable and direct effect in expanding concealed carry to Illinois, the lone holdout of all fifty states, through a decision in the Seventh Circuit. The public support for the decision in downstate Illinois, away from Chicago, led the state to implement a restrictive version of “shall issue” concealed carry legislation. This can be directly tied to the Court, but there is more on this in the chapter on Elazar’s political culture and Illinois. The dicta of *Heller*, generally taken now as part of its holding, is that:

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. (54)

This included “the carrying of ‘dangerous and unusual weapons,’” which are, more specifically, automatic weapons. These dicta kept the pre-*Heller* and pre-*McDonald* status quo in place, and it required subsequent litigation or political action to move the needle in the direction of the social reformers.

To be fair to the Dynamic Court Theory, there is evidence that courts are having at least some effect. In an extraordinary effort of research cataloging every available federal and state-appellate Second Amendment challenge from *Heller*’s announcement until February 2016, professors Ruben and Blocher published a groundbreaking article called “From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms” (2018).

In it they challenge the view advanced thus far that lower courts have been ignoring the right to keep and bear arms, where it has been previously noted that of 1,150 Second Amendment challenges, 96 percent of them have been rejected (Law Center to Prevent Gun Violence 2017). In this analysis, the authors analyze individual challenges rather than opinions. Their findings confirm the Constrained Court Theory that significant social change cannot come through the courts. But they simultaneously give ammunition to the theory's critics and show that courts are not the powerless entities Rosenberg set them up as, as they do have some findings that lend some support to the Dynamic Court Theory.

In summary, they found an overall 9 percent success rate (108 of 1,153 cases) for Second Amendment cases; federal trial court Second Amendment challenges have a success rate of 8 percent, federal appellate courts are at 13 percent, and state appellate courts are at 9 percent. Where this success rate is broken down by subpart, however, is where there are interesting findings in their research. First, they found what a line of scholarship about rights litigation already has revealed: that most litigants fail on “objectively weak claims” (1,447) because their cases are a Hail Mary effort. Most Second Amendment gun cases are because litigants are felons found to be in possessions of firearms, and *Heller* explicitly sanctioned felon disarmament. Fully 64 percent of challenges in the database were initiated by criminal defendants, and they succeeded just 6 percent of the time. Their findings confirm those of Epp (1998) about the importance of the “support structure” in that organizational clients, who usually target federal court, had a success rate of 29 percent compared to 9 percent for individual plaintiffs. Meanwhile, the analysis also confirms the findings of this book that may-issue licensing systems and assault weapons bans are nearly always upheld, while total bans on carrying of handguns in public have fallen with a success rate of 22 percent, which is “the highest in the dataset” (Ruben and Blocher 2018, 1484). This latter point about a higher success rate ending the total ban on the carrying of handguns does lend credence to the Dynamic Court Theory, although I would add the caveat that the elimination of handgun bans was not all the Court's power at work, but activists working with the decision the Court provided them as a tool, like a lever. I will show more on this later in the chapter on Illinois.

Ruben and Blocher (2018) report that challenges subject to intermediate scrutiny succeed at a higher rate (10 percent) than the rest of their dataset (9 percent), and this is contrary to the stated case that courts use the “interest balancing test” from Justice Breyer's *Heller* dissent (which is akin to intermediate scrutiny) to dispose of claims to which they are hostile. This, however,

is a far, far lower success rate than claims from other amendments in the Bill of Rights. By way of comparison, Greenblatt (2009) found a 73 percent success rate for heightened scrutiny and 88 percent and 74 percent success rates in strict and intermediate scrutiny cases looking at First, Fifth, Sixth, and Fourteenth Amendment cases between 1942 and 2006. A study just on free exercise First Amendment claims found a 52 percent success rate for strict scrutiny cases (Wolanek and Liu 2017) between 1990 and 2015. Comparing these success rates against Second Amendment cases shows that not all rights are created equal. And while Ruben and Blocher found that the federal circuits considered most hostile to arms rights, the Second, Fourth, and Ninth (Moscary 2018), have a higher success rate for challenges, although they (correctly in my opinion) mollify this finding with the suggestion that this is only because those circuits are home to the most restrictive gun laws in the nation and thus make the best litigation targets.

Of 438 state appellate challenges in the database, 66% are from Illinois (167), California (59), Massachusetts (36), and New Jersey (26). Of these four states, only appellate courts in Illinois have granted Second Amendment relief. (Ruben and Blocher 2018, 1476)

Ruben and Blocher (2018) provide a wealth of data, which are especially helpful as they parse it, but in the end if we are comparing the Constrained Court Theory against the Dynamic Court Theory, on-the-ground effects are really what matters when we are seeing if there is significant social change. To start, their success rates “do not distinguish between final judgments and interlocutory decisions” (Kopel 2018a, 82) that is, a success for the Ruben and Blocher’s dataset would be when, after a lawsuit against an arms ban, a district judge rejects a government claim that an arms ban does not implicate the plaintiff’s Second Amendment right. But when a circuit court later announces a new standard of review and the government offers some evidence under that new standard and the arms ban is upheld, the on-the-ground facts do not change. There is no increased keeping and bearing arms.

Kopel and Greenlee (2017) synthesized circuit court Second Amendment doctrines, and such examples happened in the Second, Fourth, and Ninth Circuits, creating a big loss for Second Amendment reformers by the new standards of review and precedent setting. Still, final success on the merits has occurred in the Seventh Circuit (which brought “shall issue” to Illinois) and the Illinois Supreme Court and in the District of Columbia, and these cases overturned the strictest prohibitions and affirmed the legality of impartial licensing systems. But the decisions in the Second, Third, Fourth, and

Ninth Circuits have been in the opposite direction (Kopel 2018a). Because of the later decisions, for the right to “bear” arms in California, New York, Massachusetts, Rhode Island, Delaware, New Jersey, Maryland, and Hawaii, which have the strictest licensing regimes in place, *Heller* and *McDonald* may as well not have happened for all the on-the-ground change.

The scattershot results are because with an absent Supreme Court and the narrow holding of *Heller*, lower courts have gone their own way. It would be entirely conjecture, without looking at Justice Scalia’s personal papers in the case, to know if his policy goals were wider than just the elimination of the handgun bans and storage laws. We have only a few clues as to why the holding of *Heller* was so narrow. The first clue is the aforementioned dissent of denial of certiorari of *Friedman v. City of Highland Park, Illinois* (2015) by Justice Thomas that Justice Scalia joined. In the dissent, the justices note how the lower courts are turning the Second Amendment into a “second-class right” because the Seventh Circuit allowed an assault weapons ban to stand using justice Breyer’s “interest balancing” approach.

In the many interviews Justice Scalia has given over the years, he outlines no larger agenda; if anything, his words in the interviews tend to give weight to those who would pass more gun control. For example, in a 2012 interview with journalist Chris Wallace, when asked about high-capacity magazines, he merely suggested that future Supreme Court cases will determine limitations on the right to keep and bear arms, saying, “Some are undoubtedly [permissible] because some were acknowledged at the time” the Constitution was written. Going on, he said, “So yes, there are some limitations that can be imposed. What they are will depend on what the society understood were reasonable limitations at the time.” When prompted again on specifics after his originalist answer, he said, “My starting point and probably my ending point will be what limitations are within the understood limitations that the society had at the time,” he said. “They had some limitations on the nature of arms that could be borne. So we’ll see what those limitations are as applied to modern weapons” (2012).

The second clue we have as to why the holding in *Heller* is narrow is the words of retired Justice Stevens in a *New York Times* interview to promote his memoir. After it was clear that Justice Stevens was likely going to be in the minority for *Heller*, by his own admission he went to extraordinary lengths to try to prevent an individual right interpretation of the Second Amendment by circulating his “probable dissent” five weeks before Justice Scalia released his draft majority opinion. He said that “he could not recall ever having done anything like that” and “I thought I should give it every effort to switch the case before it was too late”; he credits himself with getting the

ever-elastic Justice Kennedy to ask for “important changes” to the opinion’s scope (Cox 2019, 20). We do not know for sure, but the interview indicates that the dicta Justice Scalia added that reads as an afterthought about current gun control laws and how the decision “should not 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 arms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms” was presumably the language Justice Kennedy, as the swing vote, was able to get added when pressured by Justice Stevens (Liptak 2018).

Given the 5-4 majority the Court has had on this issue since 2010 and its refusal to hear any more cases directly (only remanding a stun gun case to a lower court from Massachusetts and mooted a case from New York), it is a difficult leap to make the conclusion that it did intend to take a bigger bite at the apple and declare more gun laws unconstitutional. It was certainly within its ability in a system of judicial supremacy in regard to constitutional interpretation to say that most, if not all, gun control laws violated the Second Amendment and therefore must be repealed. The acceptance of the prohibition on automatic weapons is particularly inconsistent. If the Second Amendment is intended to be a bulwark against government tyranny and that an armed citizenry should have the right to “keep and bear” the sorts of arms that the military would have in order to resist a tyrannical government, then fully automatic arms that one person can “bear” (that the military regularly uses) should be protected.

The loopy-goopy phrase “arms in common use” from *Heller* as the arms that the Second Amendment is supposed to protect is also problematic from the standpoint of the Second Amendment as a bulwark against government tyranny. Here is a concrete example of how that inconsistent phrase from the holding of *Heller* has already played out in some states and via some litigation. A common target for gun control is banning ammunition magazines holding more than ten rounds; indeed, this was part of President Clinton’s 1994 gun control law that expired in 2004 under President George W. Bush. Some states have bans on the possession of such high-capacity magazines, as does Chicago. Most handguns are manufactured with ammunition magazines that hold between twelve and eighteen rounds, and this has been the case for more than a century. Revolvers are an archaic technology that are a niche market for those interested in simplicity or magnum (large-caliber) rounds. According to at least one dated survey of gun owners, handguns with high-capacity magazines made up about 21 percent of the 192 million guns owned by Americans in 1997 (Hill 2013). These guns clearly are “arms

in common use.” It follows via simple logic that laws banning high-capacity magazines would be unconstitutional as a violation of the Second Amendment. If most handguns, which were the type of guns at issue in *Heller* and *McDonald* and which the Court specifically said are “militia arms” to skirt their ruling in *Miller* (where they ruled that a sawed-off shotgun is not a militia arm), then we have a clear-cut case of arms in common use that should be protected by the Second Amendment as interpreted in *Heller*. In the wake of *Heller* and *McDonald*, however, no state or jurisdiction with such restrictions on high-capacity magazines bothered to remove them, and after the Newtown school shooting in 2012, two years after *McDonald*, some states like New York and Colorado put such bans into effect when they did not have them before. New York’s SAFE Act even went as far as reducing magazine capacity to seven rounds, which did not survive a legal challenge in 2013 that raised it back to ten rounds. The only reason it was raised to ten rounds again is because nobody manufactures seven-round magazines for most common handgun models. If there were no seven-round magazine, or no legal one at least, then it would render most firearms useless for legal self-defense.

A legal drama is playing out regarding high-capacity magazines in California, which in 2000 (eight years before *Heller*) had banned the possession of magazines that hold more than ten rounds but grandfathered in all older magazines. A 2016 statute, democratically passed by ballot initiative with 63 percent support (Sullum 2019), was set to take effect on July 1, 2017, that would have banned the mere possession of any magazine that held more than ten rounds, with the penalty being a year in jail. Citizens had to either sell the magazines to an approved gun dealer or turn them into the police without payment. Judge Benetiz in the Southern District of California issued a preliminary injunction against the implementation of the high-capacity magazine confiscation law, pending a review of whether the law violates the Second Amendment. A three-judge panel of the Ninth Circuit upheld the suspension of enforcement, but they sent the case back for further proceedings on the merits of the law itself. As of March 2019, in *Duncan v. Becerra* (2019), Judge Benetiz gave Second Amendment activists a victory by completely invalidating the law, leaving in place the status quo by undoing a democratically passed ballot initiative. No doubt the case will be appealed to the Ninth Circuit, and also at issue is the Fifth Amendment’s Takings Clause.

Yet we must acknowledge the other points of Rosenberg’s case studies. A broad decision that undid laws against ten-round magazines, or military-style assault weapons, or fully automatic weapons, would have put the Court



in the difficult and sensitive position of making an unimplementable decision, resisted by state governments in the same way that *Brown* or *Roe* was, the kind of case where nonimplementation sparked Rosenberg's investigation in *The Hollow Hope* in the first place. Thus, I surmise that Justice Kennedy did not want a repeat of those cases, although we do not know just how far Justice Scalia's opinion would have gone if Justice Kennedy had been firmer against Justice Stevens's pushback.

Even if there is a market in firearms to implement the Court's decision by proxy, like there was in *Roe*, that does not mean that people still would not be prosecuted for having one illegally under a state law, a law that would have to be struck down by courts case by case. A law that the Court says is unconstitutional in the abstract would still require another round of litigation to undo it, unless the local jurisdiction took it upon itself to undo it. A stridently pro-gun control governor or mayor would continue to prosecute violations of such laws, such as New York State's assault weapons ban, and the situation would be a recipe for strife and conflict. President Obama, himself ardently pro-gun control, would not, in the manner of President Eisenhower, work behind the scenes to smooth things over, nor if push came to shove use the "sword" of the executive branch to make states remove other gun control laws. Could we expect trial courts throughout the country to throw out cases for violations of laws that were contrary to a more far-reaching *Heller*? Expecting lower courts to throw out convictions for violations of gun control laws would be a "vertical issue," so, as per Hall's (2011) findings, there is more compliance and implementation of the Supreme Court's agenda, but in reality it would be a particularly problematic expectation, given that lower courts also routinely flout the directives of the Supreme Court (Tokson 2015) and that lower courts have routinely taken the most narrow interpretation of *Heller* and *McDonald* possible, like the Ninth Circuit did in *Peruta v. California*.

So Justice Scalia's decision is a sort of compromise. Again, we do not know if it was intended this way, but that is the real-world effect of the Court not ruling on the meaning of the Second Amendment, taking no cases since 1939, and finding ways to thread the needle so as not to undo *Miller* in their *Heller* decision. State and lower courts took the Supreme Court's sixty-nine years of silence as acquiescence, and they started to rule the individual right out of the Second Amendment. When you combine this unwillingness to rule on the Second Amendment with the tide of gun control that happened after Prohibition and the tumultuous 1960s, we ended up in the situation that the Court found itself in 2008. When the Court did take a case, if we look back to the nineteenth-century gun laws, the nation

had nearly a century and a half of accumulated violations of what an originalist interpretation of the Second Amendment actually protects. In a way, the situation was not so different from *Brown*. The Fourteenth Amendment was clearly supposed to protect black citizens, but by the time the Court got around to enforcing it, there was more than a century of accumulated violations. In the case of *Brown*, according to Rosenberg and others, an emerging of enlightened public opinion, and federal dollars, led to the integration of schools and the Fourteenth Amendment being restored to its proper place. With *Heller* and *McDonald*, the Court lacked the courage to make an Originalist interpretation of the Second Amendment, which would have had the effect of repealing most modern gun control, so they split the difference because repealing most modern gun control would be asking lower courts and elected officials to implement a decision that the Court had neither the purse nor sword to enforce. No doubt to his surprise, some of Justice Scalia's harshest critics were not all liberal judges, such as Richard Posner (2012), who called him "incoherent" in his application of Originalism (and who ironically authored the Seventh Circuit decision bringing concealed carry to Illinois), but also from critics on the right, who have called *Heller's* originalism "symbolic" (McGinnis 2017).

Instead of the tumult after *Brown* or *Roe*, we get a sort of piecemeal litigation and change via the political process, which from a normative perspective is not necessarily a bad thing, especially for a supporter of federalism if we take into account the state-by-state variation. But from a straightforward rational reading of *Heller* and an understanding of the historical interpretation that Justice Scalia cited, it makes little sense. There are a million flash points with the term "arms in common use." One of the biggest problems, so to speak, of *Heller* is its circularity, which further provides a friction point. The key point in *Heller* was that "arms in common use" have Second Amendment protections, which converts the extension of the protection of the amendment to a popularity contest on a particular firearm model. This is not, ideally, how a "right" is supposed to work, which is that a right is a protection that is not dependent on majority will and popularity. This circular reasoning in *Heller* would allow the government to ban old technologies not in common use, even though they are less dangerous, and, moreover, prevent the sale of new (and presumably deadlier) technologies not currently in common use, lagging them behind what the military is sure to adopt, despite the theory underlying the amendment that a citizenry armed with weapons deadly enough to present a threat to the police and government is a deterrent to government tyranny.



PART III

Case Studies



## Illinois: A State of Conflict

It is worthwhile to briefly restate the reasons for the selection of Illinois as a case study. First, Chicago's handgun ban was the source of the Supreme Court's *McDonald* decision, which incorporated against state encroachment the *Heller* decision's holding that the Second Amendment protects an individual right to keep and bear arms. Naturally, when we want to test the ability of the Supreme Court to make significant social change, we need to examine the level of keeping and bearing arms in that city and the wider state before and after that decision. Second, based on the results of the regression analysis, Illinois is a state that is near the best fit line. We are model testing our hypothesis that pre-existing state political culture as defined by Elazar's Political Culture Theory will affect the level of implementation of the Supreme Court's decisions; more specifically, that the more moralistic a state the less keeping and bearing of arms and less implementation of court decisions, and the more traditionalistic a state the more keeping and bearing of arms.

Also, because Illinois is often considered a microcosm of the larger nation as it has all three settlement streams of subcultures in Political Culture Theory, it makes it more relevant to study. That Illinois harbors all three migratory streams necessitates a full tracing of the pre-existing political culture mix and of the results of the Supreme Court decisions, most importantly because we want to see if the different political subcultures within the state had different reactions to *Heller* and *McDonald*.

### Political Culture Historiography and Federalism

Human geography is the distribution of people and cultures that is bounded by and interacts with physical geography. In short, human cultures are prod-

ucts of the natural environment by the way locations affect them. Natural boundaries lead to sectionalism. Sectionalism is the expression of different social, cultural, economic, and political differences on a geographic basis. Sectionalism “embodies the interaction between geography and history that has forged the social patterns . . . of each sectional entity” (Elazar 2004). Federalism in the United States is a system that allows for sectionalism to be expressed in separate political territories. Different sectional identities, forged from different social, cultural, and historic differences among peoples, influenced by geography, can, within a larger system, account for their own differences in morality as expressed into law and can govern themselves within a larger political whole.

At one level down in our constitutional system from the federal government, states are given broad authority, and its own subunits of government, counties and cities, are wholly creations of the state and therefore do not serve as a check and balance against state authority. If a city, county, or a region is part of a state but has a separate cultural identity from the rest of the state, it is at the mercy of majoritarian politics. A federalist system works well when each sectional identity, which includes cultural differences, has its own territory, and when the tradeoffs between a strong central government for national defense and unified policy making and each sectional identity’s inalienable right of self-governance do not come into conflict with each other due to a zero-sum policy debate. Illinois is unique in that it has few natural boundaries, but nevertheless geography influenced the spread of each political culture’s settlement in the state. This profoundly affects the state’s politics because the three subcultures of moralistic, individualistic, and traditionalistic share one political unit. Illinois is therefore a state of conflict because its sectionalism is based on human geography, not physical geography.

### Illinois Settlement Patterns

Northern Illinois (more specifically Chicago) is dominated by the sectional identity of Yankee moralistic political culture (modified by waves of nineteenth-century immigrants and the northern migration of free blacks in the mid-twentieth century, the latter of which is called the Great Migration), while middle and southern Illinois are dominated by traditionalistic political culture from the slaveholding South as influenced by an individualistic political culture that came west from the middle colonies. The state’s three

separate constitutions, 1818 (when Illinois first became a state), 1848, and 1970, are permeated with the effort to compromise the interests of these sectionally manifested distinct political cultures.

Illinois is at an interesting geographic crossroads that led to this outcome. There were three main streams of settlement into a state that is on the map taller than it is wide: the first being traditionalists from the South, following the various river valleys northward, the second a line of individualists west from the Cumberland Gap and other passes through the Appalachian Mountains through Ohio, and the third and last moralists from the north via the Great Lakes after the Erie Canal was completed in 1825, but primarily not until the Black Hawk War in 1832, when natives from west of the Mississippi who crossed over into the Illinois territory were defeated.

The first settlers to Illinois came from the slaveholding traditionalistic South and the state was primarily settled from the south northward, but the primary population concentrations are now in the north (Berg 2002). Note that there is a good reason to go over the history of slavery in Illinois and that is because traditionalistic political culture, the one that our statistical analysis showed was the most supportive of gun rights, grew out of the auspices of the slaveholding South. Based on Elazar's historiography and the traditional role of the gun as a symbol of patriarchal authority (Taylor 2009), southern gun culture is most certainly correlated with the existence of slavery and is to some extent caused by it, perhaps due to fear of a slave rebellion. By exploring slavery and black America's history in Illinois, we can do an examination of what role that history plays in the support for the right to keep and bear arms in Illinois, both in the past and moving into the modern era, after the Great Migration.

Looking at a map, one is apt to notice that the bottom third of Illinois lies below a westward projection of the Mason-Dixon line and its neighbor to the east is Kentucky, one of the border states of the Civil War that was given to internal violence and guerrilla warfare during the war, but which never seceded due to Union army occupation. Illinois itself was almost a slaveholding state, even though according to the Northwest Ordinance, the original law setting up the expansion of the U.S. westward, slavery was forbidden. But there was no enforcement mechanism, and this was ignored. The first constitution of the state made slavery illegal to be in compliance with the Northwest Ordinance, except for some loopholes about indentured servitude and slaves brought in from other states to work a salt mine in Shawneetown (just west of the three-way border Illinois shares with Kentucky and Indiana) (Berg 2002). A state level "compromise of 1824" pre-



vented slaves from entering the state en masse, but at the price of a “black code” (Elazar 2004, 181). Free blacks could move to Illinois but were mightily discouraged from doing so.

It was not until 1853 and the draconian “Black Law” that *all* free blacks from other states were prevented from living in Illinois for more than ten days. Interestingly, for the purpose of this book, free blacks and quadroons, who were people one-quarter black according to the code, were prevented from keeping and bearing arms due to fear of an armed slave uprising, like that which happened in Haiti in 1791 (Berg 2002).

Elazar notes that the topography of Illinois would never had allowed the spread of plantation farming. Illinois, as a prairie state, was settled in “oases” of river valleys of more workable land near forests prior to technological advances that allowed for the prairie to be farmed. The major advancement was from innovative blacksmith John Deere and his “Improved Clipper” plow in about 1838 (Drache 2001), and it was such advancements (and steam power) that let Illinois become the farming state that it is today. But those advancements were not in place during the initial settlement of Illinois, so due to a historical path dependency, the initial migration patterns carried their effects forward. The black codes were themselves a three-way compromise between the moralistic and individualistic Illinoisans and the traditionalistic southerners. The moralistic culture wanted abolition and an end to second-class citizenship for free blacks, and individualistic cultures feared the introduction of slavery as a threat to their way of life but were by no means abolitionists or equalists. The traditionalistic southerners wanted to maintain their own way of life with slave labor but were unable to override the concerns of the individualists and the moralists and settled on a proto-apartheid system of racial hierarchy for the free blacks that were in the state. With the moralists unable to fully abolish slavery in the state until 1845, they settled on keeping the practice from spreading to Illinois, even though they wanted full equality for the state’s black population. The individualists wanted neither equality nor slavery and settled on just trying to keep the issue at bay by keeping free blacks out of the state and restricting slavery and indentured servitude where they could.

Without the plantations, and as time passed with no real need for a racially hierarchical structure in place as the black codes kept most free blacks out of the state, the traditionalistic political culture of the settlers gradually morphed into an individualistic political culture of subsistence farmers and small businessmen with strong family ties and a minimized sense of social responsibility due to isolated settlements, all without the aristocratic pretensions of southern gentry. Nevertheless, the middle and southern Illinois

civil communities founded by these southerners “continued to reflect Southern attitudes, values, and styles” (Elazar 2004, 157). One of those southern mores is a support of the right to keep and bear arms and an aversion to large cities, which coincides with a rural lifestyle that also supports the right to keep and bear arms. Middle and southern Illinois culture has strongly been influenced by Jeffersonian agrarianism, which valued country life over city life, valued the independent farmer over the paid worker, and saw farming as a way of life that can shape ideal social values. This cultural antipathy to cities helps explain how Chicago and downstate Illinois (anywhere outside Chicago and the collar counties of Lake, McHenry, Will, DuPage, and Kane that directly border Cook County where Chicago is) are “historically at odds” (Gove and Nowlan 1996).

Many Illinois communities resist “citification,” as Elazar notes, by even such small things as refusing to put in sidewalks to make a walkable downtown. Remember, the biggest demographic divide between support for gun control over gun rights is the rural vs. urban divide. O’Shea (2008), in a work on federalism and guns, reviewed demographics and public opinion and concluded that the pro-gun culture is primarily small town, rural, and Southern . . . demographics that aptly describe downstate Illinois.

The middle stream of settlers into Illinois came west from New Jersey, Maryland, Delaware, and Pennsylvania via Ohio and Indiana after the War of 1812. Many of the immigrants were second-generation transplants whose parents had already settled Ohio. These groups settled places like Champaign-Urbana, stayed near woodlands and streams, and never ventured far into the prairie. Their agriculture was self-maintenance rather than farming for distant markets. This middle stream headed northward to places like Springfield in the 1810s, the eventual capital, and Rockford in the middle top of the state near the Wisconsin border. These settlers, by virtue of the same influences of the southern migration as well as their own premigration culture, account for the individualistic political culture of Illinois outside of the Chicago area.

As was already noted, the third major migration into northern Illinois came via the Great Lakes after the completion of the Erie Canal in 1825 and the Black Hawk War. By then Illinois had already been a state for seven years. Chicago was incorporated in 1839, two years after Springfield was settled on as the new state capital. Elazar notes that this migration was “New England Yankees” (Elazar 2004, 161) who came from the moralistic political culture of Massachusetts, Connecticut, and New York (states that have near the highest levels of gun control) and that they immediately set about bickering with the rest of the state for their share of the political pie and to impose

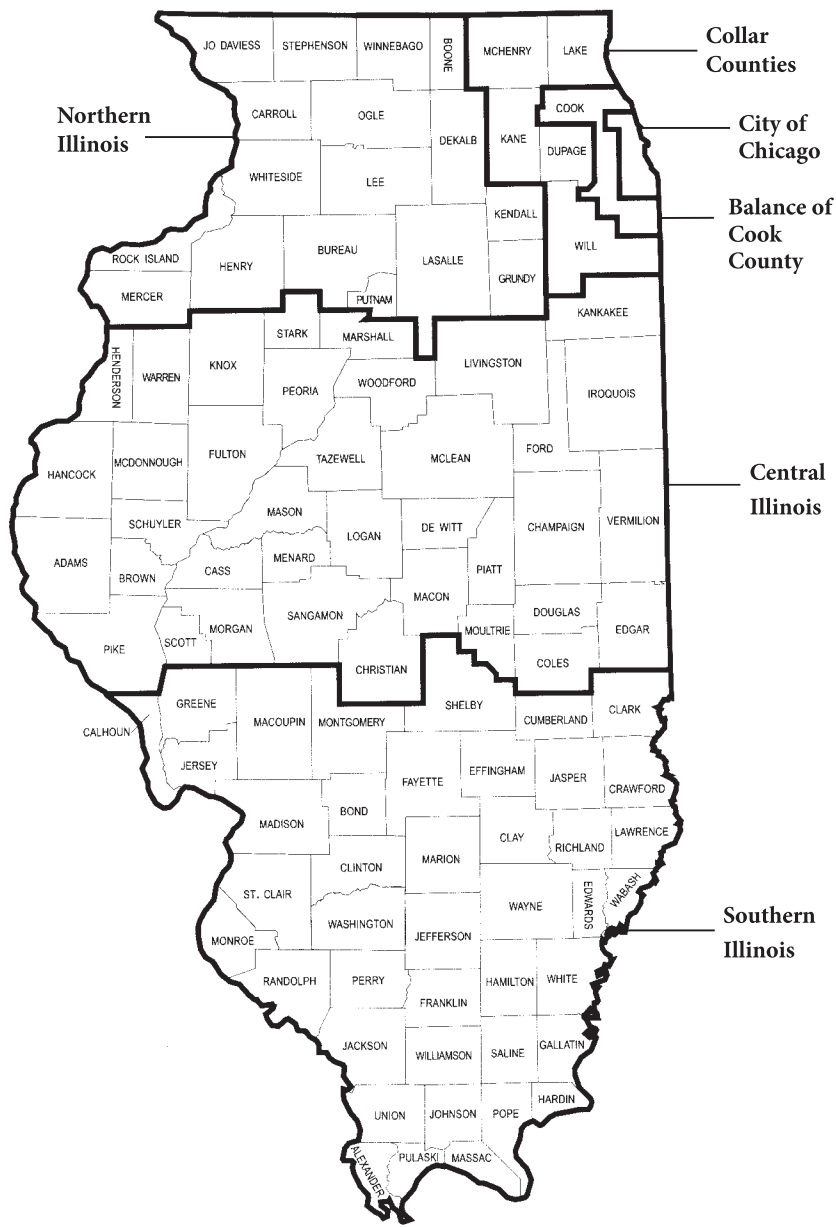


Figure 12. Northern Illinois University policy survey map—2012. (Source: Burrell and Wyckoff.)

their moralistic vision of government as a communal good on the individualistic/traditionalistic southern two-thirds of the state. These Yankees were “modernizers” who put more effort into communal goals, such as roads and public schools, than did their southern brethren (Gove and Nowlan 1996). They did not have much success changing the culture of downstate Illinois, but they were able to effect a change in the status quo, in that it was Yankee state judges in 1845 who ruled slavery unconstitutional in the state in *Jarrot v. Jarrot*. It was not until after the Civil War, however, that the black codes were repealed, and with the slavery question settled nationwide, the moralistic north and the individualistic/traditionalistic south came to a political status quo. With racial tensions minimalized to the extent that Illinois was mostly racially homogeneously white, the traditionalists and individualists eventually merged into an individualistic political culture with traditionalistic roots that dominates the southern two-thirds of Illinois. With no large number of free blacks to socially control, due to the black codes preventing them from settling en masse, there was no Jim Crow in Illinois, at least not to the extent of that in southern states. Racial segregation, when practiced in Illinois, was by individuals and businesses making the voluntary choice to disassociate, and not via force of state law.

While Chicago always had a black population, it was not until the severe labor shortages of World War I and World War II led to a large-scale migration of southern blacks to Illinois. Chicago’s population peaked in 1945, and with the freeway system of the 1950s providing the means for people to have a suburban home *and* a city job, white flight from Chicago commenced (Gove and Nowlan 1996). Chicago is a “majority minority” city (Cheng and Geraci 1987). This northern migration of southern blacks is important to set up Illinois’s pre-*Heller/McDonald* status quo because according to the Pew Research Center, 73 percent of blacks nationwide prioritize controls on gun ownership over protecting gun rights, while 55 percent of whites say they consider gun rights more important than gun controls (Mzezewa and DiNapoli 2015; Pew Research Center 2017). In short, you have in the Chicago area a moralistic political culture that is not supportive of gun rights become demographically strengthened in its opinions about prioritizing gun control by the migration of southern blacks into the area after their rise to political power after the integration of the 1960s.

There were seven streams of European immigration into the state, which, generally speaking, brought in elements that reinforced the cultures and institutions already established by the first three waves of immigrants into Illinois. They did not displace the cultures already in place, only altered them. The biggest alteration came from the Irish, who settled primarily in

cities, as they provided low-skill labor for the industrial and public works projects of the day. When the Catholic Irish did enter politics, it was as a means for social advancement rather than toward a Protestant ideal of the good life (i.e., moralistic political culture). In Illinois and elsewhere, their alteration was contributing to machine politics (Dahl 2005), which was an alteration of the moralistic political culture that had settled northern Illinois. When southern blacks moved north during World War I and World War II to take the low-skill jobs the Irish had since moved on from, they were “quiescent subjects within the civil community until the civil rights revolution” (Elazar 2004, 184). Once politically organized, they also began to heartily contribute to the machine politics of Chicago, the way having already been paved by the Irish before them. This led Chicago to have a particular mix of machine politics, with its tolerance of a certain amount of corruption, but also a moralistic outlook on government as an outlet for a common good as a residue from the Yankee puritan settlers. The large number of Hispanics in the city have not become as politically active as the Irish and blacks before them.

### Opinion Divide between Political Culture Types in Illinois

While it is useful to look at the historical differences of opinion in Illinois based on the settlement streams documented by Elazar, modern survey data also show a difference between northern and southern portion of the state. It is necessary to give more concrete measures of the opinion divide between northern Illinois and downstate than Elazar’s historiography does because, as I later explain, this opinion divide shows itself with the state’s approach to gun control, gun rights, and the results of the *Heller* and *McDonald* decisions, the latter of which applied specifically to Chicago and its close suburbs.

Between 1984 and 2012, Northern Illinois University conducted an annual policy survey of topics of importance to Illinois residents. A question about gun control was only asked in 2004, but in 1988 there was a series of questions on such things as corruption, political parties, respect for authority, and government regulation of individual behavior, which were designed to tap into various political culture beliefs associated with each subculture type (Dran, Albritton, and Wyckoff 1991). This 1988 questionnaire provides some direct evidence, other than historiography, of the existence of Elazar’s political cultures in the state. The researchers found that their direct measures of the respondents’ political culture were statistically significant

and were in the expected direction of political participation; for example, moralists follow politics more closely and vote more frequently, whereas traditionalists were less likely to participate in politics. They found, however, there were no statistically significant differences among the three political cultures by Illinois regions and, moreover, that traditionalists in Illinois are more politically active than individualists, which they hypothesized is due to the way the “traditionalistic political culture has been modified by its non-gentry surroundings and by its minority status” (Dran, Albritton, and Wyckoff 1991, 25). In other words, the lack of slavery in Illinois pulled traditionalistic political culture away from its historical southern roots.

While the researchers did not show statistically significant regional differences in political culture, they did show that non-southern traditionalists were more politically active than individualists, although less than moralists, and thus their findings are still a piece of evidence that shows a conflict between the moralistic northern portion of Illinois and downstate and that it exists in more than Elazar’s interpretation of history. The researchers showed in a regression analysis that the political culture type of the respondents was statistically significant and in the expected direction, contributing to their political attitudes and behaviors on some, but not all, other policies such as drug legalization, insurance regulation, job training, environmental protection, and what the state should do with excess revenue. Overall, the explanatory power of political culture was limited, explaining only 5 to 19 percent of the variation on some of the questions. Although the 1988 survey does not show a geographic divide of opinion among the more traditionalistic southern Illinois, Chicago, and the middle and northern regions of the state, it still does show a divide on issues we would expect under Elazar’s typology.

One survey, however, is not definitive evidence that there is not a geographic divide of opinion in Illinois. Looking at other Illinois Policy Survey results, we see clear divides between the different regions of the state on a host of issues. For example, there is much less support for government spending in traditionalistic southern Illinois. In the 2012 report, the last year before it was abandoned, ironically due to state budget cuts, there were 18 percent to 47 percent differences in support for increases in state spending on a variety of topics between Chicago and southern Illinois (Burrell and Wyckoff 2012). Tables 4 through 8 all come from the 2011 or 2012 report on the Illinois Policy Survey, written by Burrell and Wyckoff, NIU professors of political science.

Note, these questions in table 4 regarding support for spending increases are time series questions, and the numbers are approximately the same back

Table 4. State Spending Increases

State Spending Increases		Support for Increases in State Spending, 2011						
<i>Differences Among Groups</i>		Public Schools	Medical Care	Job Training	Low Income Families	Public Health	Student Financial Aid	Higher Education
Statewide		66%	45%	57%	42%	47%	52%	50%
Region								
Chicago		81%	75%	77%	72%	72%	71%	69%
Suburban Cook		57%	35%	60%	30%	40%	54%	46%
Collar Counties		66%	34%	55%	40%	42%	48%	47%
Northern Illinois		65%	32%	48%	30%	34%	45%	42%
Central Illinois		57%	41%	32%	24%	28%	28%	27%
Southern Illinois		63%	28%	43%	25%	38%	42%	41%

*Source:* Burrell and Wyckoff 2012

as far as 2009. A separate issue, and also a consequence of Illinois's political culture divide, is that the state did not have a budget for two years between 2014 and 2016, has about \$200 billion in unpaid bills (O'Connor 2017), about \$111 billion in unfunded pension liabilities (*Chicago Business* 2015), a declining bond rating, and no realistic pathway to fiscal solid ground due to a lack of compromise.

### State Spending Increases

When respondents were asked in the 2011 survey (Burrell and Wyckoff 2011) how the state should deal with its financial problems, through spending cuts, tax increases, or some combination thereof, there is again a clear distinction between the state's regions. Chicago and the collar counties would prefer fewer cuts to government and more tax increases (Table 5).

Illinois's precarious financial situation has been decades in the making, and the 2012 report also asked respondents about what they felt were the causes of the financial condition of Illinois. Here again we see a divide between Chicago and the rest of the state on state employee retirement benefits (a significant part of the state's budget problem is underfunded pension plans) as well as on whether excessive government spending is a cause of the problem.

Indeed, in the 2012 report there is even a reluctance to even admit there is a problem depending on who you ask, as the responses for a question about reform of retirement benefits show (see table 7).

**Table 5. Question about State's Financial Problem**

Dealing with State of Illinois Financial Problems  
*Differences Among Groups*

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How would you prefer to deal with the state's financial problems?

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	Only Through Spending Cuts	Mostly Spending Cuts and Some Tax Increases	Equal Mix	Mostly Tax Increases and Some Spending Cuts	Only Through Tax Increases
Statewide	22%	25%	39%	10%	4%
Region					
Chicago	18%	22%	43%	10%	8%
Suburban Cook	23%	26%	39%	8%	3%
Collar Counties	22%	29%	32%	16%	1%
Northern Illinois	26%	32%	34%	6%	2%
Central Illinois	22%	21%	50%	5%	1%
Southern Illinois	29%	25%	35%	4%	6%

Source: Burrell and Wycoff 2011–2012

**Table 6. Percent of Residences Responding to Factors Contribution to Financial Crisis**

Factors Contributing to State of Illinois Financial Crisis  
*Differences Among Groups*

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Percent of residents responding “a great deal” to how much each factor contributed to the state's current financial crisis

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	Excessive Government Spending	Declining Revenues/ Bad Economy	Borrowing Money	State Employee Retirement Benefits
Statewide	74%	57%	46%	27%
Region				
Chicago	66%	67%	36%	21%
Suburban Cook	79%	53%	44%	26%
Collar Counties	76%	50%	52%	31%
Northern Illinois	84%	65%	53%	28%
Central Illinois	76%	51%	53%	32%
Southern Illinois	74%	67%	45%	32%

Source: Burrell and Wycoff 2011-2012



Table 7. Attitudes Toward Reforms

Attitudes Toward Reforms for Health and Retirement Benefits for Government Employees		
<i>Differences Among Groups</i>		
	Additional Pension Reforms Needed	Government Employees Should Pay More for Health Benefits
Statewide	51%	66%
Region		
Chicago	60%	52%
Suburban Cook Collar Counties	51%	65%
Northern Illinois	48%	71%
Central Illinois	44%	78%
Southern Illinois	51%	78%
	41%	69%

Table 8. Support for Recent Proposals

Support for Recent Proposals		
<i>Differences Among Groups</i>		
	Civil Union Legislation	Expanding Casino Gambling
Statewide	62%	62%
Region		
Chicago	68%	65%
Suburban Cook Collar Counties	60%	59%
Northern Illinois	68%	67%
Central Illinois	54%	55%
Southern Illinois	42%	58%
	50%	53%

Source: Burrell and Wycoff 2011–2012

We also see differences in opinion on cultural issues, not just fiscal issues. For example, in 2012, in Illinois there were controversial cultural policy decisions being addressed by Illinois lawmakers, the first of which resulted in the passage of a law to allow for civil unions, as well as a proposal to expand gambling (table 8).

The expansion of casino gambling is a complicated narrative that deals primarily with campaign contributions from a Native American tribe to the then governor, Democrat Pat Quinn. Civil union law, however, is a clear-cut

issue that traditionalistic southern Illinois and traditionalistic-individualistic central Illinois residents did not support.

Finally, let us review the single gun control question from the 2004 survey. It was, “Do you favor or oppose a state law that would ban the manufacture, delivery and possession of semi-automatic assault weapons in Illinois?” This would be a policy response question to the expiration of the federal assault weapons ban that was in effect from 1994 to 2004. While 64 percent of Illinois respondents overall favored a ban and 32 percent opposed one, “a bit less than half of respondents from Central Illinois and only 53% from Southern Illinois supported such a ban” (Peddle, Burrell, and Schott 2005, 12).

Based on these opinion surveys, there is a clear cultural divide in Illinois. While the NIU policy survey was geared toward issues other than testing Elazar’s Political Culture Theory, the results it provided are a window into the divide among Chicago, the collar counties, and downstate in terms other than historical narrative. We should see them as further proof of that divide to go along with our historical evaluations and the evidence laid out in other sources as well as the practical experience of seeing how Illinois is unable to make coherent long-term budget policy decisions at the state level.

### Chicago and Downstate Divide on Guns

How does this divide play out with regard to firearms? Chicago plays two simultaneously incongruous roles in Illinois politics today, particularly as it relates to the issues of guns, gun control, and gun violence. On the one hand, its politicians and representatives are quick to lecture about how government, in moralistic terms, is there to help the common man deal with disorder and to achieve a civil society, and the city uses its larger weight in electoral representation to push for gun control as a solution to gun violence. But on the other hand, the city of Chicago is also responsible for the majority of the shootings in Illinois. There were 2,785 shootings in 2017, and 650 homicides, the vast majority of which were with guns, which was more than New York City and Los Angeles combined (*Washington Post* 2018). And while the police say that these shootings are primarily targeted gangland killings from those involved in the drug trade, thankfully modern emergency room medicine, bad marksmanship, or lack of firepower keep the actual death rate lower. Despite its outlandish name, the website <https://heyjackass.com> is an excellent resource that aggregates publicly available Chicago crime statistics back to 2012, detailing where each shooting took place and even where in their body the victim was wounded. Final numbers

for 2019 show 461 shot and killed, 2,292 shot and wounded, 2,754 shot at, and 518 total homicides.

Immediately after the *McDonald* decision in 2010, Mayor Richard Daley perfectly encapsulated Chicago's moralistic political culture sentimentality: "Gun violence is not just a Chicago problem, it is an American problem. And, it will continue until we understand that there are reasonable and responsible steps we can take as a nation to help end the needless gun violence that irresponsible people bring on our friends and family" (Carey 2010). From the moralistic political culture standpoint of Mayor Daley, the shootings, almost exclusively by a small subset of Chicago residents of other Chicago residents who are part of the same small subset, over drugs and between gangs and most of which are taking place in a few certain neighborhoods of Chicago, were not just Chicago's problem, the problem was the entire nation's. Mayor Daley was not engaging in rhetorical excess. Chicago politicians have long felt that while their city may have strict gun control, guns just come into Chicago from outside city limits. America as a whole, not just Chicago, Mayor Daley believed, had to act to prevent the murders in the city. This moralistic attitude continued with Daley's successor, Rahm Emanuel.

Illinois politicians using their demographic majority from Chicago have long acted on their moralistic beliefs with regard to guns. Chicago Mayor Richard J. Daley (the elder) urged the state to require registration of all guns in 1967, but because he was unable to override downstate legislators, a compromise was reached to create the Firearms Owners Identification Card system (Clark 2014). Illinois is one of the few states that still requires a government permit to purchase any sort of gun; the others are California (moralistic/individualistic), Connecticut (individualistic/moralistic), Massachusetts (individualistic/moralistic), and New Jersey (individualistic). Illinois has consistently had a higher amount of gun control compared to the rest of the nation. From 2007 through 2015, its Brady Gun Control Index score has it as the ninth highest state in the nation for restrictions. A close suburb of Chicago, Morton Grove, banned handguns outright in 1981. This was followed by the suburb of Evanston, Chicago itself in 1982, the suburb of Oak Park in 1984, the suburb of Winnetka in 1988, and the suburb of Wilmette in 1989. Outside of the 1976 D.C. handgun ban, these were some of the only outright handgun bans in the nation. Handgun bans in San Francisco, California, in 1982 and 2005 were ruled unconstitutional under state law. Interestingly, the small village of Kennesaw, Georgia (traditionalistic/individualistic), responded directly to the Morton Grove ban by unanimously passing an ordinance requiring the head of each household to own

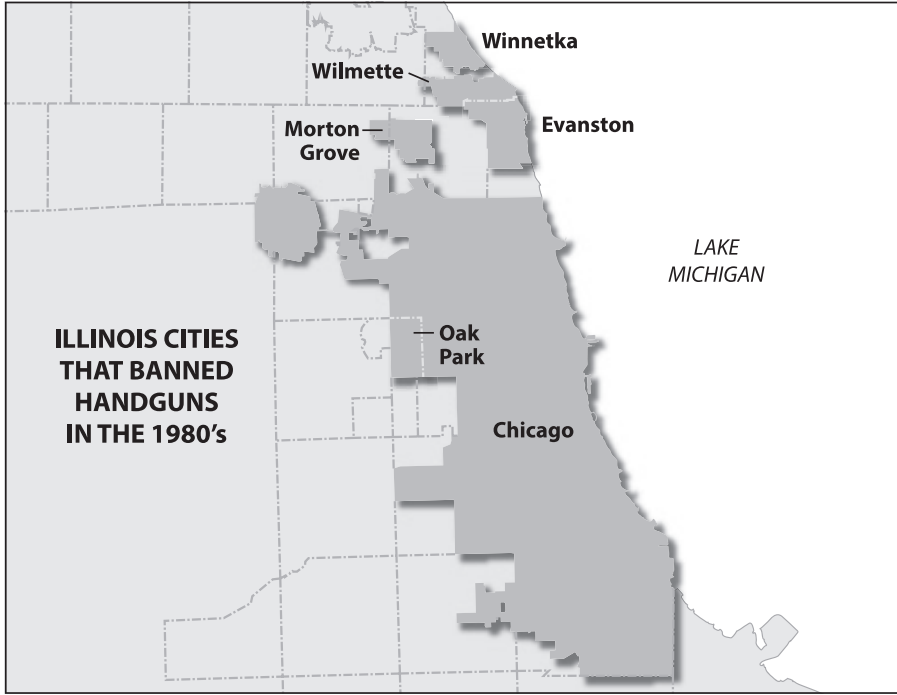


Figure 13. Map of Illinois cities that banned handguns. (Source: Anthony Cooling and Robert Cronan.)

and maintain a gun, although this symbolic law was never enforced, and in 2013, Nelson, Georgia, passed a similar measure (Copeland 2013). Illinois was the last state in the nation to get any form of concealed carry, and even that came via a court decision (more on this later as the Constrained Court Theory is tested in Illinois).

The first of these Illinois handgun bans was eventually upheld by the Illinois Supreme Court in 1984, and later the Seventh Circuit in 2009 in *National Rifle Association of America, Inc. et al. v. City of Chicago, et al.*, which upheld Chicago and Oak Park's handgun bans. The Seventh Circuit said that since the Second Amendment was not incorporated via the Fourteenth Amendment, the Oak Park and Chicago bans were constitutional because the decision to incorporate a portion of the Bill of Rights was up to the Supreme Court to decide (Ehret 2009).

Although the Seventh Circuit consolidated this case with the Second Amendment Foundation's *McDonald* case for its decision, both were appealed separately to the Supreme Court. The two cases also varied in scope

and the terms of the specific regulations being challenged. There is more to say on this later, but after *Heller*, all the suburbs but Oak Park repealed their handgun bans. Oak Park was part of the “et al.” in *McDonald v. Chicago et al* and was also part of the National Rifle Association case mentioned earlier.

Although Wilmette’s ban was abolished in 2008, it was also after an intervening incident that neatly shows the state divide on guns. In an example of the traditionalistic/individualistic downstate being against the moralistic Chicago on the issue of guns, there was passage of an interesting piece of legislation in 2004. In 2003, Hale DeMar, a resident of the wealthy suburb of Wilmette, was arrested and charged with various misdemeanors for shooting a burglar in his own home with a firearm it was illegal for him to possess via municipal code. While the Cook County state’s attorney later dropped all charges and declined to prosecute Mr. DeMar, the village board still fined him \$750 for the gun possession despite the ordeal (Puryear 2008). This sparked substantial controversy, but Wilmette did not reconsider its ban (Black 2004). The shocked response from the rest of the state was enough for them to work together to overcome Chicago’s moralistic sway on gun rights:

In March 2004, the Illinois Senate passed Senate Bill 2165, a law introduced in response to DeMar’s case, with provisions designed to assert a right of citizens to protect themselves against home invasions, such that self-defense requirements would be viewed to take precedence over local ordinances against handgun possession. The measure passed the Illinois Senate by a vote of 38-20. Barack Obama was one of the 20 state senators voting against the measure.

[Democratic] Governor Rod Blagojevich vetoed the bill. On Nov. 9, 2004, the Illinois Senate voted 40-18 to override Blagojevich’s veto. Again, Obama acted against the bill.

On Nov. 17, the Illinois House voted overwhelmingly, 85-30, to override the governor’s veto and Senate Bill 2165 became law. (OnTheIssues.org 2016)

The law became Public Act 93-1048. (IL General Assembly n.d.)

## Sanctuary Counties and Municipalities

In another illustration of the state’s cultural divide between Chicago and downstate on firearms, a trend started in Illinois and spread elsewhere in the nation: local jurisdictions outside Chicago declaring themselves a “sanc-

tuary” against the state’s gun laws. As form of local resistance to statewide gun control laws pushed after the Parkland school shooting, the phenomena started in May 2018, and by September 2018, 39 out of 102 Illinois counties and at least 24 Illinois municipalities had passed “gun sanctuary” resolutions (Landis 2018; Decker 2018; Eger 2018; Trotta 2019). As of March 2021, that number was 67 of 102 Illinois counties (Davis 2021). The trend in Illinois slowed because Republican governor Bruce Rauner did not sign the bevy of gun control bills that came across his desk; he only signed two less controversial gun control laws that July: House Bill 2354, called the “Firearms Restraining Order Act,” which empowered police to confiscate firearms from people who are deemed a threat to themselves or others, and Senate Bill 3256, which imposed a seventy-two-hour waiting period to purchase all guns, not just handguns (which Illinois has had in place for decades). He also vetoed a bill that would require state regulation of gun dealers, which would have layered on top of federal regulations. His successor, Democrat J. B. Pritzker, did sign that bill into law in January of 2019.

The sanctuary name is a deliberate play on the “sanctuary city” movement, in which state and local governments limit their cooperation with the federal government’s effort to enforce immigration law. It is clearly a rhetorical jab at the city of Chicago’s status as a sanctuary city and Illinois’s status as a sanctuary state after Governor Rauner signed the TRUST Act “at a Mexican restaurant in Chicago’s Little Village neighborhood, officially barring cooperation between Illinois police departments and immigration officials” (Esparza 2017). According to an exposé on the matter in the *Chicago Tribune*, Chicago has been a sanctuary city since at least 1985, when “Mayor Harold Washington sign[ed] an executive order ending the city’s practice of asking job and license applicants about their U.S. citizenship and halting cooperation by city agencies with federal immigration authorities” (Rumore 2017).

Not all jurisdictions use the sanctuary terminology, but as of June 2021, 1,459 of 3,144 counties nationwide have passed local laws declaring themselves gun sanctuaries, which represents about 46 percent of U.S. counties (Williams 2021). Further, there are also fifteen sanctuary states (Davis 2021). The trend among states started during the Obama administration, when four states passed sanctuary-type laws under the power they said they possess under the Ninth and Tenth Amendments to declare certain firearms and accessories exempt from federal regulation (Fields 2020).

Nevertheless, the name “sanctuary” is a new twist. “It is a buzzword, a word that really gets attention. With all these sanctuary cities, we just decided to turn it around to protect our Second Amendment rights,” said

David Campbell, vice chairman of the Effingham County Board; likewise, Effingham County's state's attorney Bryan Kibler said, "We're just stealing the language that sanctuary cities use. We wanted to . . . get across that our Second Amendment rights are slowly being stripped away" (Mikelionis 2018). This whole movement highlights the downstate/Chicago divide not only on guns but illegal immigration as well.

Not long after the 2016 election of President Trump, who took over the Oval Office with promises to build a wall between the United States and Mexico, Chicago mayor Rahm Emanuel, surrounded by immigration activists, said, "To all those who are, after Tuesday's election, very nervous and filled with anxiety . . . you are safe in Chicago, you are secure in Chicago and you are supported in Chicago. Chicago has in the past been a sanctuary city. . . . It always will be a sanctuary city" (Gonzales 2016). Even without going into the issue of firearms, the issue of immigration also shows the divide between Chicago and downstate. A 2016 county-by-county election map shows that President Trump, one of whose main campaign issues was ending illegal immigration, had much more support in downstate Illinois, even though the state's twenty electoral college votes went to candidate Hillary Clinton as she won Illinois with 3.09 million votes (55.8 percent) over Donald Trump's 2.146 million (38.8 percent) votes (IL State Board of Elections 2016) due to the population and the number of Democrats centered in and around Chicago. A map of Illinois counties with gun sanctuary county status marked shows a clear overlap with counties that President Trump won. This gun sanctuary map is figure 14.

Democratic governor J. B. Pritzker and the veto-proof majority of his party that voters sent to the Illinois legislature in November of 2018 to replace Governor Rauner enacted gun control in the way of state-level licensing of gun dealers, the very same measure that was vetoed by Governor Rauner. This law will be discussed further on as part of the analysis of Rosenberg's Constrained Court Theory as it is tested in Illinois. As for Governor Pritzker, he has claimed to be a moderate on the issue, saying that he supports the Second Amendment but also gun control (OnTheIssues.org 2017), but he also used the press conference for an Aurora, Illinois, mass shooting in February 2019 as an opportunity to pontificate for more gun control throughout the state.

On the other hand, during the 2020 quarantine and shelter-at-home restrictions placed on the state, Governor Pritzker did designate gun stores as essential services at the outset, unlike other states, even before the Department of Homeland Security's (DHS) guidance that they should be classified as such, leaving them open for the massive amount of panic buying

that occurred. Note that the DHS memo was, in its own words, “advisory in nature” (Krebs 2020). As per federal law, gun sales with associated background checks must occur in the dealer’s place of business. Firearms cannot be mailed to a purchaser’s home, and the buyer has to fill out ATF Form 4473 and pick up the firearm in person. Stores were cleaned out of inventory in many places, and according to some reports it was mostly new gun owners (Gara 2020). Since at the time I lived near two Illinois gun stores, during the quarantine often I saw full parking lots in both of them. Curious, I went into one and witnessed nearly empty shelves and racks and a sign telling customers they were limited to only two boxes of ammunition each. I spoke to a man, a retired firefighter, who had just purchased a Glock handgun. He admitted he’d never shot a gun before but who tried to prepare for the task by watching YouTube videos.

It wasn’t just my hometown. NICS background checks in March of 2020 were up 80.4 percent from March of 2019, going from 1.32 million to 2.38 million (Eger 2020). From March 15, 2020, to March 22, 2020, the highest number of background checks on gun sales since the FBI began to keep records in 1998 occurred, some 2.4 million checks; some 20 percent of sales were reportedly new gun owners in 2020 (Blackman 2021). Seven states deemed firearms sales nonessential, while Illinois and most states adopted restrictions that permitted firearms retailers to continue, in some form, to conduct business. In California, Governor Newsom’s order was neutral, leaving the decision to counties, and in a display of localism, L.A. County’s sheriff took the lack of a specific exemption for gun stores, combined with panic buying, as a reason to close them. These closures predictably triggered lawsuits by activist groups (Volkh 2020; M. Williams 2020; Eger 2020; Blackman 2021), and Pennsylvania, New Jersey, and L.A. County reversed themselves due to a combination of the federal guidelines, lawsuits, and politicking (*NBC Los Angeles* 2020; Sullum 2020; Levy, Rubinkam and Scolforo 2020; Eger 2020). New York, under the staunch anti-gun governor Andrew Cuomo, ignored the federal guidance. Similarly, the cultural conflict point of abortion came up during the quarantine; Iowa, Ohio, Texas, and Mississippi closed abortion clinics during the pandemic, which led to lawsuits by pro-choice activists to open them up again. Like the gun retailer lawsuits, these abortion activist lawsuits had mixed success (Jeltsen 2020; Volkh 2020).

The gun sanctuary movement in Illinois seems to have played itself out by 2019–2020. It is important to note that the “sanctuary” movement started in Illinois, even though prior to it there were similar efforts with different names in other states.



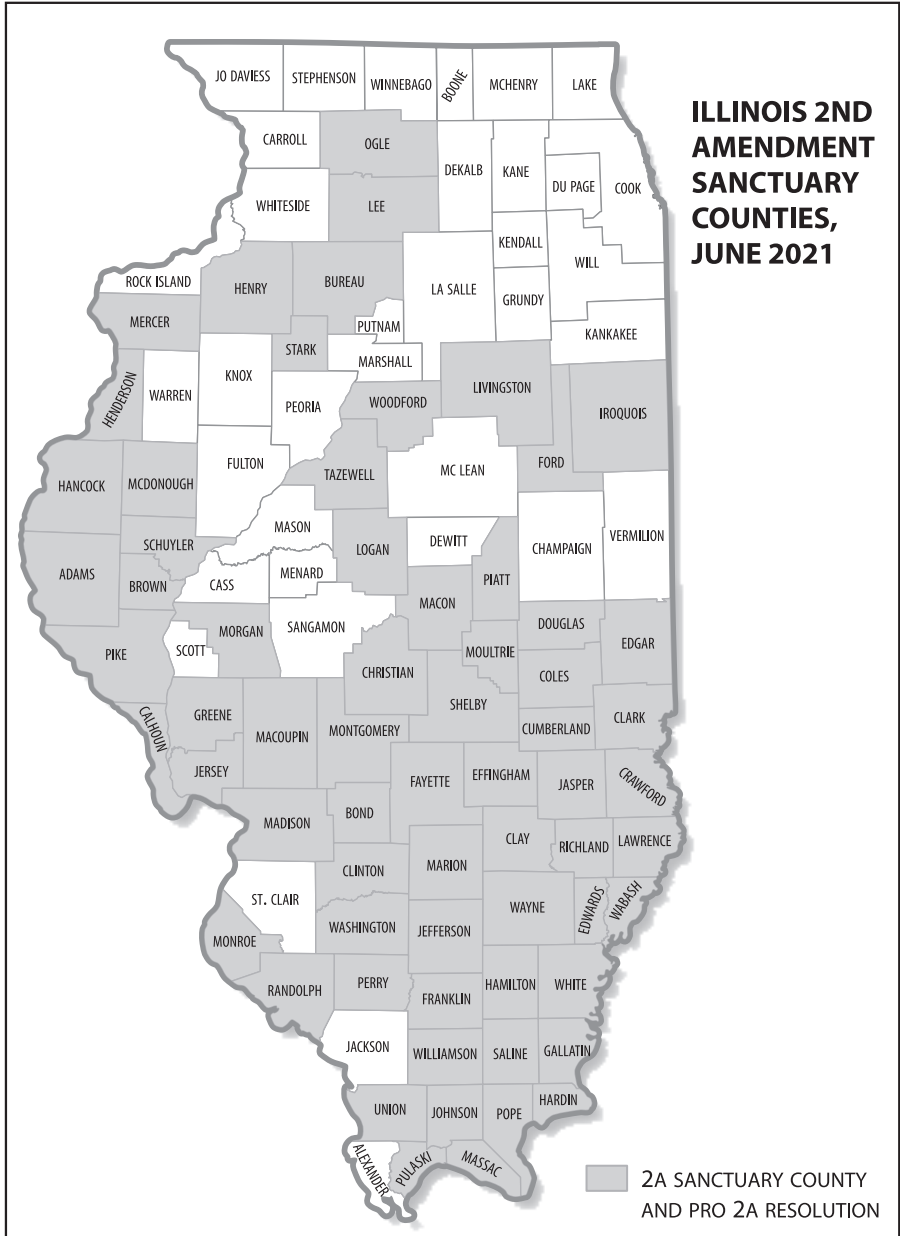


Figure 14. Map of Illinois gun sanctuary counties. (Source: [www.sanctuarycounties.com](http://www.sanctuarycounties.com) and Robert Cronan.)

These are concurrent nullification efforts without the provocative sanctuary moniker, though most use the “sanctuary” term after the Illinois downstate counties began to use it. It is tangential to the qualitative analysis for Illinois to detail the Second Amendment sanctuary movement further, but it is important to note that it started in Illinois as a “downstate” phenomenon, led by both parties, against the gun control efforts of moralistic Chicago. For those interested in an aggregation of data about the gun sanctuary movement, the website <https://sanctuarycounties.com/> has one, and their map shows that a swath of middle America has passed Second Amendment resolutions.

In summary, on the opinion divide, that Chicago is the economic powerhouse of the state means that even above its larger population, its economy gives it greater political leverage. Chicago prospered as its location made it a transportation hub even before its central location made it an ideal hub for air travel in the twentieth century. Its position on Lake Michigan gives it access to the Great Lakes and a river system that feeds into the Mississippi River. The rivers of Chicago are thus constantly full of barge traffic, as moving product over water is cheaper than land or air, and the lock and dam system along the Illinois River systems facilitates this trade. Chicago’s ideal location means it is a major industrial and population center in the state of Illinois. According to the census, Chicago had about 2.7 million people in 2018; for the collar counties area, due to the suburbanization of the city proper via rail and car, the Chicago metropolitan area has about 7.5 million people, excluding the portions of southern Wisconsin (Kenosha) and northwestern Indiana (Gary). Given that the whole state of Illinois has about 12.8 million people, it means that Chicago is the political and economic heart of Illinois, even though it has been in somewhat of a state of decline as high property taxes and low economic opportunity have residents leaving Chicago, and Illinois, more than any other state in the union (Eltagouri 2016).

This high population relative to the rest of the state means that Chicago, via majority rule, usually has its way in the capital of Springfield over downstate opposition. But the same issue that plays out nationwide also plays out in Illinois, where lower population density regions have greater proportional representation in the upper and lower houses in the legislature. As Elazar notes, even though Chicago has one-third of the population and the majority of the economic power, southern and central Illinois political leadership has sought and gained constitutional concessions for their group. Still, the Chicago vote pretty much has to be overridden by the rest of the state working together, and guns are one of those few issues where it can happen, like the “DeMar law.” In 2014, Republican candidate for governor,

Bruce Rauner, won every county in Illinois except Cook County, where Chicago resides, with just 50.3 percent of the vote to his opponent's 46.4 percent. The Democratic Party in Illinois is particularly strong under the leadership of Speaker of the House Mike Madigan, who has been speaker since 1983 (apart from a short spell in 1995–1997 when Republicans took over the state assembly). His long term in office and the institutional power he wields (Gove and Nowlan 1996) means that downstate Democrats, who may oppose Chicago Democrats on cultural issues, still tend to vote in a bloc with their northern peers on other policy matters.<sup>1</sup>

The political culture history of Illinois sets the table as to why there is a distinct Chicago/downstate split of opinion on many issues, including guns, which plays a prominent role in what happens when we process trace events.

### Testing the Dynamic and Constrained Court Theories in Illinois

Before we test the Constrained Court Theory in the state, note that not all aspects of the Constrained Court Theory require testing at the state level. For instance, even while Illinois takes a unique place in this test, as the Second Amendment was incorporated through a case related to municipal handgun bans, there does not have to be an analysis of the legal precedent for the doctrine of incorporation itself. Therefore, we do not have to test  $H_1$ , that social change will not occur without ample legal precedent. It is still necessary, though, to briefly discuss the doctrine of incorporation as it applies in this case as part of the process tracing of testing the Constrained Court Theory on the topic of guns, because much of the history of incorporation deals directly with the right to keep and bear arms.

Additionally, as in Washington, D.C., and nationwide, there is no situation in which the implementation of *Heller* or *McDonald* led any officials to implement any decision to gain resources. This is partially due to the nature of the decisions, which only removed handgun bans and restrictive storage laws and did not lend themselves to the use of incentives, but also because there have been no situations where officials from the federal or state government offered another jurisdiction budgetary funds to expand the right to keep and bear arms. The only time incentives come into play for *Heller* and *McDonald*, in the national-level analysis, is when arms and related busi-

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1. As this book was undergoing its final edits, the news broke that Michael Madigan was indicted on federal racketeering charges. He had stepped down in January of 2021 after a bribery scandal.

nesses chose to move, or not, to jurisdictions that have a political climate favorable to the enterprise. At the outset, this situation does not occur in Illinois, and it only could occur in the wake of the increased cost of state-level gun dealer licensing possibly leading to some dealers choosing to close their businesses (Lauterbach 2019).

## Incorporation

Hours after *Heller*, the NRA, the Second Amendment Foundation (which sponsored *Heller*), and the Illinois State Rifle Association filed separate lawsuits seeking to overturn the handgun bans in Chicago and several of its suburbs. The *Heller* decision, coming out of the D.C. gun ban, applied only to the federal government. To test the Constrained Court Theory for Illinois, a court decision would have to apply the Second Amendment to Illinois as a state. The *McDonald* decision overrode the Seventh Circuit that had upheld the Chicago handgun ban. It also overrode an Illinois Supreme Court decision that ruled that the Illinois state Bill of Rights' protections, which reads, "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed" did not preclude handgun bans. The Supreme Court had already explained its legal and historical reasoning for ruling that the Second Amendment protected an individual right in *Heller*. Therefore, the majority of *McDonald* consisted of debate about the role of the Second Amendment vis-à-vis the Fourteenth Amendment. In a 5-4 decision, the Court held that the individual right to keep and bear arms in the Second Amendment was incorporated and applicable to the states through the due process clause of the Fourteenth Amendment.

Just a bit more of background on incorporation; it is a court doctrine by which the Bill of Rights is made applicable to the states through Supreme Court decisions, and almost all of the protections in the Bill of Rights have been made applicable to the states over the years. While most legal scholars say that it was the *Slaughter-House Cases* (1873) that the Supreme Court used to nullify the Fourteenth Amendment until the Court started to reverse itself in the twentieth century, there is another nineteenth-century Second Amendment case that bears on the incorporation doctrine, and that is *United States v. Cruikshank* (1875), which explicitly deals with the right to keep and bear arms. As Robert Palmer (1984) writes, "*United States v. Cruikshank* accomplished the nullification of the Fourteenth Amendment that scholars traditionally attribute to *Slaughter-House*."

In Reconstruction Louisiana, federal prosecutors brought charges against

white defendants who were accused of violating the rights of free blacks. In a situation where no one's hands were clean, after an 1872 election in the state in which two separate groups, one Union, another racist and segregationist, declared victory and that they each respectively were the official government of the state, armed atrocities were committed by both sides in the violence that followed. Klansman William Cruikshank was found guilty by the trial court of violating federal civil rights laws, including ones protecting the rights of freemen to keep and bear arms. When Cruikshank appealed, his case eventually made it to the Supreme Court, where the Court ruled those laws unconstitutional. The Supreme Court came to this decision by saying that the right to keep and bear arms in the Second Amendment was not a right created or even granted by the Constitution, but a pre-existing right from natural law.

*Cruikshank* was overturned in *DeJonge v. Oregon* (1937), in which the Court stated that the right to assemble peaceably as found in the First Amendment indeed was guaranteed to be protected against state encroachment by the Fourteenth Amendment. Given that the 1937 case was directly contrary to *Cruikshank*, there has not been any use of *Cruikshank's* line of case law or legal reasoning in modern Second Amendment litigation.

Technically, the Supreme Court did not rule on the constitutionality of the Chicago gun ban; instead it reversed and remanded the case for additional proceedings, but the Court's position on the Second Amendment made it clear that handguns bans are unconstitutional. In the same manner that *Heller* left latitude for permissible regulation, the Court stressed that the right to keep and bear arms was not unlimited. Again, and importantly for later discussion on this matter, it did not rule about the right to keep and bear arms outside the home or on assault weapons and large-capacity magazines. Meanwhile, the dissenting justices argued that the right to keep and bear arms was not "fundamental" and therefore states and localities could regulate guns at will, as well as that the *Heller* decision itself was incorrect and in leaning on a wrong decision, the Court was coming to a wrong conclusion on the Chicago and Oak Park handgun bans.

### Implementation of *McDonald* in Illinois

- $H_{3b}$ : Negative incentives are used to override opposition.

In the order that things occurred, we have to skip ahead to hypothesis  $H_{3b}$ , negative incentives, because when process tracing the implementation of

the Supreme Court's *Heller* decision, negative incentives were used first to increase the level of keeping and bearing arms in Illinois even before any legislative action and indeed even while *McDonald* was working its way through the court system. Through threat of litigation by nonprofit advocacy organizations, most notably the NRA but also the Second Amendment Foundation and the Institute for Justice (Winkler 2013), the Supreme Court was quickly able to make social change. This litigation and threat of litigation increased the keeping and bearing of arms because after *Heller*, the Chicago suburbs of Wilmette (not named in the lawsuit) and Morton Grove quietly repealed their handgun bans. Wilmette's board voted 7-0 to repeal the ban (Puryear 2008), with Trustee Lali Watt saying of the lawsuits, "This certainly is not a battle we can win in Wilmette" (Kuczka and Dardick 2008). The board of Morton Grove specifically said the potential for costly litigation was the reason for their 5-1 vote to repeal the handgun ban (Chanick 2008). Evanston's city council voted 7-1 to repeal their ban, also giving their reason for doing so as avoiding lawsuits, as it was one of the municipalities that the NRA filed against (Cox and Horan 2008). "Quite honestly, we cannot afford to fight for principle at this point when the law is against us," said Alderman Steven J. Bernstein, Fourth Ward (NRA-ILA 2008). Another suburb, Winnetka, voted unanimously to repeal its handgun ban after the NRA and three residents filed a separate lawsuit in 2008. Village Council president Edmund Woodbury said, "The council voted unanimously to repeal the sections in our ordinance that had been the subject of the lawsuit by the NRA. The village has a significant financial risk in keeping the ban in place, and given that, we felt it best to allow the national debate on this subject is [*sic*] settled" (Black 2008).

Chicago stuck to its guns. Mayor Richard Daley vowed to fight to keep the handgun ban. Oak Park, relying on the deep pockets of Chicago, rode along with them, and only these two respective handgun bans were part of the *McDonald* decision.

After the Washington, D.C., ban was struck down last year, Chicago assured neighboring Oak Park . . . officials there could count on Chicago for help. "All of the issues in the Oak Park complaint are (covered in) the Chicago complaint, and Chicago indicated that if we lost and there were attorney's fees on these issues that they would not seek a contribution from the village," said Ray Heise, Oak Park's village attorney who wrote the suburb's ordinance. (*Peoria Journal Star* 2009)

It is not known if the City of Chicago reached out to those other municipalities like it did Oak Park, but it is doubtful Oak Park would have kept the ban in place if it had had to pay its own legal fees. Even so, litigation and the specter of litigation led to a repeal of handgun bans in the suburbs of Morton Grove, Wilmette, Winnetka, and Evanston two years before the *McDonald* case was even decided. This is real, on-the-ground, tangible change that can be directly tied to the Court. These changes occurred even before the Second Amendment was incorporated and through the use of negative incentives. Again, H<sub>3b</sub> is that negative incentives are used to override opposition to an expansion of citizens' ability to keep and bear arms. The respective suburbs were, in effect, cowed by the threat of negative incentives of the lawsuits brought to bear by deep-pocketed nonprofits with lawyers.

In this concrete, albeit small, example, the Court was indeed able to make social change, which can be directly tied to it and not a secondary effect of some sort, although not significant in the sense of the Constrained Court Theory. The officials in question in those municipalities were not inclined to repeal their bans; they could have done it at any point in the proceeding thirty or so years, and some of them also passed assault rifle bans between their handgun bans and its eventual repeal, further limiting the keeping and bearing of arms. Still on the books is Oak Park's 1994 ban on various types of assault weapons (Oak Park Code n.d.). Similar bans were passed in the suburbs of Evanston, Buffalo Grove, Schaumburg, Aurora, Deerfield, and Chicago itself (Alroth 1994; Kopel 2018), all of which were an imitation of the federal ban. The suburb of Highland Park even passed it after the state of Illinois passed the concealed carry law (Babwin 2013). The Deerfield assault weapons ordinance was passed in 2013 in anticipation of a statewide assault weapons pre-emption law, and it was significantly expanded in 2018. This 2013 pre-emption law, Illinois statute 430 ILCS 65/13.1, only applies to assault weapons, and it grandfathers in existing municipal ordinances and allows them to be amended. It says, "The regulation of the possession or ownership of assault weapons are exclusive powers and functions of this State." Any local ordinance or regulation that regulates the ownership or possession of such arms in a manner inconsistent with state law is thus void. Because Illinois does not prohibit the ownership of assault weapons, no local government may do so, again, unless the weapons ban was grandfathered in place.

Officials were not using the Court case as cover, as when officials simultaneously convince citizens they have no choice but to implement the decision and that implementation is a way to gain more resources. The Second Amendment had not even been incorporated at that point. The Supreme

Court ruled federal handgun bans are unconstitutional, and without even waiting for a ruling whether municipal handgun bans are unconstitutional, municipalities changed their ordinances, even while expanding gun control in the form of municipal assault weapons bans after *McDonald* in 2010, like in Deerfield. By comparison, imagine if *Brown* had been decided against the Board of Education in Washington, D.C., and applied only to federal schools, not Topeka, Kansas, and yet Topeka, Kansas, decided to integrate the schools so as not to get sued by the NAACP. These decisions to roll back the bans were no doubt because the Supreme Court was not, while it had the solid 5-4 conservative majority after *Heller*, going to leave the Second Amendment in limbo, unincorporated. Oak Park Village president David Pope said that the Court's *McDonald* decision "was not terribly surprising" (Stempniak 2010). With that in mind, the leadership of the suburban communities that repealed their handgun bans knew that a judicial repeal was only a matter of time and that the process of getting there was going to be expensive. Chicago, however, under the leadership of Richard M. Daley (1989–2011) and Rahm Emanuel (2011–2019) was more than willing to spend the necessary money to defend their gun bans.

### Not Backlash per se, but Resistance to Change

We have previously defined "backlash" as political damage to a social reform movement that results from litigation. While the phrase "backlash" is colloquial, the damage to a social movement from people responding to the push for social change from that movement is more aptly called "countermobilization." We must narrowly define our terms here, in that all politics is to one extent or another a form of mobilization or countermobilization. Specifically, backlash is social activists mobilizing to maintain the status quo, or in some reactionary cases to reverse the gains of the social reformers (activists) who sought to use the courts to enact significant social change in the first place. This is not the case in Illinois, in that there was no countermobilization; instead elected politicians already in power used their already marshaled forces to maintain the status quo as best they could. To compare this situation in Illinois to Rosenberg's other case studies, it is akin to the city of Topeka in *Brown* slow-walking racial integration rather than national activists getting several state constitutional amendments defining marriage as one man and one woman.

Similar to the city of Washington, D.C., Cook County, Chicago, and Oak Park politicians did not take the *McDonald* decision lying down. In



the case of Oak Park, they initially said they were going to fight back to keep as much of their laws in place as possible. Oak Park looked to D.C.'s route to perhaps create a handgun registry, require handgun safety courses at area shooting ranges, and require the secure storage of guns that are in homes with children. In the end, Oak Park did none of those things. The village code still has its 1994 assault weapons ban and did not expand its gun control ordinances. The threat of litigation did not deter the suburb of Deerfield. As per the state assault weapons pre-emption law that allows for the amending of existing laws, on April 2, 2018, Deerfield substantially amended its assault weapons ordinance to make it much more restrictive. The change banned magazines that held more than ten rounds, expanded the definition of what was an assault weapon, and prohibited the possession, transportation, bearing, and sale of assault weapons. All residents who had such arms were required to turn them into the police after June 13, and the penalty was \$1,000 a day for noncompliance. This move obviously triggered a lawsuit, and the Lake County Circuit Court held that the ordinance violated a state pre-emption statute and blocked it with a temporary restraining order (Kopel 2018). As of September 2018, there were two parallel cases regarding this ordinance, 18CH498 and 18CH427. In March 2019, the Lake County Circuit Court issued a permanent injunction, blocking the enforcement of the ban, and village officials were exploring options to appeal (*Daily Herald* 2019).

Chicago has never backed down. The day after the Court decided *McDonald*, the city met to explore legislative responses, and in public hearings it sought testimony from a range of expert witnesses (legal and academic), law enforcement officers, community organizers, and gun control advocates. The result of these hearings was the collective decision that the city should regulate firearms possession and firearms-related activity to the largest extent possible and still be in compliance with the Court. As was noted in the nationwide test of the Constrained Court Theory, if the Court is going to create social change, it is not enough to make firearms legal to own. Their use must not be regulated or taxed out of existence such that excessive regulations will reduce the keeping and bearing of arms.

After four days of hearings, Chicago adopted the Responsible Gun Owners Ordinance that prohibited possession of a handgun outside the home and the possession of a long gun outside the home or the owner's fixed place of business (effectively preventing transport of a gun for all those who use public transportation), prohibited the sale or transfer of any gun except through inheritance or between peace officers, provided that a person may not have more than one operable gun in their home at any one time, banned

assault weapons and certain firearm accessories and types of ammunition, and created an elaborate permitting regime for each individual firearm (each one of which had to be registered). There were various other qualifications for permits, such as being over twenty-one years of age for handgun permits, which were in alignment with long-standing qualifications in federal law. But there were also new and novel disqualifications, such as for a second drunk driving offense. To obtain a permit, a citizen had to attend a four-hour training course, one hour of which had to be live-fire training. Yet the city simultaneously, in the same ordinance, prohibited the discharge of any firearm within the city limits, making sure there would be no publicly available shooting ranges in the city. Meanwhile there were private or government ones for law enforcement training, eleven in all among federal, state, local, and private security companies.

Granted, someone in the city could drive to one of the shooting ranges in unincorporated Cook County or in another jurisdiction for the training, but in the case *Ezell v. Chicago* (2011), which challenged the prohibition on firing ranges open to the public, Chicago introduced evidence that there were fourteen public firing ranges within fifty miles of the city, seven were within twenty miles, and five were within five miles. There was still, however, a total ban on the buying and selling of guns within the city and what amounted to substantive ban on guns by requiring live-fire training in a city that did not permit gun ranges open to the public.

When the case regarding this legislative catch-22 came to the Seventh Circuit, even though *Heller* and *McDonald* did not give an appropriate standard of scrutiny for evaluating Chicago's ban on ranges, the Seventh Circuit distilled First Amendment doctrine on issues like the location of adult bookstores to come to their decision. Since the Seventh Circuit noted that Chicago produced zero empirical evidence that appropriately run public ranges are a danger, they should be allowed. Judge Rovner's concurring decision to *Ezell*, which called Chicago's Responsible Gun Owners Ordinance "too clever by half," (53) said:

The ordinance admittedly was designed to make gun ownership as difficult as possible. The City has legitimate, indeed overwhelming, concerns about the prevalence of gun violence within City limits. But the Supreme Court has now spoken in *Heller* and *McDonald* on the Second Amendment right to possess a gun in the home for self-defense and the City must come to terms with that reality. Any regulation on firearms ownership must respect that right. (60)

While the ban on gun ranges was resolved in federal appeals court, the ban on gun sales was resolved a few years later at the district court level in *Illinois Association of Firearms Retailers v. Chicago* (2014), which based much of its decision on the aforementioned *Ezell* case.

In sum, given the rigorous showing that *Ezell* demands, the City has not demonstrated that allowing gun sales and transfers within city limits creates such genuine and serious risks to public safety that flatly prohibiting them is justified. If the City is concerned about reducing criminal access to firearms, either through legitimate retail transactions or via thefts from gun stores, it may enact more appropriately tailored measures. Indeed, nothing in this opinion prevents the City from considering other regulations—short of the complete ban—on sales and transfers of firearms to minimize the access of criminals to firearms and to track the ownership of firearms. But the flat ban on legitimate sales and transfers does not fit closely with those goals. (35)

Chicago responded to the ruling by changing its ordinance to allow gun sales, but with numerous burdens on would-be owners such as severe zoning restrictions on gun stores, extensive paperwork requirements beyond federal ones, and a mandate to video-record every sale. The latter two requirements were later put into place state-wide by Governor J. B. Pritzker in 2019. A Google Maps search as of January 27, 2018, revealed that there were no gun shops in the city, and only three concealed carry training academies, at least two of which have indoor ranges. By April 18, 2020, there were only two gun stores with Chicago addresses. It is perhaps that the market does not call for gun stores within city limits (the 2018 Google Maps search revealed nineteen in close suburbs), but it is equally likely that the city's ordinance also has the intended effect of reducing the keeping and bearing of arms by city residents.

- H<sub>2</sub>: Social change will not occur without support from substantial numbers of members of the legislature and the executive.
- H<sub>3</sub>: Social change will not occur without support from some citizens or low opposition from all citizens.

There is no neat and clean division to test each of these two hypotheses independently, as when the narrative is process-traced out, both of these are intertwined when discussing the split of opinion between downstate Illinois and Chicago and the interposition of the Seventh Circuit's decisions.

A pair of lawsuits from 2011 encapsulate the political culture divide in Illinois in the same way as the “DeMar” incident had done regarding the Waukegan handgun ban, which resulted in downstate traditionalistic/individualistic politicians overriding the moralistic concerns of northern Illinois to make self-defense in the home with a handgun legal whether there is a local ban or not. Around 2011, Illinois was the only state in the nation not to have some form of concealed carry, after Wisconsin had passed a concealed carry law in July of that year. Not long after *McDonald* was decided, Mary Shepard of the Illinois State Rifle Association, who was the victim of a violent attack, filed a lawsuit against Lisa Madigan in her capacity as attorney general of Illinois. Also in 2011, Michael Moore, working with the Second Amendment Foundation and another advocacy group IllinoisCarry, did likewise. Moore was a retired Cook County sheriff’s deputy who was possibly eligible to carry a concealed weapon with a permit under the federal Law Enforcement Officers’ Safety Act (LEOSA). As a retired Cook County sheriff’s deputy, Moore needed a permit from the agency he retired from in order to carry under the auspices of the LEOSA, but he was denied by the Cook County sheriff because he was a corrections deputy rather than a highway patrol deputy. After being denied, he sued as well.

Both cases eventually made their way to the Seventh Circuit and were merged into *Moore v. Madigan*. In a 2-1 decision, Judge Richard Posner, writing for the majority, noted that while self-defense outside the home is not part of *Heller* and *McDonald*, the distinct use of the words “keep and bear” in the Second Amendment mean that some provision must be made for bearing, or carrying, arms outside the home. Therefore the state of Illinois’s complete prohibition on all forms of carry outside the home did not meet intermediate scrutiny. This precedent led to some wonky results later in California in the Ninth Circuit, where limited forms of “open carry” are allowed under state law. The Ninth Circuit therefore says that the “bear arms” portion of the Second Amendment is not being denied, but they also say that California’s “may issue” permit system meets intermediate scrutiny even though permits are almost never granted in some counties. This we will discuss in the chapter on California, but in regard to Illinois, an injunction was put in place by the Seventh Circuit giving the state of Illinois 180 days to come up with some form of carry law.

Not surprisingly, Chicago mayor Rahm Emanuel and some alderman vowed to fight the decision, and various aldermen expressed support for using Illinois state law, which allows for home rule and for various municipalities to set their own gun laws. This would have been to their profit because it would have given their city discretion as to who does or does not

get a permit (Babwin 2012). As discussed in the national-level testing, many states have firearms pre-emption laws that prohibit cities and counties from setting their own firearms laws. Supporters of such laws say it allows for a unified standard throughout the state, preventing a profusion of municipal laws that could be confusing to citizens and that perhaps violate a sense of fairness since some items or acts could be illegal in one city and legal in an adjoining city. Detractors say that pre-emption laws do not allow local jurisdictions the flexibility to regulate firearms based on their local needs and desires, and their arguments largely mirror support for zoning regulations. Illinois has no pre-emption law except for the aforementioned one on assault weapons, leaving handgun regulations up to home rule cities, municipalities, and counties.

Depending on the product of the Illinois legislature as it responded to the Seventh Circuit, Cook County, or even Chicago, conceivably could have been given the ability to regulate concealed carry as they saw fit, depending on whether a “shall issue” or “may issue” concealed carry had passed out of the legislature. California, for example, gives the county sheriff final determination on the granting of a permit, and permits are easier to come by in rural portions of the state than in urban areas like San Francisco (Drange and Smith 2015), a city which voted in 1982 and 2005 to ban handguns (both times the bans were later thrown out in state court). The rest of Illinois might have allowed Chicago politicians that leeway during the crafting and passage of the final law, but it did not.

As the 180-day injunction timer ticked down to zero, an en banc rehearing of the Seventh Circuit’s decision affirmed it. Attorney General Lisa Madigan appealed to the U.S. Supreme Court and was denied certiorari because the issue was moot by the time the Court reviewed it. By that point Illinois had come to a compromise between Chicago and downstate in the creation of a concealed carry law in 2013. If the timer had run all the way out, Illinois would have had “constitutional carry,” basically the largely unrestricted concealed carry as exists in Vermont and other “permitless carry” states. It almost came to that, as the *Moore v. Madigan* decision came December 11, 2012, and Governor Pat Quinn’s veto was overridden and the concealed carry law passed on July 9, 2013, some 210 days later. But it did not exceed the 180-day injunction due an appeal from Lisa Madigan on June 9 for more time (Garcia 2013). Either way, even after passage of the law, it was another year before the first permits were issued, as the state had to set up a new bureaucracy to process applications through the state police. The legislation tied the hands of the state’s executive branch, giving it 180 days to finalize the application process and begin taking applicants.

In Illinois, as we have seen with the “DeMar law” and the passage of a concealed carry law, guns are one of the cultural issues where downstate Democrats will cross party lines and vote with Republicans. It is also an area where the Speaker of the House Mike Madigan, the father of the aforementioned attorney general Lisa Madigan, who exerts domineering control over the Democratic Party in the legislature, is either unwilling or unable to whip his party into unity. The final concealed carry bill was sponsored by Harrisburg representative Brandon Phelps, a Democrat. Harrisburg is below the Mason-Dixon Line, is only one county away from the border with Kentucky, and is a traditionalistic county based on Elazar’s discussion of how the state was settled.

The final law is clearly a product of legislative sausage making and is generally more restrictive than many other states, even though it is “shall issue.” Unlike other states, concealed carry is prohibited on mass transit, such as buses or Metra trains. It is also prohibited in schools and restaurants where more than half the business is alcohol sales. That latter rule is designed so a citizen can go to a restaurant like a steakhouse and not consume alcohol, but not a bar even if they did not consume alcohol. It also prohibited carry within one thousand feet of a school or within one thousand feet of a public park. The prohibition on carrying in parks was changed by an Illinois Supreme Court decision (*People v. Chairez* 2018) when the state court applied elevated intermediate scrutiny to the park prohibition and where the government could not demonstrate that such a prohibition served a strong public interest when it had no evidence that prohibiting concealed carry in parks protected anyone from gun violence. The *Chairez* court decision specifically called out Chicago:

But the State conceded at oral argument that the 1000-foot firearm restriction zone around a public park would effectively prohibit the possession of a firearm for self-defense within a vast majority of the acreage in the city of Chicago because there are more than 600 parks in the city. Aside from the sheer number of locations and public areas that would qualify under the law, not only in the City of Chicago, but throughout Illinois, the most troubling aspect is the lack of any notification where the 1000-foot restriction zone starts and where it would end. (21)

What is also interesting is that the administration of the state’s Republican governor at the time, Bruce Rauner, defended the law as written. Then again, Governor Rauner was a moderate who later signed into law gun con-

trol, and Mr. Chairez's situation was not that of an activist, but someone who filed a postconviction petition seeking to vacate a guilty plea to possession of a firearm at a park in Aurora, Illinois, on the basis that the statute was unconstitutional. On the precedent of *Chairez*, later that same year, the one-thousand-foot prohibition on guns near schools was struck down by an Illinois appeals court in *People v. Green* (2018). Green was a uniformed security guard with a gun who was reported to the police by a school's assistant principal after he was spotted across the street from the school in an unmarked private vehicle. The Court agreed with Green's contention that the statute under which he was convicted was unconstitutional, even though they supported the prohibition on guns in sensitive places such as schools, noting such carry prohibitions were in the dicta of *Heller*. They removed Green's felony charge and asked the legislature to engage in an evidence-based approach, taking particular issue with the vagueness of the idea of an unmarked perimeter of one thousand feet. The Firearm Concealed Carry Act (430 ILCS 66/) still prohibits the carrying of firearms in the building, property, and parking areas of schools; likewise federal law generally bans firearms within one thousand feet in all directions of school grounds.

For Illinois, there is also a significant amount of training required for the permit relative to states that also have permit requirements, such as Virginia or Wisconsin. Obtaining the Illinois permit requires sixteen hours of training (eight for military veterans) and a live-fire course where a marksmanship test must be passed. By comparison, Virginia and Wisconsin do not require training for veterans and have no live-fire course, and the training requirements are not spelled out in hours, although the classroom courses usually last one full day. There is also a \$150 fee in Illinois, which is high compared to states like Texas, where the permit is \$40. Some of the high fee cost is to pay the roughly \$25 million per year that the bureaucratic permit system costs to operate, and some of it may be a deliberate choice to act as a barrier to limit the keeping and bearing of arms. For example, California has a \$300 fee for its "may issue" system, one of the highest in the nation. But, given that the permit system was also designed to make a profit of about \$20 million for the state (Heinzmann, Garcia, and Gorner 2013), the high price may also be in part due to Illinois's poor financial status at the time of passage.

In the end, the individualistic and traditionalistic downstate politicians were able to act collectively to override the moralistic Chicago and collar county politicians, and this only happens when downstate acts collectively and when there is support from substantial numbers of the legislative branch of Illinois and support from a majority of citizens. Only then was significant

social change for more keeping and bearing arms by way of the concealed carry law able to come to Illinois. Note the partial refutation, in this example at least, of Hypothesis 2, that social change requires the support of the executive. Illinois governor Pat Quinn was an opponent of concealed carry and vetoed one bill to try to push for a system of local control over permits (and thus a more restrictive system). He had that veto overridden by the legislature, which is sign of significant popular public and legislative support and a sign that if it is high enough, the executive is not needed.

### Conclusion on Illinois

The results of the Illinois case study affirm the Constrained Court Theory. Significant social change did not occur through the courts. Consistent with that finding, it also shows that courts do matter in that they were used as leverage with negative incentives and by a supportive legislature to bring concealed carry to the last state in the union to get it. While Rosenberg's Constrained Court Theory does cover negative incentives as a means for officials to implement the Court's decision, it would be a stretch indeed to say that this universally applies in this case. There is continuing litigation. The overarching picture, however, remains, and that is that Chicago seeks to implement the Supreme Court's, the District Court's, and the Seventh Circuit's pro-gun decisions to the minimum extent possible (and indeed create alternative restrictions) and will likely continue to do so unless its moralistic/individualistic culture is somehow shifted, perhaps by in-migration of traditionalistic residents or out-migration of moralistic residents. Likewise, there are numerous and ongoing lawsuits such that this book would be quickly outdated if I tried to detail them.

Nevertheless, the key court cases have been indicated and prominently featured. The fact is that Chicago and Cook County, with their deeper pockets, said that they were going to maintain as much of their pre-*McDonald* status as they could, and that they meant it, have continued to mean it, and have largely succeeded. Like Washington, D.C., Chicago took active steps to thwart the will of the courts. In some situations, such as the statewide concealed carry law, we see byplay between the moralistic Chicago and the individualist/traditionalistic rest of the state. There is a clash of political cultures. But when it is just Chicago restrictions in place for Chicago residents, the rest of the state is either unwilling, undesirous of, or just plain unable to override Chicago's ability to govern itself as it sees fit with regard to firearms.

For the state of Illinois, there has clearly been increased keeping and



bearing of arms via the Court's decisions, but only because downstate individualistic/traditionalistic politicians could override the moralistic concerns of Chicago and the close-by metropolitan area. Let us say that courts are a sideshow, as is a straw man argument that is often put up by the strongest proponents of the Constrained Court Theory, the mechanism by which downstate is able to impose its will on Chicago and its ilk has been the leverage of a court decision. In Illinois, increased keeping and bearing arms did not come about from the legislature alone, aside from the "DeMar law" and an unremarkable and barely noticeable rollback of the state's switchblade ban not worth detailing; it came about because the courts gave the elected branches a crowbar to act, via *Heller*, via *McDonald*, and via lower courts, particularly the Seventh Circuit, which faithfully acted on the precedent of *Heller* when it decided *Moore v. Madigan* (2012). Additionally, it was the Illinois state Supreme Court that removed a compromise portion of the concealed carry law that banned guns within one thousand feet of parks and schools. The Seventh Circuit's 180-day injunction was particularly wily, given that the judges must have known that it takes years for such lawsuits to make their way through the system. The defenders of the state law banning concealed carry pushed forward with appealing the decision to the Supreme Court, and even if certiorari had been granted, without a stay put in place Illinois would have become a permitless carry state in the meantime, making it more difficult to reimpose a prohibition against concealed carry even if the Supreme Court had decided against the decision. Given the 5-4 pro-gun majority on the Supreme Court at the time, even if it had taken the case, they more likely than not would have sided with the Seventh Circuit that some form of "bearing" arms must be allowed under the Second Amendment.

Out of fear of litigation, even though the *Heller* decision did not apply to the state at the time, all the suburbs but Oak Park repealed their handgun bans, even though they were largely moot in that the individualistic/traditionalistic downstate had made their bans inapplicable in cases of home self-defense years earlier. Officials in Oak Park, free-riding on the legal resources of Chicago, waved the white flag after *McDonald* and incorporation. This surrender left Chicago as the only unit of local government to actively fight against implementation of *McDonald* and the spirit of *Heller*, which is increasing the amount of keeping and bearing arms. In Chicago, officials did not use the Court's decision as leverage to force its citizens to accept more keeping and bearing of arms, nor did the city use any positive or negative incentives; they actively repudiate them.

When it comes to testing the Constrained Court Theory, in Illinois,

Rosenberg's theory is mostly confirmed as modified that public support is not a dichotomous variable, where the public is either for or against the decision, and with the caveat that if the legislative branch's opinion is strong enough, there could be a veto override. This latter point may mean that there could be a respecification of Rosenberg's theory such that the support of the executive is not necessary if public and legislative support is high enough. But one example of the Illinois governor's veto of a concealed carry law being overridden is not enough evidence, especially since the override involved machinations about the best way for nonsupporters of gun rights to minimally accommodate the court decision through the use of home rule.

In Illinois, there is a range of support for *Heller* and *McDonald* depending on where you live in the state. As for the portions of the state where the decisions were popular, only when they act in concert can they create significant social change by overriding the majority rule of Chicago, and it helps, but is not necessary, if they have a court decision to leverage. This is true even if the executive branch is against the court decision, for the legislature was able to override Governor Pat Quinn's objections to the compromise concealed carry law to respond to the Seventh Circuit, as Governor Quinn wanted a more restrictive permitting system. Indeed, for Chicago and its close suburbs to lose their handgun bans, some even before they had to respond to a court decision against them, and for Illinois to go from the last state in the union with no form of concealed carry to a "shall issue" state with at least 200,000 concealed carry permit holders is indeed significant social change. But it is significant social change that occurred only because it was supported by public opinion in the majority of the state of Illinois, which used court cases as the reason to coalesce their power against the big fish in the small pond that is Chicago. In Illinois, courts matter, but they matter only at the margins and after public opinion is on the side of their decision, and then said decisions can be used to make social change.

## “Come and Get Them!” Texas and Guns

Texas was selected based on the results of the regression analysis and investigations about differing pre-existing conditions and these states' implementation of *Heller*. Texas lies close to the best fit regression line and conforms closely to the hypothesis that as a state becomes more traditionalistic, there is a lower level of gun control in the state. Also, Texas passed a significant amount of gun rights legislation after *Heller*. It is also the opposite situation of California, which passed significant amounts of gun control. This variation in political culture type and gun rights or gun control legislation is useful for confirming the causal mechanisms that link the independent variables and their outcomes, finding the specific ways and evidence in which political cultures manifest in political institutions, especially the elected branches that are acting as an intervening variable between the decisions in *Heller* and *McDonald* and their implementation.

### Texas's History Leads to Support for the Second Amendment

If Illinois is a geographic crossroad that led to an admixture of three types of political cultures, which in turn led to its bifurcated nature on the issue of guns, then Texas is a simpler case, despite its having more ethnic diversity and a more complicated history. Texas is an example of why Elazar's Political Culture Theory does a better job in explaining the proclivities of a state's governance than relying on pure political party, racial, or ethnic explanations.

Unlike in Illinois, however, where the political struggle for dominance between the traditionalistic-individualistic southern two-thirds of the state and the moralistic-individualistic northern one-third of the state is a defin-

ing characteristic of the politics of the state to this very day, the defining moment of Texas history is the Texas Revolution, and it was an actual war of cultures, where one side won and the other lost and the victor has been defining the state's future ever since. The difference between Illinois and Texas is that there is a dominant political culture that is also demographically the largest in Texas. Texas can be roughly divided down the middle as individualistic in west Texas, as the geography there never allowed for cotton agriculture (and thus no slavery) in the nineteenth century (and it was a true frontier), whereas east Texas has some of the best agricultural land in the world and was populated by settlers from the traditionalistic (slaveholding) South.

Throughout Texas history, the individualistic/traditionalistic blend has never had the animosity or dysfunction that a split of a moralistic political culture with any other political culture has had in Illinois. Given the other cultural history of the state that consistently has a unifying theme due to external threats, these two dominant political cultures meshed relatively well together.

## Origins of Texas

When Texas, or at least the general geographic region that we now know as Texas, was first explored by Europeans, it was through the Spanish, who never quite knew what to do with the province. There was the 1540–1542 expedition by Francisco Coronado looking for the seven cities of gold that ended up just being dusty Indian pueblos (Lace 1998). Spain largely left the place alone for the next 150 years and sparsely settled there. In the meantime, less friendly tribes such as the Apache and Comanche, also living in the region breeding Spanish horses, became some of the best mounted warriors in the world, an important point to remember when asking why Spain asked Anglo settlers from America (who would eventually take over the place) to settle the region.

When the French arrived in 1682, it was because their territory to the east, Louisiana, was nearby and because King Louis XIV had become convinced that he could conquer the few Spaniards who populated the region. His efforts were for naught. The famous Alamo—which will come to symbolize the battle, literal and figurative, between two cultures—was founded as a mission in 1718 in another Spanish attempt to convert local tribes (it failed) as well as provide a bulwark against the French. Meanwhile, the fierce Apaches and Comanches proved to be unconquerable by the Spanish and

were a continual threat to the existence of these missions as well as other settlements. Most were later abandoned due to the continual raiding. Given the failure of the Spanish to religiously convert even the less migratory native tribes and with the raids from the more warlike tribes, the whole area that would become modern Texas was virtually unpopulated by Europeans because at the time none were willing to settle it. Settlement only came later when armed Americans coming west took their chances.

Eventually, the French, due to the Louisiana Purchase in 1803, gave up their ambitions for the region, and so Spain, beleaguered by native marauders, again left Texas to its own devices. In 1820, Anglo-Americans were asked to settle Texas to provide a cushion to Spanish settlements further south and west from native raiders. Between 1810 and 1820, some Anglo-Americans (hereafter just Anglos) had already drifted into the region without permission (Campbell 2003).

The history of relations between Mexico (as they gained independence from Spain in 1821) and its Anglo settlers is complicated, but there are two overarching themes: The first is that one side lost and the other won. The second is that the conquerors became the dominant culture. While we may today think of Texas as a Hispanic state due to modern immigration from Mexico and South America, the fact is that Texas when it was taken over by Anglos had no real cultural stamp left on it by either Spain or Mexico due to their limited settlements in the region and because their influence, what little of it remained, was superseded by the demographic mass of the victors and those that followed them.

The Anglo settlers into Texas came west from the antebellum south and were, in Elazar's typology, traditionalistic. Traditionalistic culture is correlated with more keeping and bearing of arms. These settlers carried with them the legacy of limited government, elite rule, and racial hegemony that characterized Virginia and other southern states. The state today is traditionalistic and individualistic. A key point that needs to be made is that even though slavery and race play a large role in later Texas history, slavery played no significant part in the Texas Revolution, unlike the American Civil War. Slavery was illegal in Mexico under its 1824 constitution in name only; Mexico allowed indentured servitude with terms of ninety-nine years, with the indentured servants able to be bought and sold, and while Mexico had done things to upset the Anglo settlers over their slavery, they also did it in the context of other things they did at the same time to upset the settlers. Notably, they forced trade to be with Mexico instead of with America by way of a large tariff on goods heading east, put more political power under the central authority in distant Mexico City, forbade further American immi-

gration, settled Mexican convicts in Texas, and suppressed and imprisoned those who in the Anglo-American tradition petitioned their government for redress of grievances.

At no time did Mexico threaten to take away the Texans' slaves, and the differences between the two cultures on the slavery issue could best be described as a dull ache (Campbell 2012). When the Texas Revolution actually came, it was after prolonged disagreements between the two cultures had bubbled over due to Mexican dictator Santa Anna's mismanagement of the escalating tensions. Stephen Austin, who was instrumental in the Texas Revolution and is the man the city is named after, was thrown in Mexican prison after formally petitioning the Mexican government for redress of grievances. After his eventual release, he returned home and declared, "War is our only recourse. There is no other remedy. We must defend our rights, ourselves, and our country by force of arms" (Campbell 2012, 129; Texas State Library Archives 2011). Note he said these words "our country" while still technically a Mexican citizen.

The war itself was a short-lived but bloody affair, bloody not in terms of the magnitude of the death, but in term of the viciousness with which both sides engaged in the fight, with brutal massacres on the Mexican side of surrendered troops at Goliad, and the Texans sometimes refusing to accept prisoners in revenge for the Alamo and Goliad. It lasted from October 1835 to April 1836 and ended when General Santa Anna was captured hiding in a swamp after he and his troops were routed in the battle of San Jacinto. He had swapped his general's apparel for a private's uniform but was outed by his troops when they saluted him as he was brought to the American camp mixed in with other prisoners. He negotiated a peace that he repudiated as soon as he was back in Mexico, but his losses were such after the Alamo and other engagements that he was politically weakened enough that he had to focus on re-establishing his rule over Mexico, which had been effectively usurped in his absence.

To sum up the causes of the Texas Revolution, Mexico, wanting workers and farmers and people to fight their battles for them with hostile natives, invited Americans into the country. Not long into the process they realized they had made a mistake because the Anglos outnumbered them and had no desire to assimilate to Mexican values. Even though they were good enough Mexican citizens, they saw it through their own cultural value of individualism, which clashed with the Mexican value of hierarchy. Mexicans initially tried to suppress the Anglo individualistic culture and control future demography by restricting further Anglo immigration. Not surprisingly, they received pushback against their assimilation efforts from Americans

(for the Texans still viewed themselves as Americans) who had just fought a revolution against England for some of the very same abuses (as they saw them) perpetrated against them by Mexico. Mexico eventually found itself on the losing end of a civil war against the immigrants they had just invited in, who received material and logistical support from citizens just across the border in America, who saw themselves as Americans and not Mexicans despite the clear lines on the map. In short, the Anglos thought that their culture's right to live as they saw fit superseded Mexico's right to control its own borders and trade policies.

### Texas Gun Culture and Pre- and Postrevolution

The traditionalistic aspects of Texas are shown by the long history of one-party dominance in state politics, the low level of voter turnout, and social and economic conservatism, a consequence of the state's connection with the South. The individualistic nature of Texas can be seen in the support for private business, opposition to big government, and faith in individual initiative, which is a legacy of the state's frontier culture. The frontier culture and that Texas was born of revolution means that the state is particularly attached to its firearms, both literally as a means of that revolution and as a defense against native raiders, as well as the figurative ideal of a firearm as a symbol of independence and defense (Taylor 2009). Given that the disarming of the American colonists by the British was one significant precursor to the American Revolution (Halbrook 2008a), it is easy to see why firearms are important to a culture that is born of armed revolution.

At the start of hostilities, the Mexican forces marched north to confiscate the Anglos' weapons, which resulted in the first shot of the Texas Revolution being a cannon the Mexicans were attempting to claim. The story is remarkably similar to British attempts to disarm Americans when they marched out of Boston to seize the colonists' gunpowder, which resulted in the start of armed conflict in the American Revolution. Indeed, the first flag of the Texas Revolution was a white cloth cut from a wedding dress with a single star and a cannon painted on it (representing the very cannon that the Mexican forces were trying to seize), with the words "Come and Take It" written on it (Lace 1998, 29). Those words are a reference to the battle of Thermopylae, where reportedly King Leonidas I of Sparta said "*molan labe*," or "come and get them," to Xerxes I of Persia when Xerxes demanded that the Greeks surrender their weapons. "Molan Labe" is a modern gun rights motto; in 2018 the phrase "molan labe gun rights" yields 552,000 results in a Google search.



Figure 15. "Come and Take It" mural at the Gonzales Memorial Museum





Figure 16. Modern twist on the Texas “Come and Take It” flag

Granted, it is easy enough to say that hostile powers will naturally seek to disarm rebellious subjects; that has frequently been the case in history, but such actions also create a cultural meme that ownership of arms is therefore important among the rebellious should they actually win their independence, as Texas did.

### Texans’ Armed Society: Citizen Militias and Honor Culture

Texas was an independent republic for a full ten years before being annexed by the United States. During that time, one of the primary problems the citizens of this new country had was the raids of Comanches and certain other tribes, who, while it could be argued were defending their ancestral homeland against encroaching settlers, were also active aggressors who torture-killed adult male settlers, kidnapped children, and made war brides of the captured pioneer women. Naturally this did not endear them to the Texans, and in response the Texans committed reprisals. Keep in mind, at this time Texas was still sparsely inhabited, with only about “21,000 non-Indians” in population (Campbell 2012, 124), so a coordinated sweep of about five hundred warriors in 1836 from the Comanches, Kiowas, Wichitas, and Caddos (Campbell 2012) and another sweep in 1840 of about five hundred Comanche mounted warriors and another five hundred supporters through the state made quite the impact (Lipscomb 2016; Campbell 2012). They burned, looted, and raped their way across a large swath of Texas like a tiny Mongol horde.

Just because the Texas Revolution was over did not mean there was a peace between Mexico and Texas. There were semiserious on-again-off-again invasions by Mexico. Mexico never did recognize the new nation, and the fighting only stopped in 1843, some six years after the battle of San Jacinto, when Britain was able to broker a peace deal between the two powers. Again, such foundational situations contributed to the pro-gun legacy of Texas. As for the native attacks on Anglo settlers, such raids only end with a massive mobilization of resources from the stronger power, which is finally willing to fight a war of extermination or complete territorial annexation, in short "total war," in which civilian resources become military targets and where territorial occupation denies the enemy any safe harbor. It would not be the case until after the Civil War had been won by the Union and a nascent military-industrial complex capable of waging total war was directed at a target other than the Confederacy.

One other cultural aspect contributed to Texas's pro-gun mindset: honor culture. Honor culture is commonly defined as one where people avoid insulting others but simultaneously have a willingness to resort to violence after insults; "an armed society is a polite society," as the saying goes, though this is not always the case. Then and now, it is normal for men to go about armed in Texas. "Gentlemen carried a pistol, and either a revolver or a smaller derringer, and a knife, probably worn in leather sheath, as accessories" (Campbell 2012, 215). Before the fallout of dueling, "Gambling, horse racing, and drinking often sparked violent confrontations among antebellum Texans, many of whom needed very little provocation before reaching for their pistols and knives" (Campbell 2012, 229).

### Texas's Hierarchical Structure

It is important to note, while tracing out Texas gun culture, that the proclivity or even the legal right to keep and bear arms did not apply equally to all persons in and around Texas. Racial tensions are also the reason why Texas, despite its long history of keeping and bearing arms for defensive and cultural reason, lagged behind when the concealed carry movement began in the 1980s. Once full racial integration occurred in the twentieth century, there was no longer a need for concealed carry laws that on their face were intended to be racially neutral, but which had the intended effect of disarming blacks and Indians.

First Texas restricted, for obvious reasons, the arms trade with Indians. The Comanches obtained British-made weapons through direct and indi-

rect trade with Americans. The Texas legislature in 1836 made this trading illegal and broke up the trading posts (Rivas 2018), and they were following a long precedent going back to the founding of the United States of trying and failing (because the incentives were too lucrative) to prevent the trading of firearms with natives (Harsanyi 2018). It is impossible, however, to pass a law that will truly prohibit the spread of any object to those who want it and who are willing to pay good money to get it. The Comanches and other Indians were able to obtain arms, ammunition, and gunpowder (none of which they had the technological capability to produce on their own) through raids or illegal trade.

At this point in Texas history, it is not helpful to use the term “Anglo.” Hispanic residents of the new independent country, sometimes called Tejanos, were considered “white” when it came to their political rights, including that of keeping and bearing arms, unless they had enough African ancestry in them to look black; blackness at the time was legally defined as more than one-eighth black ancestry. And while there was ethnic tension at the start of the Texas Republic, in a practice going back millennia, the wealthy elite Hispanics married their daughters to wealthy men in the new Anglo elite. The process continued what was a gradual economic meshing already taking place previously under Mexican rule. Residents of Mexican descent in Texas and New Mexico were already falling into the orbit of the economy of the United States when political control changed, which most likely eased the transition (Resendez 2004). By amalgamating themselves, most were able to maintain their station (Campbell 2012). Anglo culture was the dominant one, although the Tejanos kept their own identity due to their Catholicism. There was also a large influx of Germans into Texas at the time as well as smaller groups from the Czech Republic, Slovakia, Austria, France, Scandinavia, Ireland, and Poland (Kearney 2014), and these groups were not “Anglo” in the sense of being former British colonists and their descendants, but they were European whites.

Again, while the circumstances surrounding the early years of Texas no doubt contributed to the desire of Texans to remain armed as a people, the state has had a checkered history when it comes to firearms in the hands of its residents, as the ability to own, much less carry, a weapon depended on where one was in the social hierarchy. If a traditionalistic political culture is hierarchical, then Texas was a perfect encapsulation of that prior to integration in the twentieth century. In antebellum years, free blacks were prohibited from owning or using guns, as they were not considered citizens.

Southern Americans in general, not just Texans, were understandably wary about any sort of arms usage by any group other than whites. Nat

Turner, a Virginian slave, led a short-lived rebellion in 1831 of free blacks and slaves that led to the slaughter of sixty white men, women, and children. Southerners also greatly feared a slave uprising like that in Haiti that took place from 1794 to 1804. During that revolt, a society deeply fragmented along racial, ethnic, and class lines completely fractured, and the most numerous group in the distribution, slaves, were led into a brutal, and ultimately successful, rebellion to overthrow their masters. Turner's rebellion and the Haitian uprising were also used as a reason to prohibit the migration of free blacks into Illinois during the debate around the 1848 state constitution, a measure that passed 50,261 to 21,297 (Berg 2002, 164).

Texas also had strict laws about when slaves could carry arms. The Slave Code of 1840 prohibited any slave from carrying a weapon "without written consent of his master, mistress or overseer" (Rivas 2018, 287). Any weapon carried without that permission could be confiscated by any white person, and to put a bite into the law, the slave's owner had to pay a \$10 bounty (about \$250 in 2018) to the one who confiscated it. There was a later attempt to ban all weapons being used by slaves, but the code was just amended to say that the slave could only have a weapon in the presence of a master or overseer because the residents of non-cotton-growing north and west Texas needed their slaves to aid in the defense from Indian raids.

Therefore, while Texas encouraged some residents to keep and bear arms, for reasons of collective defense against Indians raiders and the Mexican army, for reasons of individual self-defense, and for reasons related to honor culture, Texas simultaneously wanted to keep any group other than whites, where practical, disarmed. To that end, while the 1836 constitution of the Texas Republic did not have an explicit protection of the right to keep and bear arms, it only allowed citizenship to whites and former Mexican citizens: "All persons (Africans, the descendants of Africans, and Indians excepted), who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic, and entitled to all the privileges of such." Further, the document says that "all free white persons who shall emigrate to this Republic . . . shall be entitled to all the privileges of citizenship" and that "all persons of color who were slaves for life previous to their emigration to Texas, and who are now held in bondage, shall remain in the like state of servitude."

Texas is by no means the only place in which the constitution takes some circumlocution when it comes to citizenship and rights. Its constitution under the Confederacy, and the rest of the United States because of the *Dred Scott* decision, still ended up as explicit about who was a citizen and had rights and who was not a citizen and, therefore, merely a subject who did

not have rights. When we look, however, at the reaction to the election of Abraham Lincoln, after which Texas was convinced that the Constitution, with its roundabout protections of slavery, would not be enough to continue the practice, it and other slave states seceded and put in explicit protections for slavery in their constitutions.

### Texas into the Union, the Civil War, and Reconstruction

One of the primary reasons for American opposition to Texas joining the Union, aside from the expansion of slavery, was the fear that it would lead to a war with Mexico. The expansionist President Polk was willing to provoke such an event if need be, and he was able to override Whig opposition in Congress. Texas came into the Union as a full state in 1845. That Texas came into the Union as a full state was vitally important for the future of the state because unlike many other western states that started as territories with vast tracts of federal land they had no control over and still do not even to this day, Texas always had full control of its land and was able to exploit it fully to benefit itself economically. This led to, for example, the oil boom in the twentieth century. That Texas also owned its own land also made the system of Indian reservations on land set aside by the federal government impossible in Texas without the state itself setting aside the land, and it was only tried on a limited basis with native groups who were already less violent. Instead federal reservations for the tribes who were nomadic raiders were north of Texas in Indian Territory (Oklahoma). This fact greatly retarded the chance for some sort of peace between the two cultures, as the Indians would have to give up land claims inside of Texas.

The Mexican-American War was an overwhelming victory for the United States. In 1848, the Treaty of Guadalupe Hidalgo had Mexico cede its northern territories to the United States, which would pay compensation for the damage of the war and assume the debt owed the Mexican government to U.S. citizens. Joining the Union also had an immediate beneficial effect on Texas. It still had enormous debts from repeated militia campaigns against the Indian raiders, which were the largest budget expense during its ten years of independence. While Texas retained its debt as a condition of joining the Union, the U.S. Army built a series of forts in the state that provided both fiscal relief from endless militia callouts and a larger measure of physical safety than the Texas militia alone could provide. When Abraham Lincoln's election prompted secession, Texas voted wholeheartedly for it. Only a few counties in the German belt in the center of the state and a few that bor-

dered Indian Territory (Oklahoma) voted more than 50 percent against secession, the latter's logic being that they wanted to continue the protection of the U.S. Army against Comanche raids. The franchise had been extended in Texas to all white males, so despite the hierarchical nature of the traditionalistic system, the same people who had voting rights in every other state in the Union at that time supported secession, so going to war was not just the decision of the political elite. Moreover, the level of volunteering to serve in the Confederate army from all classes also showed their support for the Lost Cause. "In-depth studies of Texas units in the Confederate Army show . . . it was indeed a 'rich man's war' brought on by slavery, [and] a 'rich man's fight' and to a somewhat lesser extent a 'poor man's fight' as well" (Campbell 2012, 259).

While the evidence is quite clear that slavery was not a cause of the Texas Revolution against Mexico due to Mexico's tolerance of slavery and indentured servitude, it is equally clear that slavery was the primary cause of Texas's secession from the United States. The Declaration of Causes from the secession convention in Texas said that a great sectional party had formed in the North based on hostility to the southern states' system of African slavery. Furthermore, the 1861 Texas Confederate Constitution added an article preventing the legislature from having the power to emancipate slaves. Given that explicitness, it is hard to find any other primary driver of secession in Texas.

During the Civil War, Texas units served mostly out of state with great bravery and distinction, and in doing so paid a great price with the South's eventual defeat. As the old saw among historians studying the Civil War goes; "a Southern soldier," born and bred in an honor culture, and around firearms as a way of life, "was worth three Union soldiers" who were hastily trained grocers and shopkeepers. But, as the saying continues, "there were three union troops for every one Southern soldier." The lack of adequate marksmanship found among the average Union soldier upon joining the army was such that in 1871, former Union officers founded the National Rifle Association (NRA) to promote marksmanship training. The NRA did not get into politics until the 1930s.

Texas suffered less than the rest of the South during the war. Most of the fighting took place outside its borders. Despite repeated invasions the North was unable to occupy the state and state troops patrolled to protect residents from Indian raids in the absence of the U.S. Army. The Indians took advantage of the situation as the patrols were not as effective as the U.S. Army's system of forts. All told, Indians were responsible for killing or kidnapping about four hundred Texans during the war, but it was gen-

erally no worse than in antebellum days. Further, the Union blockade of the South did not prevent cotton and other goods from being traded back and forth with Mexico, and thus there were no bread riots like there were in Richmond, Mobile, and Atlanta. Due to its lack of Union occupation, slaveholders in the rest of the South sent some seventy thousand slaves to Texas during the war to prevent the Union army from emancipating them. At the conclusion of hostilities at Appomattox in 1865, most Texas troops just filtered home and tried to carry on a normal life. They were allowed to carry their guns with them and keep their horses as a measure of good faith based on Lincoln's policy of an easy peace. Slaves who were not freed at the end of the war were freed when federal troops arrived some months later for occupation of the conquered territory, for indeed it was conquered territory. The price of the rebellion was paid by the flower of Texas's white male youth, with the deaths to camp disease and battle of between twelve to fifteen thousand men, most in their twenties and thirties (about 50 percent of the white males); to put that in perspective, if one uses the 2000 census population numbers for Texas, that is about 540,000 men (Campbell 2012).

## Reconstruction

Reconstruction in Texas occurred in two phases, and these phases had a distinct relation to the right to keep and bear arms in Texas. In the first phase, President Andrew Johnson kept to Lincoln's policy of "letting 'em up easy," which had the practical effect that after the war the same men, or the survivors at least, who had led Texas into secession were back in charge of it. The postwar 1866 constitution that Texas passed to normalize relations with the Union was, of course, superseded in whatever state definitions of citizenship there were with the passage of the Fourteenth Amendment to the U.S. Constitution in 1868 (which Texas refused to ratify at the time), which on paper gave full and equal rights, to include to keeping and bearing arms, to freed blacks, who were explicitly given birthright citizenship in Section 1 of the Fourteenth Amendment, which reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The promise of the Fourteenth Amendment of an equal right to keep and bear arms for black citizens was denied again by both the end of Reconstruction due to the lack of federal troops to enforce it and later by the Supreme Court in *United States v. Cruikshank* (1875), as discussed in the chapter on Illinois.

It does appear, however, that Texas did in that 1866 document move toward a system in which the right to keep and bear arms applied to all. The right to keep and bear arms for citizens remained in the state's Bill of Rights identical to before secession, which read, "Every citizen shall have the right to keep and bear arms, in the lawful defence of himself or the State," and when added to Article VIII of the new constitution, entitled "Freedmen," which said, "Africans and their descendants, shall be protected in their rights of person and property by appropriate legislation," it meant that (on paper) all citizens of Texas had the right to keep and bear arms. The initial post-Civil War government, however, consisted largely of former Confederates, who passed Black Codes that essentially reimposed the antebellum hierarchy, although without slavery or the Slave Code in which a black man could not carry a weapon without his master or overseer with him. There was a way around this, of course. The 1866 legislature passed an act to prohibit the carrying of firearms on land owned by someone else without their permission. Given that virtually no freedmen actually owned any land and white landlords were reticent to give permission for blacks to have guns, it meant that freedmen were still *de facto* disarmed by law. But, as Professor Johnson notes in his work *Negroes and the Gun: The Black Tradition of Arms* (2014), those laws were frequently flouted.

The second phase of Reconstruction in Texas was a military occupation and an extension of the franchise to all classes imposed on the entire South by radical Republicans who had taken control of Congress and later with complicity of President Ulysses S. Grant. Most former Confederates were removed from power at the state and local levels, and a new Texas Constitution was drafted in 1869. It changed the state Bill of Rights to read, "Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the Legislature may prescribe." This government lasted for only four years and was notable for the high taxes it imposed to fund things such as universal mixed-race schooling and also for the antipathy it generated with the white Texans who had attempted to recreate antebellum conditions as much as possible. With the new language in the state constitution, the legislature banned the carrying of weapons, whether worn openly or concealed, as a means to both control violent Confederate sympathizers and the various groups who would retaliate against them, as black citizens frequently fought back. Although the Republican legislature passed this measure for the entire state, localized prohibitions on concealed carry had already been put in place in larger urban areas. It was called "An Act to Regulate the Keeping and Bearing of Deadly Weapons," and it passed in 1871 and was not modified substantially until 1995. That the same law was in continual operation from 1871 to 1995,



and that concealed carry did not come to Texas until over a decade and a half after the movement started in Florida and only after the end of segregation in Texas, is solid evidence that race is at the heart of the gun issue. The 1871 ban extended to firearms and was enforced by a new state police force; officers who neglected their duty to enforce the ban were either dismissed, fined, or even subject to indictment. Violations of the ban itself resulted (as it varied throughout the years) in a \$25 to \$200 fine, loss of the weapon, forced labor, and up to sixty days in jail. These fines, used against a black population that often carried concealed weapons despite the law, fueled the South's convict labor system (Johnson 2014).

The ban was not entirely popular with Texans, either Republicans who supported Reconstruction or their political opposition, the Democrats, and it was as widely flouted on both sides. But to give a measure of the pressure Republican leaders were under regarding the law, consider the following excerpt from the *Houston Daily Union* in 1871:

The Democrats are furiously opposed to the State Police, and all the measures necessary to put down violence and crime, and to assure peace and quiet to each community; let us still arrest and drive out thieves and murderers, and continue to oppose Democracy. The Democrats are sullen and angry because the firearm bill has robbed rowdies of their six-shooters, their bowie knives and the sword canes; let us continue to disarm rowdies and murderers, to stop bloody affrays, and to thus oppose the Democracy. (Rivas 2018, 296)

The Texas Supreme Court, packed with supporters of the Reconstruction government, decided in *English v. State* (1872) that the bladed weapons at issue in the case were not military arms in connection with the federal Second Amendment and so the ban was constitutional. There was certainly a period of lawlessness in Texas; a report to the 1869 constitutional convention showed that 509 whites and 468 blacks had been murdered since the end of the Civil War by race loyalists and in retaliations.

## End of Reconstruction

Although Reconstruction ended across the South in 1877, it came early in Texas in 1874 when the Republican Party lost power in the state. The Democrat "Redeemers," as they were called, won at the polls, and even if there was no voter suppression of black Republicans, the Redeemers would have

won anyway considering the high taxes Republicans imposed on a Texas that never had them and after a series of scandals rocked the party, such as when the adjutant general of the unpopular state police ran off with \$30,000. This would be roughly equal to \$623,600 in 2017 dollars (M. Friedman n.d.), and it was a major blow to the Republican Party in the state.

The Redeemers created another state constitution in 1876 in which the right to keep and bear arms, already watered down in that it allowed for regulation, moved Texas toward a place in which its citizens did not routinely walk about armed with Bowie daggers and revolvers as in antebellum days. It said, "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power by law to regulate the wearing of arms with a view to prevent crime." This change was intended to make sure the local laws and the law that the state had already put in place to deal with Confederate sympathizers continued to pass constitutional muster, because it was soon put into use by Democrat Redeemers to disarm free blacks. Again, that the 1871 state law stayed on the books until 1995 is significant evidence for the premise that when racial segregation was eliminated, there was also no need for facially neutral laws to disarm a racial underclass.

The Texas Supreme Court overturned its own decision from the Reconstruction decision just a few years earlier. In *State v. Duke* (1875), after political power had shifted from the Republican Party to the Democratic Party of the Redeemers, the court said that bladed arms at question in *English v. State* are "arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State." The result was constitutional protection for the arms, but also that the state constitution allowed for regulation. The 1871 law was lackadaisically enforced in individualistic and frontier west Texas, a place where even under slavery blacks were armed as a consequence of the Indian threat. But in traditionalistic and hierarchal east Texas, where the majority of blacks lived, stricter enforcement was a means to maintain whites at the top of the hierarchical structure. Texas had moved to a state where the traditionalistic political culture had to deal with the realities that rights were opened up to the entire social hierarchy, not just free whites, and once this had happened, the right to keep and bear arms was thus curtailed to control the black population.

This is not to say, however, that blacks were unarmed in Texas, as a level of gun culture existed for individual-level self-defense or criminality among newly freed blacks; there was "widespread disregard for the weapons law and the authorities who enforced it" (Rivas 2018, 296). But the use of arms as a

means of political resistance was eliminated by whites. Writing about a similar situation in Mississippi, where blacks lost political power at the county level despite the possession of arms, Johnson (2014) writes:

From what we can tell today, whites were better organized, better armed, and potentially more desperate in the fight against Negro rule, which to them represented a world gone mad. A crucial aspect of the Democrat's victory was disarmament of black republicans. The full details of how a white minority managed to disarm and overcome the black majority in these counties is lost. (97)

From the perspective of one of the original purposes of the Second Amendment as a means for resistance to government tyranny, it failed for the freedmen. This is a topic we will explore again in Texas history, and also in California, where the black population moved from using arms for individual-level self-defense and instead used them as a means of armed resistance against the white majority. What followed was gun control and considerable counter-mobilization by the white majority. Ultra-radicals like the Black Panthers in California, who advocated political violence against whites as a means of so-called self-defense, destroyed the traditional divide allowed under the racist system of individual-level self-defense but not the use of arms for political purposes. These black power groups “triggered overwhelming backlash,” which led to a tipping point where majority black opinion would more strongly support gun control over gun rights (Johnson 2014, 287).

### Closing of the Frontier

After the turmoil of Reconstruction, Texas went through profound changes. For east Texas it was the slow collapse of the cotton economy. For west Texas, there was the growth of the cattle industry, industrialization, and the end of the Indian frontier. From the perspective of Elazar's Political Culture Theory, we can see why the mythology of the cowboy plays so prominently in the social history of Texas and, thus, into the state's support of keeping and bearing arms. The frontier myth is of settlers and cowboys and rugged independence, with six-shooter Colt revolvers and lever-action Winchesters at the ready; the guns the “won the West.”

In the immediate postwar period, Union troops were mostly engaged with Reconstruction activities, and they did not start reoccupying the forts they abandoned in 1861 until 1867. Additionally, President Grant's initial

policy toward the Indian nations was to try to create a peace of mutual understanding, and he went so far as appointing a Quaker, from the pacifist Protestant denomination, to implement the policy. The Kiowas' continual raiding ended this attempt at peace, and President Grant appointed Gen. Phillip Sheridan to pacify the plains. It was Generals Sheridan and Sherman whose scorched earth tactics (under General Grant) were vital in persuading General Lee to surrender at Appomattox. Thus it was no surprise that General Sheridan took a similar approach to the Indians, and he relied on the extensive use of white hunters to destroy the buffalo herds upon which the Plains Indians relied for their nomadic culture.

The Comanches, Cheyennes, and Kiowas were inexorably defeated, and their last raids in Texas were in 1875. The Apaches, who had a mixed economy and who were based further west, had the last Indian raid into far western Texas in 1880 before being defeated by the famous black cavalymen, the "Buffalo Soldiers," forcing them into Mexico and closing the Indian frontier in Texas forever.

Texas was never a peaceful place before the Civil War, and the frontier west set up conditions where gun violence, even without the Indian threat, continued apace due to the societal breakdown from the war and Reconstruction. Texas "became notorious for lawlessness and violence . . . thefts and killings resulting from conditions on the Mexican and cattlemen's frontiers added greatly to the state's historical identification to the Old West" (Campbell 2012, 302). While most cowboys did not carry guns on the trail (because a gunshot could spook the cattle), the gun was an integral part of the cattle wars that happened after the introduction of barbed wire to Texas in 1874.

Ranchers began fencing off their property, and unfortunately they did this as well to public lands and transit routes. The state government stepped in after the violence was ratcheting up due to "fence cutting," and it solved the collective action problem by making fence cutting a felony, giving those who fenced in public lands six months to tear them down, and requiring gates depending on the lay of the property. While at this time Texas had rules about carrying arms, the residents at the time saw the necessity of bearing arms for self-defense in a particularly violent time, particularly in individualistic west Texas. In the nineteenth century, like today, the larger the urban area, the more gun control there is likely to be; much of the West, as it became settled, imposed gun control in towns and cities (Winkler 2013). This gun control was meant to control the deadliness of the violence of young, male, and unattached residents and visitors, who would check their guns before going drinking or carousing in entertainment districts, so

to that extent it was temporary and not exactly akin to modern gun control efforts.

## Texas and the Right to Keep and Bear Arms in the Twentieth Century and Beyond

Republicans and Democrats have never been, as parties, ideologically consistent on the issue of gun control, just on whose guns they intended to control. Eventually, Texas in the late twentieth century headed to the front of the class for the Second Amendment movement, despite its legacy of institutionalized racism and the disarming of free blacks. What changed? Gun rights in Texas advanced only after racial segregation ended. The concealed carry movement in the state advanced after a mass shooting in the city of Killeen. In 1991, a perpetrator drove his truck into Luby's restaurant and went on a shooting spree that killed twenty-three and wounded twenty-seven. When politicians did not have to overcome race discrimination as a reason for maintaining gun control, they moved to advance gun rights. The impetus for the new concealed carry movement came from restaurant goers being unarmed and defenseless.

The status quo on the right to keep and bear arms was maintained from the Redeemers taking power in 1874 all the way to the passage of "shall issue" concealed carry in 1995 as a response to the Killeen mass shooting. Meanwhile, world and state events reinforced both Texas gun and honor cultures, and simultaneously a belief in the need to keep minorities disarmed, and while it is a fascinating and varied story as Texas progressed from the closing of the frontier at the end of the nineteenth century into the twentieth century, much of it only tangentially touches on the right to keep and bear arms in the state until we get to the era of desegregation in the mid-twentieth century.

Texans, with their history of military volunteerism because of the honor culture, participated wholeheartedly in World War I and World War II. Notable heroes came from Texas, as elsewhere to be sure, but one of the upsides of honor culture was that it produced men like Audie Murphy, one of the most decorated soldiers of World War II. The troops from both world wars who returned home spread gun culture in that they either had war prizes or had training and experience with weapons that they passed on to their family in a way that has been going on since time immemorial. It is wrong to assume that every warrior has what they called after the Civil War "soldier's heart" or in World War I and World War II "shell shock" or

what we call today post-traumatic stress disorder (PTSD). Even for some who perhaps do have PTSD they take pleasure in shooting the weapons they used in war in more relaxed conditions; doing so is actually a form of cognitive process therapy, where repeated and safe exposure to potentially anxiety-triggering conditions helped the sufferers change their thoughts and feelings. Either way, the military came to Texas as much as Texans joined the military. Federal military bases often ended up in the South, and Texas in particular, where the flat terrain and clear weather gave it a natural advantage because training can take place year-round, unlike in the harsh Midwest winters (Campbell 2012).

But during these interesting years of great change, while Texas was locked into the traditionalistic and racially hierarchical past, two incidents took place that put that history into perspective. These incidents serve to illustrate why Texas, despite its honor culture, militancy, and legacy of support for gun rights, did not extend that support of gun rights to all members of that state.

The first incident occurred in 1911, and it has an obvious connotation related to the Texas Revolution. While Hispanics were considered white for their political rights and did not suffer as much discrimination as blacks, discrimination was still present, although Campbell (2012) says that they bore it quietly and without complaint. In 1910, however, a host of revolutionaries mixed with refugees made their way into Texas from the Mexican Revolution occurring at that time, and in concert with Mexican nationals in Monterrey, Mexico, attempted to ferment a race war of Hispanics, blacks, and the Japanese against non-Hispanic whites. Their explicit goals were to kill any white male over the age of sixteen, liberate the Southwest from American rule, and then seen annexation from Mexico. A campaign of raids from Mexico led to property destruction, robbery, and the deaths of twenty people before the U.S. Army, the Texas Rangers, local law enforcement, and, notably, armed groups of non-Hispanic white citizens, ended the attempted revolution, but not before killing at least three hundred Mexicans in the process. Non-Hispanic whites, naturally, considered the revolutionaries an existential threat and responded accordingly.

The second incident occurred in 1917. Black soldiers of the era, as members of the military, felt they were due equal treatment to whites, but they soon discovered that whites did not want to give it to them because it would set a precedent for blacks not in the military. One does not train a man to be a killer and proficient in small arms, tell him that he may die for his country, and then in turn have his fellow citizens treat him as a lesser person without expecting repercussions to come of it at some point or another. Moreover,

there was a growing near-militant advocacy for a group-level self-defense movement in the country's black elite at the time. Although these words were written two years after the Texas incident, this self-defense movement was encapsulated by the editorial words of W. E. B. Du Bois in *The Crisis* (the official magazine of the NAACP) after the 1919 Chicago race riot:

Today we raise the terrible weapon of Self-Defense. When the murderer comes, he shall no longer strike us in the back. When the armed lynchers gather, we too must gather armed. When the mob arrives, we propose to meet it with bricks and clubs and guns. But we must never let justifiable self-defense against individuals become blind and lawless offense against all white folk. We must not seek reform by violence. (231)

*The Crisis*, started in 1910, was widely read among blacks and white sympathizers, and in that era there was a section of the monthly magazine called "Along the Color Line" that detailed lynchings as well as instances of armed self-defense that the NAACP celebrated. This growing advocacy for armed self-defense and the conflict between empowering men and then simultaneously degrading them obviously created a tense situation between black soldiers in Texas and those charged with enforcing discriminatory laws, a situation not seen since black Union troops enforced Reconstruction laws. There had been several clashes with police in Houston and at the army's nearby Camp Logan, so the spark that set the whole incident off was when Houston police beat up and then arrested an apparently innocent black soldier and then fired their weapons at and arrested the black military police officer who came to inquire about the arrestee later that day. Clearly, the police felt threatened by armed black soldiers, perhaps on a psychological level. The men in Camp Logan decided to march on the police station in defiance of their white superior officers. As they were organizing, an unidentified black soldier yelled that a white mob was approaching, and the black soldiers armed themselves and, led by a black sergeant, went to downtown Houston, killed twelve white police officers and four other whites and wounded twelve others. Four soldiers were killed by friendly fire, one of whom was from another military unit but in a uniform similar to the Houston police uniform. The killing of this soldier from another unit led the Camp Logan soldiers to abandon their action, and then their leader did what he may have felt was the honorable thing and committed suicide. After all the court-martial trials were done and clemency granted to a number of men by President Wilson, nineteen soldiers were hanged. The trials, held in San Antonio, were of great

public interest in the minds of many white Texans who supported continued segregation for the roughly 12 percent of the populace that was black. No doubt they became even more aware that a group of well-armed and trained men who were subject to oppressive laws were like dry tinder waiting for a spark. Regardless, these incidents gave further impetus to the white majority to continue the general laws in place since Reconstruction to perpetuate the predominantly white only use of arms.

## Modern Texas and Gun Rights

If modern Texas was to be a bastion of gun rights for all citizens across the board rather than selective gun rights for the whites at the top of the traditionalistic hierarchy (which actually results in a fair amount of gun control being enforced against minorities), then Texas had to be desegregated first. The other reason for restricting weapons, to prevent dueling, had already long since disappeared as an issue due to a religious revival (Cramer 1999). Desegregation advanced steadily and relatively quietly in Texas compared to the rest of the South and exactly the way Rosenberg describes in *The Hollow Hope*, even though he does not focus on Texas in particular. It happened at the college level first, due to Supreme Court cases like *Sweatt v. Painter* (1950) in which Heman Sweatt was admitted to the School of Law at the University of Texas after the Supreme Court ruled that the separate law school set up for black students was not equal to the white one. The success of black athletes at the collegiate level also helped end segregation. Then after *Brown* in 1954, Texas secondary schools were desegregated at a slower pace. While there were incidents involving white citizens blocking access, it was never as bad as elsewhere in the South (Campbell 2012; Rosenberg 2008).

There is one other curious aspect of Texas political history that needs to be covered as it pertains to the right to keep and bear arms, and that is the transition of Texas from a single-party Democratic state to solidly Republican. The Republican Party, being the party of Lincoln and Reconstruction, was not competitive in Texas from the time of the Redeemers coming into power in 1874 until Eisenhower easily took the state's electoral college votes in 1952 and 1956. FDR's New Deal policies, the majority of which were too liberal by Texas standards, had opened the first cracks in one-party rule. Texas history is a perfect encapsulation of what Levendusky calls the great "partisan sort" of how liberals became Democrats and conservatives became Republicans (2009). In short, Levendusky shows how conservative



Democrats found a more welcoming home in the GOP and liberal Republicans in the Democratic Party. While Democrats in Texas are not completely shut out in statewide races, those who do win statewide, like Governor Ann Richards (in office from 1991 to 1995), are still more conservative than their fellow party members nationwide. This switch of Democrat to Republican, pretty much across the board in Texas, has had the practical effect of moving Texas Republicans in tandem with the nationwide Republican Party's wholesale embrace of gun rights that started with President Ronald Reagan, even though Texas culturally was already along that route. Indeed, the need for Texas primary delegates likely has had the effect of moving Republicans more and more into a pro-gun camp. This includes those seeking national office from other states that are not necessarily pro-gun, such as 2012 Republican presidential candidate Mitt Romney, who signed into law an assault weapons ban in Massachusetts, or 2008 Republican primary candidate Rudy Giuliani, who supported gun control in New York City; both took a more gun rights position than they would have taken had they been running in their home states. In his book *American Theocracy*, Phillips (2006) uses the term "Texification" to describe the effect of that state on wider American culture and specifically conservatism. This shift in party politics mostly happens through the nomination process, where informal party organizations, such as gun rights groups like the NRA, influence candidate nominations (Masket 2011).

Once the need to maintain white supremacy was removed, not just Texas, but the South as a whole, moved rapidly toward "shall issue" concealed carry laws instead of "may issue" concealed carry laws, the latter being used to deny permits to ethnic and racial groups. The movement started in Florida in 1987, although not in response to any particular event. The Texas "shall issue" law was signed in 1995 by then Governor George W. Bush, whose presidential administration later supported the *Heller* lawsuit. Although the push to bring concealed carry to Texas started with proposed laws in the 1980s, and close attempts failed in 1991 and 1993, the law finally changed in 1995. It might have changed earlier, but the Texas legislature meets only in odd-numbered years. Further, Democratic governor Ann Richards (1991–1995) said she would veto any concealed carry legislation that would cross her desk and even vetoed a statewide referendum attempt on the matter. Ann Richards lost her re-election bid to George W. Bush, and, fulfilling a campaign promise 124 years after Reconstruction, when Republicans put into place a restriction on the carrying of concealed weapons, another Republican repealed it.

The response of Texas to the Luby's Cafeteria shooting started a pat-

tern in which the response to a mass shooting in Texas was not more gun control but rather expanding the access to arms to potential victims. This response fits within the honor culture that Texas has had since its founding. The NRA's response after the 2012 mass shooting in a Newtown grade school was for armed guards at schools, with the catchphrase "the only thing that stops a bad guy with a gun is a good guy with a gun." This was not a new outlook formulated for that particular event but rather a continuation of a martial philosophy coming out of the Luby's Cafeteria shooting, and it is identical to what W. E. B. Du Bois advocated to blacks under threat of white mob violence.

Luby's Cafeteria, however, is not the most famous mass shooting in Texas. That was the 1966 University of Texas clock tower shooting, during which Charles Whitman sniped for ninety minutes, killing sixteen and injuring thirty-one. There are several reasons, though, why the status quo was maintained after that mass shooting. First, the shooting took place when Texas was still segregated, so loosening gun laws to allow victims to defend themselves would have meant loosening gun laws for all citizens. Second, the shooting occurred in such a way that the victims were unable to use firearms to themselves to defend against the threat. Third, Charles Whitman was a white man. This means that, as in the past in the South, no form of gun control needed to be implemented (or continued) the way it would have been needed to deal with a nonwhite who violently rejected the social hierarchy, as had happened in the past in Texas and which was detailed earlier in this chapter. Fourth, Charles Whitman had a small brain tumor that may have contributed to his rapid and violent decline, and this was discovered at his autopsy, at the time when any legislative response would have been crafted.

The most prominent survivor of the Luby's Cafeteria shooting was Dr. Suzanna Gratia Hupp. Dr. Hupp devoted herself to expanding concealed carry after her parents were killed in the cafeteria shooting. Her father had rushed the perpetrator and allowed her to escape through a broken window. And while these things should not matter when deciding policy, in politics they do; Dr. Hupp was an attractive thirty-two-year-old woman with an engaging manner of speaking and with a "catch" to the story of her presence in the cafeteria. She had a weapon in her purse that she had routinely carried for self-defense, but that day she had locked it in her car right before going in to eat so as not to run afoul of state weapons laws at the time. Dr. Hupp testified across the country and before Congress in support of concealed carry laws (CSPAN n.d.), became a leading advocate for gun rights, and was elected to the Texas legislature as a Republican from 1996 to 2006, when she did not seek a sixth term.

Again, the narrative that the NRA and other gun rights advocate groups present, that laws that prohibit the carrying of weapons in certain areas, commonly known as “gun free zones,” were deadly only to the law-abiding, was not recently formulated, and it is a well-worn trope. Texas’s response after the 2012 Newtown school shooting was Governor Rick Perry signing into law the Protection of Texas Children Act in June of 2013, authorizing school districts to train certain employees as school marshals and carry weapons on campus. Governor Greg Abbott signed into law a successor to it in 2016 that requires Texas colleges to allow concealed carry in campus buildings, although they may designate a few sensitive areas where they would not be permitted. Also, Governor Abbott signed into law open carry legislation that provides that, with some exceptions for schools and institutions of higher learning, anywhere concealed carry is allowed, open carry is allowed as well. Expect that after the next mass shooting, Texas will not deviate from its path of expanded gun rights.

### Testing the Constrained Court and Dynamic Court Theories in Texas

As for testing the Constrained Court Theory vs. the Dynamic Court Theory for the state of Texas, there is a lot of data showing overwhelming public support for the gun rights in the state, which translates into support from elected officials. Whereas in Illinois, courts were important in the expansion of the right to keep and bear arms mostly because they gave the individualistic elected officials a crowbar against moralistic Chicago, in Texas, *Heller* and *McDonald* were a sideshow act. *McDonald*, and later the Seventh Circuit and popular downstate opinion, forced the moralistic northeastern portion of Illinois (Chicago) to expand keeping and bearing arms, whereas in Texas the case made no actual difference to the state’s level of keeping and bearing arms. Texas already had far more keeping and bearing arms than Illinois or D.C. before *Heller* and *McDonald*. If anything, the effect was a legitimization of popular opinion, and the state kept on expanding a right the majority of residents already supported. Gun-friendly views of the most engaged Republicans in the state (those who vote in GOP primaries) shape the politics of gun control in Texas and any likely action by the legislatures. Only 4 percent of Texas Republicans blame current gun laws for mass shootings; they instead blame the failures of the mental health system. Meanwhile 43 percent of Texas Democrats blame gun laws (Henson and Blank 2018), and for now, Texas is still a solidly Republican state. This is why Governor

Abbott's response to the school shootings for Texas was an approach that emphasized training for expanding armed security.

- $H_1$ : Increased levels of keeping and bearing arms will not occur without an interpretation of the Second Amendment that allows for an expansion of individual rights.

Constraint I is the limited nature of constitutional rights.  $H_1$  is that significant social change will not occur without ample legal precedent for change. Constraint I at the state level was overcome based on the historical expansion of the right to keep and bear arms to all citizens through changes to the Texas constitution during Reconstruction, and once desegregation occurred in the 1960s throughout the South, this expansion was extended to everyone when the restrictions that were in place on the right to keep and bear arms were neutrally applied to all races. This is in addition to the accepted doctrine of incorporation and federal supremacy to overcome that constraint after *McDonald*.

- $H_2$ : Increased levels of keeping and bearing arms will not occur without support for an expansion of individual gun rights from substantial numbers of members of the legislature and the executive.

Constraint II is the lack of judicial independence. This constraint can be overcome if there is support for change from substantial numbers in the legislature and from the executive. Constraint I was overcome, and this hypothesis was not falsified, in that there was support for the expansion of the right to keep and bear arms from the administrations of every Texas governor since George W. Bush (1995–2000), who all signed into law bills that expanded keeping and bearing arms in the state. Note that Texas has no gubernatorial term limits, but four-year terms. Rick Perry was governor between 2000 and 2015, during both *Heller* and *McDonald*. Governor Perry opposed restrictions on the right to keep and bear arms (OnTheIssues.org 2010), and a simple internet search reveals pictures of him at NRA conventions and holding aloft a revolver during a campaign rally, as well as other public photo ops with him shooting firearms. Governor Perry was followed in office by the equally pro-gun Greg Abbott, first elected in 2014, re-elected in 2018, and who will serve until at least 2023. Formerly the Texas attorney general, Greg Abbott was one of the thirty-one attorneys general who were

on Heller's side in 2008 (OnTheIssues.org 2014). The GOP gained control of the Texas Senate in 2000, the House in 2002 (Republican Party of Texas n.d.), and has held solid majorities since, through at least 2020. Also, that the legislature is not full-time and meets only every two years means the views of the executive in Texas has more weight than the legislature, especially when combined with the lack of term limits and the long terms of office of the three most recent pro-gun governors.

- $H_{3j}$ : Increased levels of keeping and bearing arms will not occur without support for an individual right to keep and bear arms from some citizens or low opposition to an individual right to keep and bear arms from all citizens; unless
- $H_{3a}$ : Positive incentives are used to gain support of jurisdictions to expand citizens' ability to keep and bear arms; or
- $H_{3b}$ : Negative incentives are used to override opposition to an expansion of citizens' ability to keep and bear arms; or
- $H_{3c}$ : Market forces are allowed to allow for an increase in citizens purchasing arms to keep and bear, and likewise to utilize them in a legal manner; or
- $H_{3d}$ : Officials simultaneously convince citizens they have no choice but to implement the policies that allow for an increase in the keeping and bearing of arms and that such policies are a way to gain more resources.

Constraint III is the judiciary's lack of implementation powers. Hypotheses  $H_{3a-d}$  are about whether this constraint can be overcome by support from some citizens or at least low levels of support from all citizens or the use of various incentives or market forces. This constraint in Texas is overcome due to the large measure of support that firearms have had among the majority of Texas citizens, both historically and today, according to polling research from the University of Texas at Austin (Henson and Blank 2018). Only a bare margin of Texans, 52 percent, think gun laws should be made stricter, with 13 percent saying less strict, 31 percent saying they should be left as they are, and 5 percent with no opinion or no answer. Once you move past the historical hedging of the right to keep and bear arms to control access to guns from nonwhites, support today continues apace with public support from the cultural foundations of Texas. Therefore, the various conditions of how to overcome low public support in Texas were never necessary to expanding the keeping and bearing of arms in Texas after the *McDonald* case incorporated the right; positive or negative incentives were never neces-

sary. There was already a robust trade in arms with no additional state-level significant regulatory burdens, and administrators and officials, rather than hide behind *Heller* and *McDonald*, embraced the spirit of them as reasons for expanding the keeping and bearing of arms.

## Conclusion on Texas

The results of the Texas case study affirm the Constrained Court Theory. Significant social change did not occur through the courts, rather it occurred due to the consequence of elections. State culture matters. Texas was settled by a culture that was traditionalistic and individualistic, and that history of Texas strongly reinforced those traditionalistic and individualistic cultural values, among which is an individual right to keep and bear arms. In Texas, there is the cultural belief in a natural right of self-defense, stemming from honor culture, decades of Indian raids, and the legacy of Anglo-American political culture going back to the Glorious Revolution in England. A natural right is one that is this "self-evident," in the parlance of Thomas Jefferson. It is the idea that emerged from the religious philosophy of natural law, that principles of right and wrong and relations between individuals and the government could be ascertained by human reason. If self-defense is a natural right in Texas, then the right to own a gun for self-defense is not granted by the federal government, it comes from nature, a creation of God. In Texas, culturally at least, the Second Amendment protects an already God-given pre-existing natural right to self-defense.

It should come as no surprise that a country, then a state, would attach importance to militia arms, especially if those militia arms are used against external threats and potential domestic insurrection, even if that insurrection would come from a slave rebellion. Justice Joseph Story, the American lawyer and jurist on the Supreme Court from 1812 to 1845, wrote his famous *Commentaries on the Constitution of the United States* during the Founding Era. Of the militia, he wrote in 1833:

The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile

means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. 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 (emphasis added). (Story 1833)

At the founding of Texas and throughout a significant portion of its history, it had major external threats and also the threat of slave insurrection. Texans no doubt saw the militia and their militia arms the same way Justice Story did.

Perhaps another way to understand the situation in Texas is to think of a counterfactual world in which *Heller* went 5-4 against interpreting the Second Amendment as an individual right. In postsegregation Texas, it would not matter if the Second Amendment existed at all. This touches on an important point regarding the nature of rights. A right must have cultural support for it to even be a right. Alan Gura knew he was taking a gamble when he filed *Heller*, but he was confident that even if the federal Second Amendment was found to not protect an individual right, most states have their own state-level constitutional provisions protecting such a right. Given the culture in places like Texas, such a decision would be meaningless at the state level because the legislature was not going to take a decision that said the Second Amendment did not protect an individual right as a green light to pass gun control.

## California and the Future of Gun Control, Vanguard or Rearguard Action?

California is another highly distinctive state, but in the mainstream (if not the avante garde) of American life. The “California way of life” is a well-recognized American subculture. Californians identify strongly with it and with their state as its home. The state pursues distinctive policies, especially in the realm of social relations, that flow from that way of life and support it. California’s history has acquired an especially romantic flavor in the minds of its people, who follow it avidly, while its geographic character and position give it a measure of separation from the rest of the country. (Elazar 1994a)

California was selected as a case study based on the results of the large-N analysis and investigations about differing pre-existing conditions and these states’ implementation of *Heller*. While California lies above the best fit regression line due to its highly individualistic nature, it still conforms closely to the hypothesis that as a state becomes more moralistic, there is a higher level of gun control in the state. Also, California passed a significant amount of gun control legislation after *Heller*, which is the opposite of Texas, where significant amounts of gun rights laws were passed. This variation in political culture type and gun rights or gun control legislation helps to confirm the causal mechanisms that link the independent variables and their outcomes, finding the specific ways and evidence in which political cultures manifest in political institutions, especially the elected branches, which is acting as an intervening variable between the *Heller* and *McDonald* decisions and their implementation.

Tracking settlement patterns cannot be underrated if one wishes to understand how a state’s political culture develops. According to Elazar, the



geography of America meant that the frontier and its eventual settlement happened in such a way that it generally kept the three cultures separated. A frontier state ends up being defined by those first settlement waves from the original thirteen colonies. While a state's culture is modified by subsequent waves of immigrants or the geography itself, those first groups create a cultural precedent by which subsequent waves of immigrants find themselves accommodating to a political culture expressed in law and social policies. The existing political culture based on these initial settlement patterns will often take political measures to ensure their political culture stays the dominant one, although they may not always be successful. California is a case study in this pattern, as it became a state as an afterthought of the Mexican-American War, but after gold was found, the state was settled primarily by an individualistic political culture that displaced the Spanish-influenced residents.

A quick summary of the settlement patterns that Elazar tracks is in order. According to Elazar, the settlement patterns leading to a moralistic/individualistic split in California is that the middle current of individualistic culture, once it came across the middle stream and populated central Illinois, was halted by the Mississippi River. It then jumped across the continent to populate California because of the Gold Rush. This individualistic culture in turn took steps to prevent the influx of Asian immigrants into California from overwhelming them the same way they had displaced the Spanish and Mexicans. In this, they were successful, but eventually, a mass migration of Hispanics in the twentieth century into California created an admixture of individualistic and moralistic culture that defines the state today.

Nationwide, moralistic political culture went west from New England, settling the Midwest and Pacific Northwest (to include Northern California), while individualistic political culture went west from the mid-Atlantic. Traditionalistic political culture spread west and north from the Old South, jumping to middle and south California during the Gold Rush, and then moving back east.

If Illinois had no seminal event and its culture came from the demographic churn that gives Elazar's theory its explanatory power, and the Texas Revolution was the event that defined Texas, for California the event that defines it was the Gold Rush of 1849 that made the state what it is today, quite literally. The place went from a virtually empty territory with about fourteen thousand non-native inhabitants, taken in 1848 from Mexico, to a full state in 1850. In December of 1848 rumors of gold were confirmed by President Polk in an address to Congress. By 1849, there came a massive influx of settlers (the "forty-niners"), some three hundred thousand in all,

within the space of three to four years (Brands 2003). California virtually bypassed territory status; the people who were willing to leave everything behind to get a chance at gold and riches took it upon themselves to get politically organized and write a state constitution, something they were not authorized to do, and then boldly petition for admittance as a full state. Of note for our examination, neither California's 1849 constitution nor the 1879 one that it operates under today offer any protection for a right to keep and bear arms.

Further, Californians made this bold step of requesting admittance to the Union knowing that they were throwing the American political system into turmoil, as it affected the balance of slave states to free states. Prior to this, there had always been time to hash out the differences in Congress under the framework of the Missouri Compromise of 1820, which was, in short, that one slave state could come into the Union if a free state did, and vice versa. Considering that the population of Americans in California was some 300,000, the request certainly had to be considered back in Washington. By comparison, in 1850 Illinois had 851,471 (Census Bureau n.d.) and Texas, another recent joiner in 1845, had only 212,592 (Census Bureau n.d.). The sudden and unexpected petition of California led to the Compromise of 1850: California was admitted as a free state, Utah and New Mexico territories were set to allow for popular sovereignty to decide if they would be slave or free, and, as a pacifier to the South, the Fugitive Slave Act was passed, giving bounty hunters more power to capture runaway slaves and giving harsher provisions for interfering in their capture.

The rush of people into California entails that we use Elazar's Political Culture Theory and settlement patterns as a basis for an explanation of a state's founding political institutions. California is described under Elazar's typology as moralistic/individualistic, with the moralistic ideals of the culture (in Elazar's theoretical understanding) coming from those that settled the Pacific Northwest being drawn from the original Puritan settlers of New England (and the later waves of Hispanic immigrants), yet it was Americans from the individualistic political culture who made California a state. Panning for gold was "an activity highly attractive to individualistic types" (Elazar 1984, 112). These new Californians were not moralistic in the sense that they were coming from the culture of New England and its Puritan ethic of hard work, discipline, and frugality. California was made by people who wanted to get rich quick, who were perfectly willing to ask forgiveness rather than permission by setting up a state government on the fly, and who did so regardless of the delicate political situation in America with regards to the spread of slavery.

California culture was, therefore, founded on and continues to be filled with, the descendants of those who went out west to strike it rich, consequences be damned. Some would succeed, and some would not, but whatever happened, it was due as much to luck as hard work. So whenever we think of the moralistic/individualistic culture that is California, we must put aside notions of sober frugality, for even if the moralistic political culture of both Puritan New England and modern-day California both view collective action through politics as the highest calling and that participation in politics and the betterment of the greater good are the objectives of government, they do so in a unique California way. Meanwhile the state's individualistic culture sees the community also as a means for individual enrichment (with a little luck) and for falling back on if they fail (only to try again later).

### Spanish California

The Spanish explorers who found California by sea in 1542 thought it was an island, as they first discovered the peninsula of Baja (lower) California in present-day Mexico. They named California after a mythical island in a popular book of the time. As was the case with Texas, while the Spanish claimed the land as their own, they also left it largely unsettled and self-governed. But unlike Texas, where violent native groups like the Comanches were a large reason why the region was sparsely settled despite its favorable climate, in California it was unsettled because getting to the region was difficult by both land and sea, which is why it was uncolonized by the Europeans. Europeans had not yet discovered that adding vitamin C to the diet of sailors prevented scurvy, and Spanish sailors were frequently greatly weakened by the disease when they made it to California.

California natives had a relatively nonwarlike culture when taken as a whole, at least compared to those of the Plains Indians who ravaged settlements in Spanish and Mexican Texas. Although this is not to say the natives were entirely peaceful, since they were known to conduct raids against each other for war brides and slaves. In anthropological terms, it is a myth to think of natives as peaceful savages, and in fact the record murder rate of a native group goes to the Kato, an indigenous people of California, who in 1840 had a murder rate of 1,450 per 100,000 (Keeley 1997). Still, throughout history, material abundance has reduced conflict between groups, and California natives were not raiding cultures like the Comanches, as their climate produced resources in abundance. There was a plethora of wild game, fruit trees, salmon streams where during spawning season easily preserved

food was not difficult to catch, and on top of that, the climate never really got that cold.

California is home to many “microclimates” due to its diverse geography, which is one of the prime reasons the movie industry grew in the state. That the movie industry exists in California is touched on later for the role it plays in the right to keep and bear arms in the state. Virtually every climate and land type are found within the state. This varied climate also makes California a huge and varied producer of agricultural output, especially when modern irrigation is used. That California is full of extremes in geography and climate, with virtually every variation of mountain, desert, temperate rain forest, and rich and poor soils alike, leading to different occupations and lifestyles of its American settlers in later years, contributes to California’s fractious nature today. As Elazar notes, “All human beings and groups are located in a particular space, in a particular time, and in a particular culture. It is necessary to understand all three facets of location in order to understand how people behave and why they behave as they do” (Elazar 1998).

The somewhat less warlike and nonmigratory natives of California were more amenable to Christianity than the natives of Texas, and many of them converted. The shortage of manufactured goods in general due to limited trade meant that coastal natives also never possessed firearms and gunpowder in any quantity until the 1820s, and this newfound firepower was used in a few short-lived revolts against Mexican rule. Demographically, the native cultures of California were overwhelmed by the flood of Americans, Australians, Chinese, and South Americans that came during the Gold Rush. There was a bit of military activity further inland against the natives, whose lifestyle conformed more with those of the Plains Indians who ravaged Texas, but there was never any successful pushback by them to the settlement and an appropriation of their lands. We are again reminded about Elazar’s admonition about geography. The Plains Indians were swiftly moving mounted warriors who swept in, pillaged, and were gone just as fast because the geography allowed those tactics to work. The varied geography of California, with its mountains, valleys, deserts, and forests never allowed for an effective use of cavalry like the wide-open plains of America’s middle areas did. Geography channels culture like water; it follows the path of least resistance. Applying the analogy of geography and water, we can propose that due to geography, California natives probably never could have had a culture of being mounted raiders like those that terrorized Texas, which led to strong support in Texas for keeping and bearing arms for a citizen militia.

California’s first governor, Peter Burnett, in his State of the State address, noted the problem of whites and American Indians during the state’s early years:

The two races are kept asunder by so many causes, and having no ties of marriage or consanguinity to unite them, they must ever remain at enmity.

That a war of extermination will continue to be waged between the races until the Indian race becomes extinct must be expected. While we cannot anticipate this result but with painful regret, the inevitable destiny of the race is beyond the power or wisdom of man to avert.

Situated as California is, we must expect a long continued and harassing irregular warfare with the Indians upon our borders and along the immigrant routes leading to the States. Although few in numbers, and unskilled in the use of fire arms, they seem to understand all the advantages of their position; and they consequently resort to that predatory warfare, most distressing to us, and secure to them. They readily flee before every considerable force called out to meet them, and retire to their haunts in the mountains, where it is vain for us to pursue. As time is to them of no value, they can readily content themselves to lie in wait for weeks at secure points, ready to attack small parties of miners remote from assistance. From their irregular mode of warfare and the features of the country in which they wage it, there is reason to believe that they will prove far more formidable than is generally supposed; and that in the end we shall lose man for man in our encounters with them.

Considering the number and mere predatory character of the attacks at so many different points along our whole frontier, I had determined, in my own mind to leave the people of each neighborhood to protect themselves, believing they would be able to do so, and that a regular force would not find employment in the field. (Burnett 1851)

California left its citizen on their own for self-defense, with no militia, and moreover, the California natives did not conduct raids but rather used ambush tactics only on outlying miners.

Even when reservations were set up for California natives, when they were set at all, they tended to be in scrubland due to livable land being more valuable for purposes of gold mining. This led to tribes being unable to live collectively, as the land would not support them in their historic way of life. Many went out on their own and worked as ranchers and laborers, leading to the dissolution of whole tribes. In the same way, more peaceful tribes had been “missionized” by the Spanish, disappearing as tribal units, and were

thus amalgamated into their empire. Rolle (1998) notes that the introduction of alcohol was just as destructive to the less warlike and more sedentary California natives' way of life as anything else. Alcohol wreaked havoc on California natives as a faceless enemy.

California's first governor, Peter Burnett, was prescient with his opinion in 1851 that it would take total war to defeat the remaining entrenched natives. Professor Ben Madley's history, *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873* (2016), shows that the U.S. Army, occasionally aided by militia companies and vigilante groups, systematically killed as many as sixteen thousand natives. The last of the California Indian conflicts took place in 1873 with the Modoc War and their defeat at the hands of the U.S. military. By comparison to the huge sweeps of sometimes a thousand or more Comanche and allies across Texas, the Modoc War involved only sixty native warriors and a few hundred U.S. soldiers, and it lasted less than a year. Also, unlike Texas, California had the help of the U.S. military from the very start. President Grant granted amnesty to some of the Modocs, several were hanged, and the rest of the survivors were sent off to Indian Territory (Oklahoma), where most promptly died of disease.

While conflict and unfriendly relations with the natives greatly contributed to the support for the right to keep and bear arms in Texas, for survival purposes if nothing else, in California this was not the case, as ambush raids were small by comparison and the military was there from the start. There were an estimated one hundred to three hundred thousand native inhabitants prior to the arrival of the Spanish, and the population never fully recovered from the devastation of European diseases, which was made unintentionally worse through the presence and practices of the Spanish mission system, along with the introduction of alcohol. The natives not absorbed into the Spanish Empire and Mexico were later overwhelmed by the 49ers destroying their salmon streams while panning for gold and by the military campaigns against them. Madley estimates that at the end of the Modoc War in 1873 there were about 30,000 California natives, down from about 150,000 when the 49ers arrived. The 1890 census records their numbers at just 16,624 (Rolle 1998, 16). Thus while military action needed to be waged to pacify them and force them onto reservations, there was no well-regulated citizen militia anywhere near the levels of Texas that had to be maintained by any non-natives to defend against them. Any militia action was ad hoc, similar to what happened in Illinois, where the only major conflict with natives was the Black Hawk War in 1832.

These two facts contributed to a lack of a martial mindset among Cali-

fornians. Further, there was no “remember the Alamo” moment, where the preservation of a right to keep and bear arms was defended against hostile intent, as when Mexico sought to disarm residents of Texas in the Texas Revolution. And although California is a mixed bag when it comes to race relations and nativism, particularly when it comes to its substantial Asian population, there was also no need to be armed against a possible slave revolt like the one in Haiti that was feared in the antebellum South. The social conflict that happened in California prior to the twentieth century was class-based as much as race-based. These facts contributed to a lack of an enshrinement of a right to keep and bear arms in California’s state culture from its founding.

### From Mexican California to American California

California under Mexican rule was just a short waypoint prior to American rule. The change from Spanish to Mexican rule in 1822 was a bloodless one because California was so isolated. Essentially, when the news came up from the south, the letterhead on the paperwork was just changed and new oaths were sworn. Just as Texas was only nominally Mexican and was falling into the American orbit even prior to the Texas Revolution, California was only culturally Spanish and was going its own way prior to its switching to American hands. In sum, the Spanish and Mexican presence and the later limited presence of the American, English, and Russian economic interests in California prior to the land coming into the possession of the United States had little impact on California’s history other than some interesting trivia and lots of Spanish-language names on maps. The American conquest, if it really could be called that, was a series of short and small-scale battles with the limited number of troops America could land from ships, as overland contact for Americans prior to the Gold Rush was only by way of a few fur-trapping mountain men. There was no conquest to enter the state’s lore, which led at least a disassociation from war, arms, and violence in the state’s culture at its foundation. California was only important to the United States after they took it from Mexico’s possession because it provided two quality natural harbors on the Pacific Ocean, San Diego and San Francisco. At the end of Mexican rule, there was only an estimated white population of fourteen thousand (Rolle 1998, 56), and this was between various foreign nations and Hispanic Californios, who were considered white as they had been in antebellum Texas.

President Polk was an unabashed expansionist, willing to provoke a war with Mexico to get Texas into the Union (as discussed in the Texas chapter).

In a State of the Union address in December 1848, just after the Mexican-American War concluded in February of that year, President Polk took the opportunity to crow about the gold that his war brought to the nation's bank vaults through the acquisition of California in a manner not so different from a modern president claiming credit for a booming stock market. Furthermore, just like a modern president, his words in that address were not selected for modesty, which further added to the gold lust that struck the nation.

This optimism and enthusiasm for future possibilities, as defined by the folks who went west for gold, is still part of California culture today, and it is markedly different from the traditionalist, hierarchical, honor culture of the South and the Protestant ethic of a moralistic political culture. Furthermore, it is different from those who settled Illinois and took up occupations and farming as the land allowed. This is not to say that American California did not have interpersonal violence like Texas did with its honor culture; indeed, it did have significant violence. Between 1849 and 1856, during the height of the Gold Rush, there were more than a thousand unpunished murders in San Francisco alone (Rolle 1998, 110). But in California's Gold Rush saloons and brothels, unlike in Texas, "customers were expected to keep their derringers out of sight, unless attacked" (Rolle 1998, 116).

In other words, a man did not go about advertising his ability to engage in deadly violence with the open wearing of a pistol or Bowie. In Texas, interpersonal violence was often a personal or family matter of honor, while on the other hand, in California the outbreak of violence among the hordes of unattached men on the gold fields often revolved around property. Californians spontaneously organized to deal with this, and it led to a profusion of self-organized vigilante groups who worked to eventually bring a sense of law and order to the region. Individualistic political culture is associated with both an ethical tolerance of corruption but also a willingness to innovate in public policy. These vigilante groups would have citizen trials and, if they deemed it necessary, public executions (Rolle 1998, 109–10).

This is markedly different from Texas, where constitutionally authorized law enforcement is the legal enforcer of the social order and only they are brought in to control crime, such as happened with the creation of the Texas Rangers and the creation of a state police during Reconstruction. In Texas, if armed vigilantism occurred, it was usually in support of white supremacy. It is a marker of the moralistic and individualistic nature of California that the residents took the initiative on their own to form vigilante committees when there was a breakdown of law and order. Professor Bakken, in his *Practicing Law in Frontier California* (1991), makes that case that, for



a large part, the vigilante committees acted responsibly, freeing suspects if there was no evidence. Professor Barry Weingast (2014), looking into the development of law, saw in California's rise an interesting case study, and he came to the conclusion that essentially law in the Far West was a "bottom up" rather than "top down" organic growth of legal institutions to settle disputes, mostly dealing with property, as the Gold Rush was all about property rights. Even though Elazar says that it was individualistic types that made the jump to mine for gold in California, their behavior once there is also perfectly aligned with Elazar's concept of a moralistic political culture, which believes that that collective action through politics is for the greater good and participation in politics is widespread and expected as a duty of citizenship.

By the mid-1850s all the loose gold had been panned out, and there were ghost towns in the place of formerly bustling mining towns; gone with the prospectors was the inflation and astronomically high prices for everyday goods. Other more advanced methods were used to continue to mine for gold, and by the mid- to late 1850s, the era of individualistic miners who made their way out west for fortune had given way to monied interests, and with that came endemic corruption that would reach its height in the early twentieth century and the great San Francisco graft prosecutions of 1906–1907. The good government movement, in tandem with the larger Progressive Era reform movement happening nationwide, was able to gain significant reforms in California by way of several constitutional amendments, and it set the tone for the state to be governed in a manner more in tune with a moralistic political culture through the start of the twenty-first century.

### California from the Civil War until the Twentieth Century

The foundation of a state plays a substantial role in how the state treats gun rights, but just like in Texas and Illinois, much of the history of the state's modernization, while interesting, can be glossed over, as it has little to do with the culture of keeping and bearing arms.

Even though its imprudent entry into the Union had precipitated a crisis about what the nation would ultimately do about slavery, little happened in California during the Civil War. Some Californians went east and fought for the Union, and the few secessionists who did reside in the state were quickly suppressed. The most important role California had in the war was that its steady supply of gold was immensely important in keeping the Union financially stable.

A transcontinental railroad from California to the East, which was long delayed because in antebellum days Congress bickered over whether it would run through the South or the North, was authorized during the Civil War. Not surprisingly, the railroad took a northern route. Construction started in earnest after the war was over in 1865 and was completed in 1869.

The story of the right to keep and bear arms in Illinois, and very much so in Texas, is intimately intertwined with issues of race, and there was a strong sentiment of white supremacy in California, but the issue never played itself out the same way as in Texas or Illinois. Perhaps because there was never any fear of a slave insurrection, or, like in Illinois, there were so few slaves or free blacks ever in the state, or because the Chinese never wished to arm themselves for both their own protection and as symbol of their liberty, as the freedmen of Texas did. Eventually, the anti-Chinese sentiment and the problems it entailed came to a head, and the issue was resolved in such a way that could never happen with American blacks and former slaves. For eighty-three years the United States as a nation decided to virtually end Chinese immigration.

The anti-Chinese sentiment that led toward the ending of Chinese immigration kicked into high gear with the Panic of 1873, which was a financial crisis that led to a recession that lasted until 1879. Work was hard to come by for native citizens during those years, and in 1876 more than twenty-two thousand new Chinese immigrants showed up in San Francisco alone (Rolle 1998). While anti-Chinese discrimination was always prevalent in California, the immigrants were tolerated, and in many ways supported, by commercial interests that desired the cheap labor instrumental in building the western portion of the railroad, just as cheap Irish immigrant labor was instrumental in building the eastern portion. After the completion of the railroad, the treaties that allowed unrestricted Chinese immigration did not look like such a good deal in the middle of the recession, when Chinese immigrants were competing for work with native citizens (who voted, unlike the immigrants). Because the Qing dynasty (1636–1911) was in such a state of decay, with near constant famines and rebellions, there was an unexpectedly large number of immigrants. The Chinese Exclusion Act was signed into law in 1882 by President Chester Arthur, and it banned all Chinese immigration for ten years. It was extended for another ten years in 1892. Various other immigration acts generally limited the number of all immigrants coming into the United States, although they were loose enough that there was significant immigration from southern European nations until 1924.

President Coolidge signed into law the Immigration Act of 1924, which was the most stringent immigration policy in American history,

and there was virtually no immigration into the United States until the Immigration and Nationality Act of 1965. Only those with a college education or special skills, much less common in that era, were allowed to immigrate. Entry was denied to Mexicans and disproportionately to eastern and southern Europeans and Asians; meanwhile the law allowed for immigrants from northern European nations such as Britain, Ireland, and Scandinavia. The 1924 law was a product of an isolationist America after World War I and fears of communism as much as anti-immigrant sentiment. Initially, a quota was put in place that limited immigration to 2 percent of any nation's residents already in the United States in 1890, although it was later changed in 1927 to a cap of 150,000. This quota, and later the cap, fixed political cultures for decades by limiting changes to internal migration only, and right after the United States was fully settled from Atlantic to Pacific. This is what allowed for the explanatory power Elazar's Political Culture Theory in the first place.

California's expression of exerting its sovereignty over Chinese immigrants, as it pertained to the right to keep and bear arms at least, was expressed in a series of laws that prohibited the concealed carry of weapons by them and Mexican immigrants. California did have a statewide law between 1863 and 1870 that prohibited concealed carry, but after the 1870 repeal of that law, control over weapon carriage was turned over to local authorities. Because there was a cultural expectation that weapons would stay concealed and not be worn open in the Texas manner, California did not put a prohibition on the concealed carry of weapons and did not follow the logic of the prohibitions on concealed carry that cropped up in the South as a legislative reaction to dueling and honor culture. That is, the laws in California against concealed carry were not to prevent dueling but were explicitly to prevent the carrying of arms by Mexicans and Chinese, in the same manner that the "may issue" system of concealed carry laws were put into place in the South during Reconstruction, a time after the end of dueling culture.

What is surprising is that even though there was no push by the Chinese immigrants to acquire arms like freedmen in the South were wont to do, California still took steps to prevent the Chinese and Mexican Hispanics from carrying concealed weapons. In 1917, the California legislature enacted the first statewide permitting system for concealed carry, usurping the local control that had been in place since 1870. An updated version was passed in 1923, and, based on historical source material, we can see the entire premise was disarming Chinese and Mexican Hispanics. According to an article in

the *San Francisco Chronicle* from July 15, 1923 (Cramer n.d.), “It was largely on the recommendation of R. T. McKissick, president of the Sacramento Rifle and Revolver Club, that Governor Richardson approved the measure.” McKissick goes on to explain that there might be a problem with the ban on resident aliens and noncitizens owning handguns and that there was some question of whether the courts would uphold it, but if the court did, then it would have a “salutary effect in checking tong wars among the Chinese and vendettas among our people who are of latin descent.” The California Supreme Court ended up supporting the ban on noncitizens owning guns in *In re Rameriz* (1924), although it was much later struck down by the California Court of Appeals (*People v. Rappard* 1972).

That gun control would be tied to nativism is hardly surprising when we look back at the history of white supremacy in Texas, but the conditions in California at the time with regards to immigrants were similar to those in other parts of the country. For instance, New York State’s Sullivan Act, named after “Big Tim” Sullivan, a corrupt Tammany Hall machine politician, was passed in 1911, and it was the toughest gun control law in the nation at the time in that it required a “may issue” permit for even owning a firearm, not just carrying one concealed, and it made carrying one concealed a felony. Previous incarnations usually pegged the penalty as a misdemeanor with a fine. Under the Sullivan Act, resident aliens were prohibited from obtaining permits, and neutrally written language was discriminatorily applied against the immigrant population:

The model of gun control that emerged from the redeemed South is a model of distrust for the South’s untrustworthy and unredeemed class, a class deemed both different and inferior, the class of Americans of African descent. . . . If the white South saw blacks as a threat, the country as a whole saw southern and eastern Europeans in similar terms. For this reason, in part, the numbers of such immigrants were subject to significant limits. Beyond this, these immigrants were associated with mental deficiency, with crime, and most dangerously, with the sort of anarchist inspired crime that was feared in Europe, such as political assassination and politically motivated robberies.

In New York, these fears found expression in the passage of the Sullivan Law in 1911. Of statewide dimension, the Sullivan Law was aimed at New York City, where the large foreign born population was deemed peculiarly susceptible and perhaps inclined to vice and crime. . . . It is not without significance that the first person convicted

under the statute was a member of one of the suspect classes, an Italian immigrant. (Cottrol and Diamon 1995, 1335)

The judge in the case said to the convicted, “It is unfortunate that this is the custom with you and your kind, and that fact, combined with your irascible nature, furnishes much of the criminal business in this country” (Roberts 1992). It has been reported that most of those arrested during the first three years the law was in effect were Italian immigrants (Carter 2012). While it may be true that the Italian immigrants brought organized crime and the Mafia with them, it was not like there was not already a strong element of organized crime in the country, the kind of racket run by the aforementioned Irishman “Big Tim” Sullivan.

Mr. Sullivan may have had some heartfelt convictions about keeping the public safe from gun violence; he said that his gun control law “will do more to carry out the commandment thou shall not kill and save more souls than all the talk of all the ministers and priests in the state for the next ten years” (Winkler 2013, 205). But considering “Big Tim” was heavily involved with prostitution, illegal gambling, kickbacks, and election fraud and that he eventually became homeless and was found dead after losing his sanity to syphilis, he was perhaps not sincere about Commandments Seven, Eight, and Nine.

That shooting organizations would work with the government to restrict the right to keep and bear arms, rather than extend that right, was thoroughly documented by Professor Winkler in his book *Gun Fight* (2013). The wave of “may issue” concealed carry laws in the early twentieth century that was passed in California was also passed in Alabama, Arkansas, Maryland, Montana, Pennsylvania, Virginia, West Virginia, New Jersey, Michigan, Indiana, Oregon, New Hampshire, North Dakota, South Dakota, Washington, Wisconsin, and Connecticut. A large part of the organizing work was from the U.S. Revolver Association, which shared board members with the NRA and the National Conference of Commissioners, the legal advocacy organization that sought to standardize the nation’s gun laws. The National Firearms Act of 1934 was supported by the NRA, and its member magazine, *American Rifleman*, touted the work done to ensure passage of that act, although the NRA did not support stricter laws such as the aforementioned Sullivan Law of New York and worked to moderate several of the more onerous provisions of the 1934 National Firearms Act. Restricted immigration, or assimilation in conjunction with other items, pretty much settled the gun issue in California until the 1967 “open carry” ban passed after the Black Panthers march on the capital.

## The Tinseltown Dream Factory and Guns

One cannot write about California without paying particular attention to its varied geography that led to unique cultural influences in the state. A gaping hole in the analysis would exist if Hollywood, the most famous aspect about California, and how it plays into the right to keep and bear arms within that state was left out of this case study. This is because social and cultural influences in the case study states explain the variations in each state regarding their cultural history of the right to keep and bear arms. Exploring these unique situations by state is important in this or any qualitative analysis regarding cultural impact on political change.

Hollywood is California's most iconic industry, and perhaps the most valuable when looking worldwide at the money earned from the entertainment industry. The federal Bureau of Economic Analysis and the National Endowment for the Arts estimated that in 2011 the creative industries in Hollywood accounted for \$504 billion dollars (*Hollywood Reporter* 2013). Even that estimate did not include related merchandise, such as toys and collectables only made because of the entertainment industry's storytelling. Hollywood is truly incomparable. One does not envision in the modern imagination California without thinking of red-carpet events and the faces that grace the covers of *People* magazine. Therefore, we must attempt to explain what effect, if any, the movie industry has had on the right to keep and bear arms in California.

At the start of the twentieth century, America became the capital of the movie industry as the nascent European centers of the film industry were destroyed during World War I. Hollywood was a perfect location for movie making and had many natural advantages, the first of which was a good climate that allowed for year-round filming and the second was the varied geography. New York City was the center of cinema in America in its earliest days, but year-round filming, cheap land, the ability to film in forests, cities, mountains, and deserts (westerns are perpetually popular) within close proximity drew the industry to California. Its natural advantages of weather and geography gave Hollywood what it needed for later ascendance over New York City as a place to make movies, and it has maintained its primacy as a center of the industry, even though the initial advantages are not as important today as they were in the early twentieth century. Because a picture is worth a thousand words, a blog called Amazing Maps has a post that is worthwhile to share about a 1927 Paramount Studio map of potential filming locations in California that best depict international regions (figure 17).

There is one last reason why Hollywood moved from the East to the

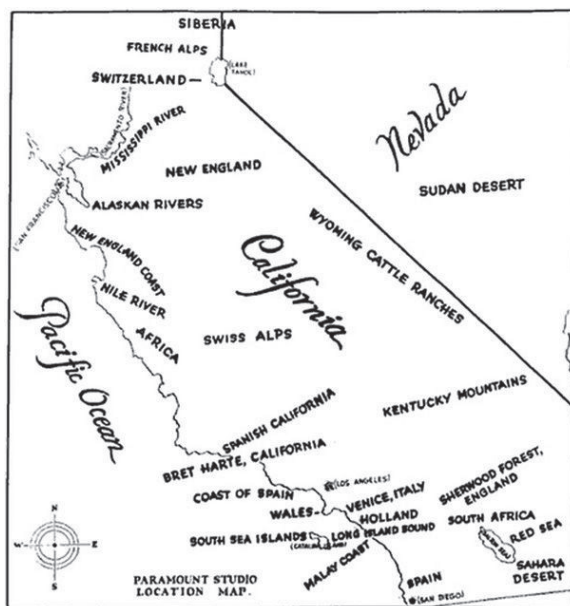


Figure 17. Map of California for movie studio filming locations

West. Neal Gabler explains in his book *An Empire of Their Own: How the Jews Invented Hollywood* (1989) that Jewish immigrants, unable to break into the monopoly of the film industry by its creator, Thomas Edison, instead went west and set up shop in the then wide open spaces of rural California.

### Hollywood's Schizophrenic Relationship with Guns

The first thing to note is that Hollywood movies, particularly westerns, glamorize the role of the gun in American life in a manner that the sociologist Jimmy Taylor calls “cowboy cool” (2009, 51). Hollywood consistently puts out images of guns as empowering tools of both heroes and villains alike, yet simultaneously, since at least the 1980s, with a few noted exceptions such as former NRA president Charlton Heston, the public face of the industry strictly adheres to an orthodoxy of support for gun control. An example of this orthodox thinking is that after the 2012 school shooting in Sandy Hook, more than four dozen A-list stars appeared in a widely viewed and hyped YouTube video called “Demand a Plan,” which was put together on behalf of the Law Center to Prevent Gun Violence and Mayors Against Ille-

gal Guns. The choppy quick edits of the eight-two-second video, intended to put as many recognizable faces in front of the viewer as possible, was a celebration of celebrities demanding from Congress and President Obama new national-level gun control measures.

Another crystal clear example of Hollywood's pro-gun control orthodoxy is the actions of "powerhouse player" (Lang and Maddaus 2017) Harvey Weinstein. After his fall from power due to sexual misconduct, in his first public statement since the *New York Times* broke the story in October of 2017, he wrote that he needed to "learn about myself and conquer my demons" and that his future "actions will speak louder than words." Of the myriad ways that Mr. Weinstein could have chosen for making his play to curry favor within the industry and perhaps distract the public from the extensive list of his wrongdoings, he chose to attack the NRA. In the closing paragraph of his written statement was his attempted power move: "I am going to need a place to channel that anger, so I've decided that I'm going to give the NRA my full attention. I hope Wayne LaPierre [the president of the NRA] will enjoy his retirement party. I'm going to do it at the same place I had my Bar Mitzvah" (2017).

Yet what cultural impact, let alone what political impact, the entertainment industry has on the right to keep and bear arms in California proper, particularly after *Heller* and *McDonald*, is difficult to say. This is especially true given the film industry's bipolar portrayal of firearms as empowering and cool in movies while also supporting stricter gun control in real life. The numerous parodies of the *Demand a Plan* celebrity policy request, juxtaposing the A-listers' gun control appeal next to clips of the self-same individuals gunning people down in their film roles, muddied their moral clarity. This doublethink from Hollywood on the issue of guns is not new either. *Rambo* fans cheered when Ronald Reagan, himself a former actor, said after the Beirut hostage crisis that he had seen *Rambo* and would know what to do the next time American lives were threatened (Reuters 1985). Yet Sylvester Stallone, who has gunned down innumerable henchmen and evil protagonists in his long career, in real life said of the Second Amendment in 1998:

It had to be stopped, and someone really has to go on the line, a certain dauntless political figure, and say "It is ending, it is over, all bets are off, it is not 200 years ago, we do not need [the Second Amendment] anymore, and the rest of the world does not have it. Why should we?" Until America, door to door, takes every handgun, this is what you're gonna have. It is pathetic. It really is pathetic. It is sad. We're living in the Dark Ages. (Suebsaeng 2014)



Harvey Weinstein was sent to prison for rape, and no federal gun control laws passed after the Sandy Hook shooting despite all the star-powered appeals to politicians. After Sandy Hook, however, two major gun control laws passed in California at the state level, whereas California already had the strictest gun control laws in the nation, and that is the key distinction.

For purposes of this book I need to be clear what effect I am saying the entertainment industry has on the level of keeping and bearing arms in California, even if I cannot measure it fully. The net effect of the California entertainment and cultural elite being ardently pro-gun control is that, on par, it makes the Democratic Party in California more likely to support gun control, as the state-level party follows along the national party's platform, and California is mostly under the political control of the Democratic Party. This conclusion is supported by two pieces of evidence. The first is that Hollywood, as an industry and the majority of its celebrities, support the Democratic Party, which in turn supports gun control.

Hollywood as an industry donates a substantial amount of money to the Democratic Party, which maintains a large measure of electoral control over California, and the Democratic Party has long had a platform of support for gun control, going at least as far back as the "explicit endorsement for additional gun control legislation" found in candidate Bill Clinton's 1992 platform (Utter and Spitzer 2011, 76). *Business Insider*, using Federal Election Commission data, reports that Harvey Weinstein, since 2000, has donated zero dollars to Republicans but nearly \$1 million dollars of his own money to Democrats nationwide and has provided about \$1.5 million more to the party in bundled donations (Smith and Gould 2017). *Business Insider* also looked at the biggest Hollywood celebrity donations for the 2016 election using Federal Elections Commission data, and there were almost no donations to the Republican Party. Major donations made from donors' political action committees to those who supported Democratic Party candidate and gun control advocate Hillary Clinton were \$1,002,700 from A-list names such as Steven Spielberg and Jeffrey Katzenberg and \$502,700 from J. J. Abrams. There is little doubt that Hillary Clinton was a pro-gun control candidate. During the 2016 primary election during a debate, in response to a question about "which enemy are you most proud of" she responded, "Well, in addition to the NRA, the health insurance companies, the drug companies, the Iranians. Probably the Republicans" (CBS News 2015). By comparison, the biggest donations to Republicans was *Cheers* star Kelsey Grammer, who gave \$5,000 to pro-gun rights Republican primary candidates Ben Carson and Rand Paul, and \$2,700 by Jerry Bruckheimer to Jeb Bush (Oswald 2016). Moreover, there are other measures of support besides

money, and many celebrities are willing to put their star power to use in support of Democratic as opposed to Republican candidates, which is what made A-list star Clint Eastwood's appearance at the 2012 convention in support of Republican nominee Mitt Romney stand out by comparison. These data are by no means exhaustive, as it mostly covers from the year 2000 onward, but it is still representative.

The second piece of evidence that the movie industry makes California more pro-gun control is that the cultural elite in Hollywood did not always publicly support gun control until the 1980s, and after their move to the left on the issue (and in politics in general), at the same time the national parties were differentiating themselves on the issue of guns, more gun control was passed in California until the present day than elsewhere in the nation. At the start of the twentieth century and through the 1980s, the level of gun control in California was comparable to many places elsewhere in the nation, notably my two other case study states of Texas and Illinois.

To understand why a liberal Hollywood means that there is more, rather than less, gun control in the state of California requires further examination of both the history of Hollywood and how the Democratic and Republican parties split and took sides on the issue of gun control and gun rights. To start, one of the points that comes through clearly in Professor Winkler's book *Gun Fight: The Battle Over the Right to Keep and Bear Arms* (2013), which examines the political fights on gun control from the nineteenth century until just after *Heller*, is that guns and gun control were not a partisan issue in that neither party had any particular lock on the being pro-gun or pro-gun control. The NRA had supported gun control legislation in 1934, and southern segregationist Democrats supported gun control to keep firearms out of the hands of black citizens. Furthermore, in 1967 the Republican Party under California governor and Hollywood actor Ronald Reagan passed gun control in the state, partly in response to the armed actions of the Black Panthers. Republicans, both in the party and in the electorate, generally went along with Republican elite's acquiescence to calls for gun control from the Democratic Party, and the Second Amendment was not a topic of concern among party elites. Still, it was Republican pushback that kept the Gun Control Act of 1968 from being even more restrictive, but as the Republican Party became more conservative in the 1980s, it came to support gun rights over gun control as a consequence. It was the very same man, Ronald Reagan, who signed a large California gun control bill into law in 1967, who as president shifted the nation's mood away from gun control at the national level and who signed the nation's first modern gun rights legislation, the Gun Owner's Protection Act of 1985. Reagan's signing of that

California gun law, however, should be properly contextualized. On May 2, 1967, the Black Panthers spontaneously made an armed march on the capital of California, a provocative act but a legal one due to the laws on the open carrying of firearms at the time. It is unlikely, however, that any restrictive law would have been the direct result directly of that march. The bill that eventually became the Mulford Act had sat around for several months prior to May 2 and was not up for any debate the day of the impulsive march. The press only gave the Panthers' event so much coverage because a gaggle of the press was there for a feel-good event involving school children.

Further, there is only anecdotal evidence that the Mulford Act was drawn up because of the Panthers' earlier agitation of going about openly carrying arms. The rushed passage and signing of the law on the July 28, which only passed on narrow votes, was spurred on by the Detroit riot of 1967, which went from July 23 through July 27 of 1967. That event, which resulted in tremendous property damage and forty-three people dead, riveted the attention of the nation at the time. While the riots were still going, Representative Mulford did not let a crisis go to waste and pushed his bill through.

Although the armed cop watching and the march on Sacramento by the Black Panthers entered the larger hagiography of the civil rights movement as an important watershed, the signing of the law the day after the Detroit riot shows that it was as much a response to urban rioting as to the Black Panthers' militant agitation. There is plenty of reason to conclude, contrary to popular history and other scholarly work that relied on secondary sources and after-the-fact memoirs written by the Black Panthers themselves who were too self-interested to be fully trusted, that the Black Panthers march did not cause the Mulford Act in and of itself; it merely caused an already proposed bill to be strengthened, ultimately in contravention of their larger revolutionary struggle.

The proposition that the presence of Hollywood in California reduces the level of keeping and bearing arms in the state is further supported by the timing of Hollywood becoming a liberal enclave and the increase in gun control in California in the 1980s. Hollywood was not always a liberal enclave. Ceplair and Englund in *The Inquisition of Hollywood: Politics in the Film Community, 1930–1960* (2003); pegs the start of liberal Hollywood to about 1975. In a summary of the book, Ceplair wrote:

The powerful International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators and the Screen Actors Guild were headed by conservatives, and it was the right-wing Motion Picture Alliance for the Preservation of American Ideals that provided

the House Committee on Un-American Activities with names of “subversives” and whose members testified as “friendly” witnesses in the 1947 hearings into the industry. Following the blacklisting of the Hollywood 10 that year, guilds and union purged liberals and radicals, and movies ceased to carry social-criticism messages. The blacklist began to dwindle (very slowly) in the early 60’s. The first counterculture movies began to appear in significant number in 1969. (Ceclair 1992)

The gradual breakup of the vertically integrated studio system after a court case, *United States v. Paramount Pictures* (1948), allowed for greater diversity of thought and ideology in Hollywood. By the mid-1970s, Hollywood was openly liberal. By then, the work of the House Un-American Activities Committee had ceased and the Hays Production Code, a series of “do not and be carefuls” from 1934 that were industry self-imposed to avoid government censorship after a series of scandals, were by the late 1950s a pale shadow of their original iteration. The Hays Code had put movies into a sandbox of socially conservative acceptability and cultural conformity. Provisions included, for example, no complete nudity and no ridicule of any religious faith. The Motion Picture Association of America created its rating system to replace the Hays Code in 1962, and with some variation, that system is what we see today.

By conventional measures of circumstantial evidence, Hollywood is placing a thumb on the scale toward gun control as opposed to gun rights. What I cannot define is how much weight is being placed on that scale, and that is okay. We can describe something without being able to fully quantify it. The purpose here was never to find quantifiable segments by which star power or political donations can be said to affect the level of keeping and bearing arms in California. What I can say is that the political culture of California, which is inseparable from the glam and glitz of movies and television, the worldwide center of which is in Hollywood, contributes to a higher level of gun control and thus a lower level of keeping and bearing arms in the state. In an alternate world where the center of the world’s movie industry had stayed where it had started, in New York City, the level of keeping and bearing arms in California would be unaffected by a large group of wealthy and politically connected celebrities and studio personnel in the state who (1) maintain a liberal orthodoxy that is strongly pro-gun control and (2) who make substantial donations of both money and star power to various gun control organizations and to liberal politicians who want gun control as a matter of policy preferences and are willing to act on them.

Only one other aspect of California's history as it moved from the nineteenth to the twentieth century and how it affects the right to keep and bear arms in the state really needs to be discussed before moving on to testing the Constrained Court Theory. That aspect is the number of military bases in the state without a corresponding martial culture, as opposed to Texas. The foremost reason is that there was never a martial culture in California when the military bases, mostly U.S. Navy and U.S. Air Force, came to the state in the first place. The sailors and airmen that came to California to man the ships and fly the planes came from anywhere and everywhere in the nation at a time when the American military was already nationwide in logistical scope. In Texas, when military bases came en masse before and after the Civil War, it was at a time when units were put together from local volunteers, sometimes with the leaders professionally trained at military academies. This was particularly true during the Civil War, where local boys would all get put together into one unit from a state, and, given the dearth of professionally trained officers coming from the military academies, officers and noncommissioned officers would be from the educated class of the same region as the men who served under them. This local quality of military units was still true all the way to the lead-up to World War I. In 1916, about half the strength of the standing army was through the existence of state National Guard units (Yockelson 1998). At the start of World War I, the United States had no process in place to build a mass army, supply it, and transport it, unlike continental European powers that had universal military service programs in place and a large pool of trained reservists at the outbreak of the war (Garamone 2017).

### California's Demographic Transformation

There is more going on in California to explain its strong anti-gun stance, more than the state never developing a martial culture or honor culture or having a history in which the right to keep and bear arms played an integral role. The reason is the demographic transformation of California because of the Immigration Act of 1965, but first let us get where we need to be to understand the situation, using Elazar's Political Culture Theory as a guide.

Based on Elazar's explanation of settlement patterns, the downstate portion of Illinois, which is really just everywhere outside the collar counties of Chicago, have individualistic and traditionalistic political cultures that are markedly different from the moralistic political culture that dominates Chicago. The Illinois chapter goes into explicit detail about how settlement

patterns in the state affect the right to keep and bear arms as well as other dysfunction in Illinois's governance. The moralistic political culture came into the northern portion of the territory late in the game, after the Black Hawk War and via the Great Lakes from formerly Puritan New England, and the moralists subsequently went about changing the state in fundamental ways, notably ending slavery via the courts and setting up enough conflict that a new state constitution was required. Elazar's historiography makes it quite clear that demography may not be destiny, to paraphrase the cliché, but it plays a large part in the political culture of the state and region. This phenomenon is also found in Texas, in that the original Spanish/Mexican colonists were overwhelmed by Anglo settlers, who, after a successful war of secession, imposed their culture on the original owners of the land. The Spanish/Mexican settlers, always few in number, gradually amalgamated themselves to the dominant culture of the houseguests who took over the mortgage and who went on to defeat the threatening neighbors, the Comanche. Since the Texas Revolution, Texas has stayed solidly traditionalistic until the twenty-first century despite the demographic implosion that was the Civil War and the attempt at forced cultural change that was Reconstruction. Today, it is still traditionalistic/individualistic except for pockets that are moralistic or progressive, mostly in the urban pocket of Austin. So, using Elazar's well-tested Political Culture Theory, we can see that Illinois is the way it is based on Elazar's account of settlement patterns, and that Texas is the way it is due to Anglo settlement patterns. Therefore, we must look with a clear and nonideological eye at more recent settlement patterns and how the settlement patterns that have taken place after Elazar finalized his theory in 1966 have changed the political culture of the state of California.

### California as a Bellwether

California until the 1990s was a swing state, and it was not a given that its electoral votes would go to the Democratic Party in the presidential election. Republicans, except for the 1964 Goldwater loss, won the state from the 1950s through the 1980s. The last time was in 1988, when Vice President George H. W. Bush won the state by 51.13 percent to Governor Michael Dukakis's 47.56 percent (Leip 2016). By 1992, California was on its way to becoming a one-party state due to Hispanic migration, although it did take some time and there was pushback. In 1994, California voters passed Proposition 187, which sought to prevent people from receiving social services or public education until they were verified as U.S. citizens, which was

invalidated by the courts in 1999. Still the measure passed by a large margin, 59 percent to 41 percent (Bennett 2014).

Just like Texas's moralistic pockets and how Illinois was changed by moralists moving into the Chicago region, California's individualistic political culture, a legacy of the state's formation from the wave of opportunistic settlers coming during the Gold Rush, has been markedly changed by relatively recent Hispanic immigration. In 1970, 76 percent of Californians were non-Hispanic white, by 2016, it was 38 percent non-Hispanic white (Meyerson 2016). "Since the state began tracking party affiliation in 1922, Republicans have never had such a low share. [By 2014] Republicans are 29% of voters; Democrats are 44%" (Bennett 2014). There is a plethora of data by professional pollsters, mostly by the Pew Research Center on Social and Demographic Trends, which in no uncertain terms show how for the gun issue, the demographic transition of California to a state with a large Hispanic population has pushed the state even further in terms of support for gun control.

Since Hispanics convinced President Ronald Reagan to support amnesty in 1986, pundits and political scientists have been making the case that Hispanics from Mexico and the rest of South America are natural conservatives, in that they are traditional Catholics and have a conservative stance on a host of cultural issues. That may be the case theoretically, but in actuality, they are solidly in the camp of the liberal Democratic Party, anywhere from +18 to +44, in every presidential election since 1980, and the Democratic Party is the current home of the gun control movement. For a chart on the issue, there is table 9 sourced from Pew Research (Lopez and Taylor 2012). As the Hispanic population of California increased, between 1960 and 2010, its electoral college votes have, in tandem, gone to the Democratic Party, with the flip happening in the 1992 election, in every presidential election until 2020 and on into the foreseeable future.

Not to get off track on identity politics with any analysis of why Hispanics vote for the Democratic Party, it is enough to note for this book the certain fact that Hispanics vote Democratic, and since the gun issue was sorted into partisan camps in the 1960s, the gun control movement resides in the Democratic Party.

It is not just that big tent politics means that Hispanics inside the Democratic Party support gun control by default because of party affiliation. In an alternate world where Hispanics voted Republican for whatever hypothetical reason, as a demographic group a large majority of Hispanics would still support gun control over gun rights. While it may be true that their party affiliation is driving their policy preferences on gun control, this is

Table 9. Hispanic Vote in Presidential Elections, 1980–2012

The Hispanic Vote in Presidential Elections, 1980–2012					
% of Hispanics that voted for the . . .					
Year	Democratic Candidate		Republican Candidate		Democratic Advantage
1980	Carter	56%	Reagan	36%	20%
1984	Mondale	61%	Reagan	37%	24%
1988	Dukakis	69%	H.W. Bush	30%	39%
1992	Clinton	61%	H.W. Bush	25%	36%
1996	Clinton	72%	Dole	21%	51%
2000	Gore	62%	W. Bush	35%	27%
2004	Kerry	58%	W. Bush	40%	18%
2008	Obama	67%	McCain	31%	36%
2012	Obama	71%	Romney	27%	44%

*Notes:* Independent and 3rd party candidates not shown. In 1992, Ross Perot received 14% of the Hispanic vote.

*Source:* Pew Hispanic Center exit poll data

not likely the case because Hispanic rates of firearms ownership are low. Owning a gun naturally implies support for gun rights over gun control because a gun owner has a personal vested stake in the matter. Owning a gun, literally, makes the personal political by dint of legal possession of the item at the center of the policy debate. We find, according to Pew research, that only 20 percent of Hispanic households have guns, compared to non-Hispanic whites at 41 percent and 19 percent for blacks (Morin 2014). On a personal level, not household level, polling estimates are that 48 percent of white men own guns, whereas only 24 percent of white women and 24 percent of nonwhite men do, and it is even lower for nonwhite women at 16 percent (Parker et al. 2017). Given that so few Hispanics own guns, survey research should show that they are less invested in support for gun rights, and indeed this is the case. Pew also found that 62 percent of Hispanics support gun control over gun rights, compared to just 39 percent of non-Hispanic whites; moreover, this is even stronger for recent immigrants than for the native born:

Looking across all Hispanics regardless of their voter registration status or eligibility, 82% of foreign-born Hispanics think controlling gun ownership is more important than protecting gun ownership rights, compared with 59% of Hispanics born in the U.S. who say the same. (Lopez et al. 2014)



At one time, a conservative Republican could capture California's electoral votes, as Ronald Reagan did in 1980 and 1984 and his vice president in 1988, but the state is now solidly in the camp of Democratic liberalism in a manner that Daniel Elazar would easily understand and indeed articulated in his historiography. California flipped parties because the type of immigrants into California after 1965 were different than the ones that arrived between 1921 and 1965. The 1965 act was intended to give preference to skilled and educated immigrants, but in an unintended consequence, the last-minute inclusion of a prioritization of immigrants with family members already in the United States is what changed the demography of America dramatically. This measure was intended to ensure that the demographic mix from 1921 stayed intact, but when demand for immigration from Europe declined, their slots (and family slots) were given to Asian, African, and mostly Hispanic immigrants (Chishti, Hipsman, and Ball 2015), who were able, through chain migration, to bring in ever larger amounts of their fellow demographic group. Table 10 shows regions of birth for immigrants in the United States from 1960 to 2019 (Migration Policy Institute 2019b).

The recovery of European economies after World War II, combined with western European population decline from low birth rates, led to a decrease in the number of prospective immigrants to the United States from that continent; meanwhile the desire to immigrate from the continent's former colonies continued to increase. Compared to prior to 1965, half of all immigrants come from Latin America, the largest share of which is from Mexico, and one-quarter are from Asian countries: India, the Philippines, China, Vietnam, El Salvador, Cuba, South Korea, the Dominican Republic, and Guatemala account for nearly 60 percent of the current immigrant population (Chishti, Hipsman, and Ball 2015).

Asian immigration into the United States and California has also been quite large. Polling data on Asians (admittedly a broad category that could be parsed numerous ways) and guns shows that they are not supporters of gun rights. The Spring 2016 Asian American Voter Survey run by the University of California–Riverside shows that Asian support for gun control is even higher than that of Hispanics, with 77 percent supporting stricter gun laws and only 17 percent opposed (Ramakrishnan 2016), whereas for the rest of the United States as a whole, it is only about 50 percent supporting more gun control and 50 percent opposed to more gun laws, a finding from many other surveys. Table 10 shows how Asian immigration into the United States has markedly increased, and this has been the case in California as well.

Table 10. Regions of Birth for Immigrants in the United States, 1960–2019

US Immigrant Population by World Region of Birth, 1960–2019						
Region of Birth by Percent						
Year	Americas	Asia	Africa	Europe	Oceania	Not Reported
1960	19.1%	5.0%	0.4%	74.5%	0.4%	0.6%
1970	27.2%	8.6%	0.8%	74.5%	0.4%	3.3%
1980	37.1%	18.0%	1.4%	36.6%	0.6%	6.3%
1990	46.3%	25.2%	1.8%	22.0%	0.5%	4.1%
2000	54.4%	26.4%	2.8%	15.8%	0.5%	0.0%
2010	55.1%	28.2%	4.0%	12.1%	0.5%	0.0%
2019	52.1%	31.4%	5.5%	10.4%	0.7%	0.0%
Region of Birth by Amount						
Year	Americas	Asia	Africa	Europe	Oceania	Not Reported
1960	1,860,800	491,000	35,400	7,256,300	34,700	59,900
1970	2,616,400	824,900	80,100	5,740,900	41,300	315,700
1980	5,225,900	2,539,800	199,700	5,149,600	77,600	887,300
1990	9,161,800	4,979,000	363,800	4,350,400	104,400	808,200
2000	16,919,400	8,226,300	881,300	4,915,600	168,000	NA
2010	22,031,000	11,283,600	1,606,900	4,817,400	216,700	NA
2019	23,392,800	14,099,500	2,475,100	4,665,200	300,200	NA

Source: Migration Policy Institute 2019b

## Testing the Dynamic and Constrained Court Theory in California

Now that we have reviewed the cultural and demographic history as it applies to California's right to keep and bear arms, let's move into hypothesis testing.

- $H_1$ : Increased levels of keeping and bearing arms will not occur without an interpretation of the Second Amendment that allows for an expansion of individual rights.

Constraint I, the limited nature of constitutional rights, was overcome because of incorporation, a well-accepted legal doctrine. This hypothesis was not falsified, and at the state level, with federal supremacy, incorporation was little in doubt.

- $H_2$ : Increased levels of keeping and bearing arms will not occur without support for an expansion of individual gun rights from substantial numbers of members of the legislature and the executive.

Constraint II, the lack of judicial independence, was not overcome by support for change from substantial numbers in the legislature and from the executive. This hypothesis was not falsified. Coming into the *Heller* and *McDonald* decisions, California had a higher level of gun control than every other state in the nation, and the level of democratically passed gun control continued apace. California's high level of gun control is based on its Brady Index scores from 2007 to 2011, in 2013, and in 2015. The only closest comparable state is New Jersey (individualistic), although California always comes out ahead. By way of comparison, Illinois (individualistic/moralistic) is in the middle of the pack of the fifty states, trending upward over time, while Texas is close to the bottom, trending downward over time.

The rural portions of California are, like everywhere else in the United States, more given to a right to keep and bear arms than the urban portions. But as urban and suburbanization advance, a state without an underlying cultural respect for the right to keep and bear arms will further restrict access to arms because the biggest divide in opinion on gun control has always been urban vs. rural. The figures vary by survey, but only about 30 percent of urban residents own guns, while about 60 percent of rural residents do (Blocher 2013). Owning a gun is axiomatically support for an individual right to keep and bear arms.

The history of California gun laws has been tracked. A gun rights group called the Calguns Foundation, which engages in litigation, provides a sourced timeline of California's major gun laws from the twentieth century onward, which, combined with other research, shows the laws that contributed to the aforementioned highest Brady Index score in the nation. Only a few of these laws can be considered gun rights laws, such as a 1969 pre-emption law only allowing the state to control a licensing requirement for the purchase of a firearm. The list is found in table 11.

Portions of Proposition 63 are tied up in the courts, the primary case being *Rhode v. Becerra* (Ballotpedia 2020). Regardless of the actual outcome, it is enough to show that gun control advanced in California even during the administration of the only Republican governor of California in recent history, Arnold Schwarzenegger (2003–2011), who was a moderate on the issue and believed (before *Heller*) that the Second Amendment allows law-abiding citizens to own guns. But he also supported the Brady Bill and assault weapons bans (OnTheIssues.org 2003).

Table 11. Timeline of California Gun Laws in Twentieth and Twenty-First Centuries

	Year	Policy Change
1	1917	Dangerous Weapons Control Act—prohibits concealed carry
2	1923	One-day waiting period on handguns
3	1924	Dealer's Record of Sale (DROS) must be reported to state
4	1924	Concealed carry prohibition law updated
5	1955	Three-day waiting period on handguns
6	1965	Five-day waiting period on handguns
7	1967	Mulford Act
8	1969	State pre-emption of the field of licensing and registration of guns
9	1975	15-day waiting period on handguns
10	1990	First round of assault weapons laws (specific guns banned by name)
11	1991	Required sales through dealers, no more person-to-person sales
12	1993	Intra-family transfers exemption of person-to-person sales clarified
13	1994	Basic Firearms Safety Certificate (safety courses required for handgun purchase)
14	1996	California Gun Free School Zones
15	1996	Law prohibiting a license to own firearms, and safe transport of firearms language
16	1996	Armor-piercing handgun ammunition banned
17	1997	Dealer's Record of Sale (DROS) must be electronic
18	1998	Personal Handgun Importer (persons moving to California must register handguns)
19	1998	Roster of Handguns (Safe Gun list), passed 1998, effective 2001
20	1999	Second round of assault weapons laws (guns banned by feature), effective in 2000
21	1999	Only one handgun every 30 days, passed in 1999, effective 2000
22	2000	Banned sale of magazines that hold more than 10 rounds, grandfathers existing mags
23	2001	Handgun Safety Certificate required for firearms purchase
24	2003	Requirement to prove California residency added to Handgun Safety Certificate requirement
25	2011	Open carry of unloaded handguns banned
26	2011	Long gun registration, passed 2011, effective 2014
i27	2012	Open carry of unloaded long guns banned, passed 2012, effective 2013
28	2014	Expansion of requirement of persons moving to California to register handguns
29	2015	Firearms Safety Certificate requirement expanded to long guns
30	2016	Bans ammo purchases by mail, license and background check required to buy ammo, ban on magazines holding 10+ rounds, all gun thefts are felonies, theft reporting required (Prop 63)

Source: Calguns Foundation, Anthony Cooling

What is also noticeable that from 2008's *Heller* to 2010's *McDonald* and onward is that the needle has not moved toward gun rights as opposed to gun control, in the legislative sense, in the state of California. There has been no increase in keeping and bearing arms by way of the Supreme Court decisions. Moreover, the most recent sweeping gun control law passed by ballot initiative won with 63 percent of the vote (California Secretary of State's Office 2016), showing that by a broad margin there, the voting public supports gun control over gun rights. At the outset we can confirm that the Court has not been successful in creating significant social change in California. The demographics of California in the twentieth century make it that unless there is a federal intervention in the steadily advancing gun control regulatory regime of California, there will not be any significant social change toward more keeping and bearing arms in that state.

The same high level of gun control California had prior to both the *Heller* and *McDonald* decisions remains in place, and moreover, the elected branches have expanded the amount of gun control, and this is, ironically, partly in response to the work of gun rights advocates. To protest the general lack of a right to bear or carry arms in the state due to the "may issue" permit system, gun rights advocates began to openly carry unloaded handguns as a political statement (being unloaded, they were ineffective as a means of self-defense), an act of political protest that was not in violation of the Mulford Act. This was unsurprisingly banned, with limited exceptions for hunting and target shooting. The gun rights advocates then switched to the open carrying of unloaded long guns. Subsequently, and again unsurprisingly, this was also banned, with limited exceptions for hunting and target shooting. Media reports at the time show that the legislation was specifically targeted at open carry activists.

The [ban on open carry of long guns] by Democratic Assemblyman Mike Gipson of Carson adds to existing legislation banning the open carrying of handguns and long guns. The initial law limiting the open carrying of handguns was passed in 2011 in response to demonstrations by Second Amendment advocates who brought weapons openly into stores and restaurants to protest other restrictions. (Thompson 2017)

If the gun rights advocates were hoping *Heller* and *McDonald* would give them top cover or that their protests would sway public opinion, they were mistaken. They ultimately harmed their cause.

The narrowness of the actual holdings in *Heller* and *McDonald*, that only

complete handgun bans and restrictive storage laws are unconstitutional that applies to the states through the Fourteenth Amendment, means there was no immediate impasse between the Court and elected officials to roll back any gun control laws other than any complete bans on handguns or strict storage laws. Since only Chicago, a few of its close suburbs, and Washington, D.C., had complete handgun bans and such restrictive storage laws, the effect of the twin cases of *Heller* and *McDonald*, from the perspective of a California state legislator like Mike Gipson, is that at most the decisions take complete bans off the table. This was the official position of the Brady Campaign, with the president of the organization, Paul Helmke, saying of *Heller*: “The only thing that hurts our efforts is if it is an extreme decision that says you cannot have any limits, anytime, anywhere. But anything short of that—that basically allows reasonable restrictions. . . . I think could help the gun control movement” (Schor 2008). The realpolitik in the state of California is that the linked cases of *Heller* and *McDonald* are symbolic only, even if they are exceptionally important in the bigger picture of constitutional jurisprudence. To the California legislature there were no actual actions required to stay within the rule of law, as nothing needed to be done to comply with the Supreme Court’s ruling.

This is not to say that *Heller* and *McDonald* have had no effect on California. They certainly have, just not in the legislative sense; the cases have been keeping the lawyers busy. The impact they have had is that California has also been the target of a significant amount of litigation with regard to the Second Amendment, but with virtually all of it coming to naught from the perspective of the gun rights reform movement. Nevertheless, there are a couple of key cases that should be reviewed as they revolve around the same issue, what protections the “bear” word in the Second Amendment’s right to “keep and bear arms” means in the state with the highest level of gun control in the nation.

The first case is one that was briefly touched on earlier, as it was the subject of a dissent from a denial of certiorari by Justice Thomas, and that is *Peruta v. California* (2017). In this dissent, Justice Thomas, joined by Justice Gorsuch, wrote that the Court was in danger of making the Second Amendment an “orphan.” At issue in that case was whether the Second Amendment entitles ordinary citizens to carry handguns outside the home for self-defense, specifically concealed carry, when open carry is forbidden by law. Under California law, an applicant for a license must show, among other things, “good cause” to carry a concealed firearm. California law authorizes county sheriffs to establish and publish policies defining “good cause,” and this local control means that very few permits are ever granted in places like

San Francisco, while other counties grant them more liberally (more data on this will be presented later). The decision of the Ninth Circuit, en banc, in *Peruta*, was that

The history relevant to both the Second Amendment and its incorporation by the Fourteenth Amendment lead to the same conclusion: The right of a member of the general public to carry a *concealed* firearm in public is not, and never has been, protected by the Second Amendment. Therefore, because the Second Amendment does not protect in any degree the right to carry *concealed* firearms in public, any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of “good cause,” however defined—is necessarily allowed by the Amendment . . . *there may or may not be* a Second Amendment right for a member of the general public to carry a firearm openly in public, but the Supreme Court has not answered that question. (3–4, emphasis added)

This result from the Ninth Circuit that concealed carry was not protected by the Second Amendment was expected based on precedent of nineteenth-century cases in which concealed carry prohibitions were upheld, and the text of *Heller* itself says:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. (2008, 54)

What is startling is the pithy manner in which the Ninth Circuit opinion notes the Supreme Court’s lack of guidance on what the “bear” part of the “to keep and bear” part of the Second Amendment meant. The en banc Ninth Circuit decided that since some form of “bearing” of arms is allowed in California, through the existence of a “may issue” statutory regime, and even though open carry is generally prohibited except in unincorporated areas where a county has not made open carry illegal, that California’s regime of county control of concealed carry permits does not violate the Second Amendment.

Another Ninth Circuit case did put California's restrictive regime in jeopardy. Not the "may issue" permit system, but instead the near total prohibition on open carry. In 2017 in *Peruta*, the Ninth Circuit, en banc, had held that the Second Amendment does not secure a right to concealed carry. But just a year later, a 2018 decision from a case coming out of Hawaii came to the conclusion that there is a Second Amendment right to open carry in public spaces so that an individual may be able to defend oneself there as well as the home or a place of business, which the "keep" part of the Second Amendment protects. This panel came to this conclusion by also citing nineteenth-century cases and *Heller*. In *Young v. Hawaii*, a panel on a 2–1 vote distinguished itself from the decision in *Peruta* in a novel way. The panel was answering *Peruta's* challenge with a technical answer: "the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public. . . . But, as even the dissent acknowledges, our court explicitly left unresolved the question of whether the Second Amendment encompasses a right to open carry" (2018, 11).

According to the Ninth Circuit panel in *Young*, the "keep" portion of the Second Amendment effectuates the core purpose of self-defense inside the home, while the "bear" portion protects the core self-defense purpose of the amendment outside the home, and this, too, fits comfortably within the same nineteenth-century precedent the en banc decision used in *Peruta*. The Ninth Circuit almost created a split within its own circuit by deciding there is a right to *open* carry—and that Hawaii's restrictive regime, which prevents open carry, violates it—without overruling the en banc decision in *Peruta* that there is no right to *concealed* carry. The whole situation calls to mind Rosenberg's Constraint II, which is "the lack of judicial independence." A court can only issue decisions on the cases brought before it. *Peruta* was about concealed carry, and the Ninth Circuit en banc decided about concealed carry. The pro-gun legal activists took aim at Hawaii's laws against open carry, not at its "may issue" concealed carry system, one that is even more restrictive than California's, and the Ninth Circuit panel in *Young* decided on open carry.

Hawaii appealed, and the case was heard by the Ninth Circuit en banc. After a long delay, it was scheduled for arguments in September of 2020, after being put on hold pending a 2020 decision from the Supreme Court in *New York State Rifle & Pistol Association v. City of New York*. After that case was found to be moot, the Ninth Circuit moved ahead, concluding that Hawaii's "restrictions on the open carrying of firearms reflect longstanding prohibitions, and therefore, the conduct they regulate is outside the histori-



cal scope of the Second Amendment” (*George K. Young v. Hawaii* 2021, 4). The en banc court held that the Second Amendment does not guarantee an unfettered, general right to openly carry arms in public for individual self-defense, taking emphasis, like in *Heller*, to note that the laws in questions have been in place for a long time, since the 1920s. It was ever doubtful a court would overturn laws prohibiting the much more socially disruptive practice of open carry, which as their decision notes has been prohibited at various times and places in England since the thirteenth century and likewise in colonial America. According to Rolle (1998) concealed carry was the preferred method of bearing arms in California in the nineteenth century, though we don’t know how common concealed or open carry was. But there are fewer contemporary reports of it there as compared to Texas, where open carry was quite common. Honor culture was not nearly as prevalent in California as well, and duels were rare. Still, open carry was allowed by law until the early twentieth century, though few were socially disruptive about it until the 1960s militant wing of the civil rights movement came on the scene.

All this is not to say that no one has a concealed carry permit in California. Quite the contrary, although it is a low number in relation to other states that have a more liberal permitting system, since the requirements are also high: a \$385 fee and sixteen hours of training (Lott 2017). County-level control over the permit system in California means there are major differences between the number of permits issued in the state depending on where one lives, although the permits are good throughout the state. On one hand, this provides a Tocquevillian measure of local control because an elected official close to the people, the county sheriff, is the one who decides who obtains a permit under the “may issue” system. If the local population desires more permits because of a more pro-gun culture, replacement of a county sheriff is a much easier matter via an election where a few hundred votes make the difference between victory or defeat, rather than lawsuits, state legislation, or even a federal concealed carry reciprocity law. On the other hand, there is no geographic clause in the Second Amendment. In 2015, some classic investigative journalism was done using data from the California Department of Justice (Drange and Smith 2015) on the difference in permits granted by county in California, and the results are stark. See table 12 from Drange and Smith, which lists the number of permits by county in 2014.

In an example of this aforementioned local control, in Sacramento, a moderate independent sheriff, Scott Jones, first elected in 2010, has been granting thousands of permits, far more than his predecessor. He is not

Table 12. Concealed Carry Permits in California—2014

County	Population	Active Permits and Pending Permits
Fresno	965,974	8,273
Kern	874,589	6,916
Shasta	179,804	6,418
Sacramento	1,482,026	7,163
Tulare	458,198	4,499
San Bernardino	2,112,619	3,902
Orange	3,145,515	5,926
Stanislaus	531,997	4,014
Placer	371,694	2,905
Butte	224,241	2,886
El Dorado	183,087	3,000
Madera	154,548	2,153
Sutter	95,847	1,617
Mendocino	87,869	1,283
Tehama	63,067	1,346
Riverside	2,329,271	1,512
Calaveras	44,624	1,155
Tuolumne	53,831	1,131
Nevada	98,893	1,075
San Diego	3,263,431	1,055
Yuba	73,966	995
Humboldt	134,809	997
San Joaquin	715,597	2,010
Kings	150,269	1,026
Inyo	18,410	503
Lake	64,184	496
Napa	141,667	442
Amador	36,742	410
Trinity	13,170	415
Monterey	431,344	462
Ventura	846,178	1,817
Glenn	27,955	304
Contra Costa	1,111,339	435
Modoc	9,023	236
Del Norte	27,212	232
San Mateo	758,581	271
Colusa	21,419	188
Imperial	179,091	207
Alameda	1,610,921	208
Yolo	207,590	171
Mono	13,997	174
Santa Clara	1,894,605	151
Sierra	3,003	115
Sonoma	500,292	121
San Benito	58,267	133
Santa Barbara	440,668	73
Marin	260,750	51
Santa Cruz	271,804	99
Alpine	1,116	19
San Francisco	852,469	6

unpopular; he was re-elected in 2014 and won again in 2018, despite losing a 2016 congressional run as a Republican.

In 2014, there were 70,593 permit holders in California, which was 0.24 percent of the adult population (Drange and Smith 2015; Lott, Whitley, and Riley 2015). Let us compare our three case study states for that time period because it provides a good benchmark for growth. Illinois makes a good baseline, as it is right about the time the concealed carry law was put into place and fully implemented after the 2013 Seventh Circuit case *Moore v. Madigan*, which brought concealed carry to Illinois. In 2015, Illinois there were 103,000 permits, 1.09 percent of the adult population. In Texas in 2014 there were 841,500 permits, or 4.05 percent of the adult population (Lott, Whitley, and Riley 2015). The amount has grown in all three states, both as a total number, but also as a percentage of population. What we see is more than a doubling of the number of permits numbers and the percentage of the adult population in Illinois, likely responding to pent-up demand, a substantial and steady increase in Texas, but barely a whisper of an increase in California. By 2017, there were about 92,000 people, 0.31 percent of the adult population in California, who had concealed carry permits (a 0.07 percent increase) compared to 243,254 for Illinois or 2.26 percent of the adult population, which is dwarfed by the 1,200,746 permit holders in Texas, or 5.26 percent of the adult population (Lott 2017). Just by way of comparison, of the states that require permits, Alabama has the highest at 20.07 percent of the adult population possessing a permit, and the lowest is Hawaii, where if you include the few permits allowed for private security firms, 0.02 percent of the adult population possesses permits.

We can now test the remaining hypotheses of the Constrained Court Theory:

- $H_3$ : Increased levels of keeping and bearing arms will not occur without support for an individual right to keep and bear arms from some citizens or low opposition to an increased right for an individual right to keep and bear arms from all citizens; unless
- $H_{3a}$ : Positive incentives are used to gain support of jurisdictions to expand citizens' ability to keep and bear arms; or
- $H_{3b}$ : Negative incentives are used to override opposition to an expansion of citizens' ability to keep and bear arms; or
- $H_{3c}$ : Market forces are allowed to allow for an increase in citizens purchasing arms to keep and bear, and likewise to utilize them in a legal manner; or
- $H_{3d}$ : Officials simultaneously convince citizens they have no choice but to implement the policies that allow for an increase in

the keeping and bearing of arms and that such policies are a way to gain more resources.

Constraint III, the judiciary's lack of implementation powers, has not been overcome, although mostly because the judiciary has not made decisions that require implementation, and therefore there is no use of positive or negative incentives or market forces to overcome public opposition.  $H_3$  has not been falsified, and this goes for  $H_{3a-d}$  related to the use of incentives or market forces. The people of California after *Heller* and *McDonald* continue to send pro-gun control legislators and governors to the capital in Sacramento, and courts have not on their own significantly increased the level of keeping and bearing arms in that state. Among the voters of California, there is not a low level of opposition or strong support for the right to keep and bear arms such that it is possible to make significant social change and increase the level of keeping and bearing arms. A 2018 poll from the Public Policy Institute of California finds that 73 percent of likely voters in that state favor stronger gun controls, 21 percent think gun laws should stay the same, and only 5 percent think they should be less strict. Democrats overwhelming support stricter laws (87 percent), and a solid majority of independents (68 percent) say gun laws should be stricter. Notably, even among California Republicans, almost half (48 percent) say the laws covering gun sales should be made stricter (Baldassare et al. 2018).

Another large piece of evidence that there is significant opposition to increased keeping and bearing arms in California was the passage of Proposition 63 in 2016, which perhaps could be classified as backlash (although perhaps not, as it happened six years after *McDonald*). California Proposition 63, the Background Checks for Ammunition Purchases and Large-Capacity Ammunition Magazine Ban Initiative, was on the November 8, 2016, ballot in California as an initiated state statute, and it was approved with a 63.8 percent yes vote and a 36.92 percent no vote (Ballotpedia n.d.). Granted, the future of portions of Proposition 63 are in question via the courts, but even if it is overturned in part, it would merely return things to the status quo of high levels of California gun control, which is strongly supported by the residents of the state.

## Conclusion on California

The results of the California case study affirm the Constrained Court Theory. Significant social change did not occur through the courts, rather it occurred in the opposite direction, less keeping and bearing arms, due to

the consequence of elections and direct democracy through a ballot initiative showing the clear will of the majority of voting citizens. State culture matters. The story of California and the right to keep and bear arms is such that the state never had an arms culture to begin with because it never had to fight a revolution in which firearms were a central issue (as in the Texas Revolution). It never had an external threat in the way of a swift and effective mounted enemy like the Comanche that required a citizen militia to defend the homeland. And there was no standing threat from a hostile foreign power, like Mexico was to Texas. A professional military was always there to defend California, and the major military presence in California never spurred on a martial culture, as it is mostly the sea services or the Air Force that were placed there after the full nationalization of the U.S. military.

For the majority of California's history, however, it was mostly a rural state, so strong gun control was never imposed. For that matter, neither was strict gun control in place to control access to arms to racial minorities, as in the South, although it was put in place to restrict access to ethnic minorities who poured into the state at the end of the nineteenth century and into the early twentieth century. When the state was still predominantly white in 1924, any possible demographic changes to the state's dominant culture, which was still neutral on the issue of guns, were controlled at the national level in 1921. This status quo did not change until after 1965 and the waves of Hispanic and Asian migration to the state.

Several other changes happened in the twentieth century to push the state to have the highest level of gun control in the country. First, like elsewhere, the state became increasingly urbanized, and urban voters are more supportive of gun control than rural voters are. Second, there was a partisan sorting of the gun issue in the 1960s, with the gun control movement landing in the Democratic Party and the gun rights movement landing in the Republican Party. Third, conservative Hollywood moguls lost control of their vertically integrated studio systems, and a more liberal culture has pushed the state more into the Democratic Party, which is the home of the gun control movement. Fourth, the militant wing of the civil rights movement led to armed black citizens doing what the still dominant white culture of the state considered rabble rousing, using the moderate gun laws in the state to advocate for the overthrow of the dominant culture, to which the white-led government naturally responded by restricting gun rights. But since this was in the 1960s, the gun control laws were neutrally applied to both the dominant white culture and the black power advocates. Meanwhile nationwide, from the 1960s through the 1990s, there was an increasing level

of gun control and only one piece of gun rights legislation under President Reagan. By the time the gun rights movement started to make national headway in the mid-1990s and accelerated with the election of president George W. Bush, California had moved so far against gun rights that making change at the state level would be precluded by the demographic transformation already rapidly underway.

After the 1965 changes to the nation's immigration laws, the subsequent demographic changes to the state pushed California into effectively being a one-party state, with that party being the Democratic Party, the home of the gun control movement. While rural and Republican pockets of California exist, the one person/one vote method of apportionment means that the Republican Party has little, if any, electoral say in the state. Even the lone Republican governor, movie star Arnold Schwarzenegger, in office from 2003 through 2011 largely by dint of his celebrity, signed one gun control law during his tenure. Once a Republican was out of office, the steady flow of gun control resumed, and provided that gun control laws did not amount to a total handgun ban or storage laws that prevented access to a gun for self-defense in the home, then those laws were perfectly constitutional under the *Heller* and *McDonald* decisions if those decisions were read as narrowly as possible. Both decisions deterred anti-gun legislators not one whit.

The state has, in extremely small doses, embraced more keeping and bearing of arms in that locally elected sheriffs in more rural and Republican counties are giving out permits under the state's "may issue" system, but the number of adults with permits is 0.31 percent of the population, an amount that is minuscule compared to other states with "shall issue" permit systems. Overall, courts have been no help to the gun rights advocates, with the Supreme Court refusing to grant certiorari in cases that challenge state-level assault weapons bans or restrictive carry laws. There are only a court few decisions providing gun rights advocates a glimmer of possible change, but the process by which this is happening is particularly convoluted in that history and precedent, including *Heller* itself, allows for restrictions on concealed carry.

There has not been more keeping and bearing of arms in California, and thus no significant social change through the courts. Unless a national-level event overrides state control, there will be no change for California. Such an event could be something like a national reciprocity act for concealed carry, in which, depending on how such a law is implemented, California residents could obtain an out-of-state permit from Utah that would be valid in California, and this would be an end run around the restrictive "may issue" system. Another event could be a Supreme Court decision that weapons such

as the AR-15 are protected by the Second Amendment as “arms in common use” under the precedent set in *Heller* or that concealed carry is protected under the “bear” in the “to keep and bear” text of the Second Amendment. Pro-gun residents of California cannot count on in-state voters leading the way, as demography precludes it. After the Republicans lost control of the House to the Democratic Party in 2018 and the White House in 2020, the strongly held pro-gun control stance of Hispanics and Asians who are current voters will continue to dominate California’s electoral politics for the conceivable future.

PART IV

## Still a Hollow Hope





## Cultural Variation Matters

The process tracing throughout this book, both for the national-level analysis and the state-level analyses, showed that significant social change in the case of gun rights happened slowly, more slowly than the reformers wanted and yet too fast for those who sought to maintain the status quo and to mount an effective legislative backlash campaign. But courts, specifically the Supreme Court, are a side car attached to the cultural motorcycle. They go along for the ride. To torture the analogy, from time to time, though, the side car may offer directions to the cultural driver riding the motorcycle of the elected branches. In the 1960s through the 1970s, America was headed on a path toward civilian disarmament, and that direction was slowly stopped and then reversed by pro-gun activists at state and federal levels prior to the 2008 *Heller* decision. Regardless of the history presented in both *Heller* and this book's qualitative analysis about the roots of the Second Amendment, a persuasive case can be made, as Professor Reva Siegel (2008) has in "Dead or Alive: Originalism as Popular Constitutionalism in *Heller*," that the current vision of the Second Amendment was conceived and refined as a product of the modern conservative-libertarian movement. The Supreme Court just rode the cresting wave of that cultural reversal pushed by the that movement. That reversal was but a small part of the larger electoral realignment of 1980 that brought Ronald Reagan and the New Right to power. The seed that grew into *Heller* came about when the New Right stopped trying to tame the courts and instead modeled its own rights litigation strategy after the NAACP's. It did this by creating its own conservative legal movement, initially due to the efforts of the Federalist Society and the libertarian Institute for Justice (Hollis-Brusky 2015; Teles 2008).

Just as the matriculation process for originalist judges starts decades before they get on the court, the Standard Model interpretation of the Sec-

ond Amendment as protecting an individual right to keep and bear arms, while not a twentieth-century invention, only gained theoretical dominance over the collective right model over the course of almost four decades, from the mid-1960s until its expression in *Heller* in 2008. There was a post-Civil War benign neglect for a widely held understanding of the Second Amendment as protecting an individual right that happened due to the implications of racial and ethnic minorities having access to the same level of firepower as the dominant white majority; this neglect led to the ascendance of a theory that the Second Amendment protected only a collective right for the militia, and this was further aided through the ascendance of liberal legalism in and about the Warren Court era. This malign neglect by the Supreme Court of the Second Amendment led lower courts to provide a judicial imprimatur of acceptability to racially neutral restrictions that were, at the time, not applied to the white race and came to be applied to the white race after the end of segregation. When the time came that gun rights activists were able to get the Supreme Court to apply a remedy to the situation with lower courts, there were more than a century of accumulated violations to an originalist understanding of the Second Amendment. The Supreme Court lacked either the courage or the votes (these are not mutually exclusive) to apply a remedy that would satisfy the reformers in declaring a wide swath of gun laws unconstitutional, and they did not want to strongly offend the status quo. Note that the *Heller* decision came from a Supreme Court with a membership that could be quite aggressive at times, as demonstrated by *Shelby County v. Holder* (a case ruling part of the Voting Rights Act unconstitutional) and the *Obergefell* case, which radically upended the legal landscape with regard to same-sex marriage. With the smart money among the cognoscenti thinking that Justice Kennedy's vote was on the line, the Supreme Court split the difference of an originalist understanding of the Second Amendment and one that left most gun laws in place, and the result was a pair of narrowly applied decisions, not fully doing the right thing in the eyes of the reformers and using their institutional legitimacy to enforce it fully with a decision that was tolerable to gun rights groups in that it only precluded an absolute ban on handguns and the most restrictive storage laws. The Supreme Court was careful to dollop out its institutional support for the reformer's side in the debate, and the most logical reason was expressed by Justice Frankfurter in a dissent on another landmark case, *Baker v. Carr* (1962), when he felt the Court was in danger of interfering too much with the political process; "the court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction." The Supreme Court rests at the apex of the three branches for

public support and has a steady 50 percent approval in 2018 and going back in time (Gallup), compared to 18 percent for Congress (Gallup 2018) and the highly variable presidential approval rating.

It would be perhaps too much to agree completely with Rosenberg's conclusion that the courts are "fly paper." Even he qualified that finding in the second edition of *The Hollow Hope*, subsequent writings, and in a response to his critics that is found at the University of Chicago Press website, noting that courts do matter, but in context and with qualifications he already notes in the *Constrained Court Theory*. But as best as a scientific examination of the efficacy of courts at furthering significant social reform can tell, he was, and is (as expanded by this case study topic) fundamentally correct. Serious social science approaches that analyze the Court and social change, presenting falsifiable claims, show that courts are incapable of making significant social change without support. Subsequent work by Swedlow (2009), Hall (2011), Keck (2014), and this book, that are either directly a test of Rosenberg's theories or closely aligned ones, hold up the fundamental claim that courts cannot make significant social change on their own. These later works also add various qualifying information. This book's qualifying information, which still aligns well with the original work that noted state-level variation in desegregation efforts, builds on this research by showing how states as independent political entities have significant power over implementation and thus the ability of courts to make significant social change.

Rosenberg's main complaint against his critics is that they are ideologically driven, that is, that the substantive policy change in a case like *Brown* or *Roe* is normatively positive, so the decision should be efficacious. Therefore, if a decision is not implemented, it is regarded as a criticism of the policy change. The findings of this book may mollify those critics somewhat, in that the gun rights litigation effort is a case where the newly formed conservative level movement (Hollis-Brusky 2015; Teles 2008) has run into the same headwinds of unsupportive executives, legislatures, and public opinion, especially at the state level, as those earlier reformers. Cultural variation matters, and if a state culture aligns with the courts, significant social change can be made through the courts.

## Looking Ahead

The future holds some interesting times for this issue. Nationally, progress toward gun rights stagnated and was slightly reversed under the administration of President Obama, aside from the *McDonald* decision incorporating

the right, but that was a foregone conclusion as soon as *Heller* was decided, as the Supreme Court was not going to leave the Second Amendment a constitutional orphan. At the state level, some states advanced gun rights while others toed the line right up to what was allowed under *Heller*, if not stepping over it when the “arms in common use” standard is applied. But the Supreme Court was silent on this, aside from dissents on certiorari. After *McDonald*, the only major advance of gun rights tied directly to the Supreme Court was concealed carry coming to Illinois via the Seventh Circuit and the ending of a Massachusetts stun gun ban. It is questionable if the ending of a stun gun ban is significant social change. In a Duke Law symposium piece summing up the ten years after *Heller*, Levinson (2018) called the situation “Too Many Damn Cases, and an Absent Supreme Court” (17).

With the election of President Trump, who made the selection of originalist Supreme Court justices vetted by the Federalist Society a selling point to bring along conservatives reticent to his populist campaign, by 2018 it appears that the trend is once again in the direction of ubiquitous gun ownership and usage throughout America and a strengthened right to keep and bear arms via the courts, although perhaps not the elected branches directly. For his part, President Trump has been more than willing to put his finger to the political winds and issue a change to regulations to ban “bump stocks” that use a gun’s recoil to increase the rate of fire from a semiautomatic gun while alternately rhetorically calling for a more well-armed society to respond to mass shootings. He has not yet used any political capital for any action on gun rights other than fending off the predictable calls for more and stricter gun control in the wake of another mass shooting.

In 2019, the Supreme Court did say it was going to review a case of interest on this topic, an opportunity to address a nullification of the right to “bear” arms from New York City. The legal background of *New York State Rifle & Pistol Association Inc. v. City of New York, New York* is that since the Sullivan Act in 1911, New Yorkers must get a license to obtain a pistol, and there are two types of permits. The first allows for concealed carry and the second for keeping a firearm on one’s premises only. The concealed carry permit system is “may issue,” and few citizens have ever gotten them, but after *Heller* and *McDonald*, there has been a reluctant “shall issue” process for premise permits. This would fit within a narrow reading of *Heller*, where the Second Amendment precludes total handgun bans in the home. The premise permits, however, are restrictive in what they allow for legitimate use of the permitted gun, only allowing them to be transported in an unloaded state in a locked container with ammunition carried separately to and from shooting ranges only within the city of New York. The plaintiffs

in the case seek to transport their weapons outside New York City for competitions and to a second home outside city limits but are prevented by law from legally doing so.

The Second Circuit decision upholding the law was made using a balancing test like in Justice Breyer's *Heller* dissent, using intermediate scrutiny. The Second Circuit decided that the permitting law did not infringe on the Second Amendment rights of the plaintiffs because they could procure a second handgun for the second home and because there are seven ranges within New York City limits. If the Supreme Court with Justice Kennedy was willing to strike down restrictive handgun and storage laws in *Heller* and *McDonald* but unwilling to take up the constitutionality of "may issue" permitting regimes, this case is the perfect vehicle for taking the step of deciding what the "bear" in "keep and bear arms" means in the Second Amendment with the replacement of the moderate Justice Kennedy with the very pro-gun Justice Kavanaugh. And perhaps New York City knew that it was in a difficult position and hoping for mootness because after the Supreme Court granted certiorari, the city changed its rules so that licensed gun owners will be able to legally transport their unloaded firearms to a second home, business, or any other place gun possession is permitted (Picket 2019). Ultimately, in 2020 when the decision from the Supreme Court came, the legal gamble of New York City paid off, and mootness was the result.

In late 2021, the Supreme Court will hear another Second Amendment case brought by gun rights activists. The law at issue in this case, *New York State Rifle & Pistol Association Inc. v. Bruen* is about a New York requirement for "proper cause" for a concealed carry license, which is similar to measures in other states with "may issue" concealed carry laws. With the arguably pro-gun rights Justice Barrett replacing Justice Ginsburg in 2020, there is a stronger pro-gun majority on the Court. About half the states, however, have moved to "shall issue" (twenty-one of them) or even "permitless" carry (twenty-one of them) by 2021, leaving just eight "may issue" states, so even if New York's proper cause requirement falls, it will not be a titanic shift. One can readily expect the seven remaining "may issue" states to have rounds of litigation to turn them to "shall issue" should New York go the way of Illinois.

As for the elected branches, that gun rights will advance via federal law is unlikely since the Democratic Party took control of the House of Representatives after the midterm elections of 2018. By 2020, with President Biden in office, gun rights reformers are again dealing with a pro-gun control position from the executive branch. But serious gun control has been stymied by a lack of legislative will in a divided Congress and has been limited to

executive actions like banning the importation of Russian ammunition in 2021 through executive branch regulatory changes.

Taking into consideration the political regimes literature, however, my prediction is that courts will be welcomed by Republican elected officials to exercise significant power on the issue of the right to keep and bear arms in the five instances that Hall summarizes (2011).

- regime enforcement
- division of labor
- overcoming gridlock
- blame avoidance
- legitimation

In short, Republicans will outsource their work to the courts. Gun rights may also advance in courts if the Democratic Party controls one of the houses of Congress or the presidency, but not all three branches, as another finding from the literature is that divided government will be unable to effectively check courts, as it could with unified control of government, because it will be unable to “overcome gridlock” (Swedlow 2009). I predict the Supreme Court will eventually rule some forms of assault weapons or “high capacity” magazine bans unconstitutional or clarify what “bear” means in the words “right to keep and bear,” such that some form of “shall issue” open or concealed carry must be allowed at the state level. Such a ruling would provoke quite a controversy, what the Supreme Court tried to mitigate with its narrow holding in *Heller*. Unless such a case happens, however, states like California and New York will continue to defy the spirit of *Heller* while not violating its holding that handguns for self-defense must be allowed in residences and restrictive storage laws are not allowed. Meanwhile, the national-level backlash, both the corporate gun control as pressured by prohibitionists and the regulatory burden placed on the NRA through New York’s regulation of the financial industry, will continue to vex gun rights reformers. There is little that gun rights activists will be able to do to stymie the effects of corporate gun control, as they bump into protections for free speech that they themselves uphold in different contexts. The social divide in American politics continues bleeding over into commerce, and gun groups will continue to set up parallel commercial tracks for all things gun-related.

## Final Thoughts

Guns stand out as an issue because it is one where the cultural right has successfully molded public opinion for the past fifty years, unlike many other issues, and further it is remarkably united on the issue due to the necessity of obtaining the primary and electoral votes of individual Texans. And after all, gun owners have a personal financial stake in the debate; 19 percent of gun owners are members of the NRA, and 77 percent of those are Republicans (Parker 2017). Furthermore, the conservative right has copied the organizational setup of the litigious left and done so by framing the gun issue as a matter of individual rights, what was historically at least a liberal premise. Therefore, to the gun-owning public, their level of keeping and bearing arms is a “right” that they feel should be largely excluded from the balancing implications of other public policy decision making. Incongruously, as Judge Posner said when he wrote the *Moore v. Madigan* decision to bring concealed carry to Illinois, “the Supreme Court made clear in *Heller* that it was not going to make the right to bear arms depend on casualty counts” (2012, 13).

Yet it is also hard to say how much the widespread appeal of concealed carry comes from ideological, or practical, reasons. Protection tops the list of reasons why gun owners say they own a firearm, with 67 percent of current gun owners saying this is a major reason they personally own a gun (Parker et al. 2017). The reason people say they own a gun has changed as well. In 1999, far more gun owners cited hunting rather than self-protection as the main reason they owned guns, but by 2013, those attitudes had shifted: 48 percent said protection was the main reason to own a gun, while 32 percent pointed to hunting (Pew 2013). This comes as the rate for major violent crimes has dropped to levels not seen since the 1960s, before it began to sporadically rise until a peak in 1995 (Howe 2015).



We also come to this place with a politics of strange bedfellows, in that the politics of racial resentment have been inverted for the advancement of the cause. Once America went down a path of facially neutral color-blindness, the racist backstop to public support for gun control fell away. Meanwhile, black political leaders moved to support gun control as a partial solution to urban violence. But those moves leave the moralistic ideology of trust in government and trust in one's fellow man as the primary reason to support gun control, because supporting gun control means one trusts the government with guns, but does not trust their fellow citizens. Trust of government and one's fellow citizens is lacking in a traditionalistic and individualistic worldview according to Elazar's Political Culture Theory. The data cherry on top that this divide will continue is that trust in the federal government is at an all-time low, from 73 percent when Pew first asked the question in 1958 to 17 percent by 2019, and that decline is about evenly felt between Democrats and Republicans. What this means is that if the government is not trusted and the government is the entity with the guns, then there will continue to be support for gun rights as per the Second Amendment as a theoretical check against government tyranny.

Attitudes toward guns are also highly split on racial lines. Many pre-twentieth-century gun controls were originally about keeping outgroups from owning weapons, but the issue of gun control has become a cleavage along racial and cultural lines, ironically, in the direction that the former outgroups are now of the opinion that everyone should be disarmed rather than that they should join the white majority in bearing arms.

It is also zero-sum as viewed by activist participants on both sides of the issue. Gun rights activists have the cognitive bias known as the endowment effect, which is when people place a high value on something they already possess. The prospect of losing what is already possessed is seen as aversive because it increases the feeling of uncertainty for the future. Meanwhile, the ultimate goal of gun control activists is civilian disarmament in the manner of England, where few regular citizens own guns, none of which are handguns, and none of which bear any relation to an AR-15. So gun rights activists see any movement toward gun control as a policy of failed appeasement because there will always be more calls for further restrictions.

Another helpful lens through which to look at the issue, and why there is enduring conflict, is through what regulatory scholars call the precautionary principle, which is that regulatory policies should minimize the worst-case scenarios of any situation in which there is uncertain risk. This idea is borrowed from an essay on the topic by Blocher and Miller (2018), even though

their analysis is incomplete, and I expand on it here. The essayists feel that acknowledging contradictory invocations of the precautionary principle and using the advances of regulatory scholarship on how to best moderate risk from fields like pharmaceuticals and financial services could be used to “tackle the gun control problem” by finding ground for compromise. That latter is something perhaps possible with good will, but it would require activists on both sides of the issue to acknowledge the reality of a worst-case scenario from their opponents, a point the essayists gloss over. Still, the idea of using the precautionary principle as a lens by which to view the situation is a useful heuristic.

For the proponents of gun control, the worst case scenario is the current situation, in that there are, between suicides and homicides, more than thirty-two thousand people killed and sixty-seven thousand injured a year with guns in the United States (Fowler et al. 2015), and add to this the statistically rare but high-profile mass killings and terrorist attacks that receive outsized media attention due to the phenomena of “it bleeds, it leads.” Gun control activists want to reduce the risk of a worst-case scenario, they or others dying with a gun, to near zero.

By contrast, those who support concealed carry laws also want to reduce their personal risk of dying in a crime to near zero, thus they support concealed carry to defend themselves, regardless of the societal effects of a proliferation of guns. The risk that they might be in a violent confrontation is slim, but the possibility of the worst possible outcome, death, makes it such that carrying a weapon is deemed worth the effort.

Meanwhile, another worst-case scenario for a gun rights supporter is a tyrannical government, which is what gun rights activists invoke would happen if only the government had arms and a standing army. This idea, although ancient, was frequently expressed at the founding of the country, and most eloquently by Madison in *Federalist 46*:

Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes.

Therefore, when activists on one side of the debate advocate for risk management of the worst-case “tail risk” scenario, they are simultaneously increasing the probability of the worst-case scenario on the other side of the debate. Maximal rights enforcement and more keeping and bearing arms increases the likelihood of more Americans being injured or killed by guns, and optimal risk management to a gun control proponent of reducing the prevalence of civilian arms increases the tail risk of a despotic government.

There is also another fact that reflects geographic and demographic political reality and why there is even less reason for compromise. According to the National Institute of Justice, most murders are committed by inner-city youth in gangs in connection with other felony crimes (National Institute of Justice 2011). Urban areas are Democratic Party strongholds, and suburban and rural crime rates are far lower than urban crime rates. Rural and suburban voters, particularly Republican ones, do not want to give up their guns because they are not, generally speaking, killing people with them.

As with most issues, there is a mass of people somewhere in the middle. Do not expect the problem to go away anytime soon, and as citizens, we should know that ultimately there are no solutions, only tradeoffs.

## APPENDIX A

# Timeline

### *(Topics in Depth: Guns)*

Year	Historical Event
1873	Slaughter-Houses Cases limit reach of Fourteenth Amendment Winchester lever action rifle, “the gun that won the West,” is introduced Colt Single Action Army, also known as the Peacemaker, is introduced; the reliable design and effective cartridges made it a favorite with lawmen/ lawbreakers Colfax Massacre, largest incident of racial conflict during Reconstruction; armed blacks and whites fight battle, blacks surrender and many are killed
1874	Reconstruction ends in Texas
1875	U.S. v. Cruikshank: LA encouraged armed blacks; whites responsible for Colfax Massacre go free, SCOTUS says LA had to protect blacks, not federal government State v Duke: Texas Supreme Court after Reconstruction ends overturns itself, says that certain weapons are protected, limiting efforts at gun control The Comanches, Cheyennes, and Kiowas were inexorably defeated, and conduct their last raids in Texas
1877	Reconstruction end in the South
1880	The Apaches are defeated by the “Buffalo Soldiers” and the Indian frontier is closed in Texas forever
1884	“Smokeless” powder developed and introduced by the French military, it is three times as powerful as black powder, rendering all previous guns obsolete American-born British inventor Hiram Maxim produces the first recoil-operated machine gun; the technology is quickly adopted by Western powers
1886	Presser v. State of Illinois: SCOTUS ruled the right to own and carry guns does not include the right to carry guns in public as part of a large group on military parade
1888	British and German militaries field rifles which feed ammunition by a magazine

- 1892 First semiautomatic handguns developed and over time supplant revolvers in popularity and use
- 1899 Any firearms produced prior to 1899 are considered “antiques” under federal law, making them exempt from many regulations
- 1900 German George Luger introduces the first semiautomatic pistol with a detachable box magazine to facilitate quick reloading
- 1903 Civilian Marksmanship Program (CMP) is created; U.S. government program promotes safety and marksmanship, later begins to sell surplus military arms
- 1917 Camp Logan, Texas, race riot
- 1920s NRA supports moderate gun control efforts, then gradually moves toward being apolitical until 1977 takeover by gun rights hardliners
- 1925 *Gitlow v. New York*: SCOTUS incorporates the First Amendment and starts trend of protecting individual rights
- 1934 Firearms Act of 1934: \$200 tax of suppressors (silencers) and fully automatic weapons
- 1935 American designer John Browning introduces the “Hi-Power,” the first high-capacity pistol with a double stack magazine that holds 13 rounds
- 1938 Firearms Act of 1938: Federal license required for gun dealers, defines prohibited classes (felons, etc.) from gun ownership
- 1939 *United States v. Miller*: SCOTUS rules sawed off shotgun is not a militia weapon, leaving open if the right to keep and bear arms is an individual right or not
-

Year	Ban Handguns:			Historical Event
	Yes	no	no opinion	
1944				German Army fields the "Sturmgewehr," first select-fire rifle w/ mid-sized cartridge & detachable mag; assault rifle concept is adopted worldwide
1949				Designer Kalashnikov's Automatic Rifle (AK-47) adopted by Soviet armed forces
1956				MLK applies for a concealed carry permit in Alabama after his house is bombed, but the application is denied by authorities
1959	60%	36%	4%	JFK assassination
1963				M16 rifle, the military adaptation of the ArmaLite Rifle (AR-15) is adopted by U.S. military
1964				Sprecher- The Lost Amendment; academic scholarship for the Second Amendment is an individual right to keep and bear arms, start of pro-gun movement
1965	49%	44%	7%	University of Texas tower shooting, 13 killed, 30 wounded
1966				Black Panthers formed
1967				Illinois creates the Firearms Owners Identification Card system
				Detroit riots (43 dead, 1,189 injured) focus attention on inner-city problem
				Black Panthers march on California capital
1968				MLK assassination
1968				RFK assassination
				Gun Control Act of 1968: restrictions on mail orders of guns, additional prohibited classes for ownership
1972				Creation of the Bureau of Alcohol, Tobacco, and Firearms
1973				New Orleans Howard Johnson hotel tower shooting, 7 killed, 12 wounded
1975	41%	55%	4%	Gerald Ford assassination attempt by member of Charles Manson "family"
1976				D.C. bans handguns
				U.S. Consumer Product Safety Commission was amended to specifically exclude firearms from its regulatory powers

1977				NRA member “takeover” at annual meeting led by gun rights hardliners Carter and Knox, NRA refuses on pro-gun politics
1979	31%	65%	4%	
1981	39%	58%	3%	Chicago suburb of Morton Grove bans handguns
1981	41%	54%	5%	Assassination attempt on Ronald Reagan Gallup does a second survey after the Hinckley assassination attempt on Ronald Reagan on March 30, 1981
1982	41%	54%	5%	Chicago and suburb Evanston bans handguns San Francisco votes to ban handguns, which is later thrown out in state court Kennesaw, Georgia, symbolically requires each household to have a gun (law is not enforced) Austrian G. Glock introduces polymer framed pistol (adopted by the Austrian military), setting off worries about undetectable plastic pistols
1984				Chicago suburb of Oak Park bans handguns Illinois Supreme Court upholds handgun bans Armed Career Criminal Act; 15 years for recidivists convicted of unlawful possession of a gun who have 3 prior serious convictions
1986				Gun Owners Protection Act of 1986: Restriction on supply of automatic weapons, prohibits federal database of gun owners
1987	42%	50%	8%	Law Enforcement Officers Protection Act: bans certain armor-piercing ammunition Alabama and Florida move to be “shall issue” concealed carry states; start of right-to-carry movement
1988	37%	59%	4%	Chicago suburb of Winnetka bans handguns Undetectable Firearms Act; illegal to make/import/sell/ship/deliver/possess any firearm that is not as detectable by walk-thru metal detectors
1989				California bans assault weapons after a shooting at a Stockton schoolyard, 5 killed, 32 wounded
1990	41%	55%	4%	Sanford Levinson published <i>The Embarrassing Second Amendment</i> Gun Free School Zone Act—criminal penalties for possessing/discharging a gun in a school zone U.S. v. Verdugo-Urquidez, SCOTUS rules that “the people” is the same in First, Fourth, Ninth, and Tenth Amendments

1991	43%	53%	4%	Killeen, Texas, cafeteria shooting, 23 killed, 27 injured Justice Thomas, a jurist who supports individual right interpretation of the 2nd Amd., joins SCOTUS, replacing liberal jurist Justice Marshall
1993	42%	53%	4%	Brady Handgun Violence Prevention Act; five-day waiting period for background checks until National Instant Check System comes online
1994				Public Safety and Recreational Firearms Use Protection Act (AKA assault weapons ban) w/ban on new "hi cap" mags holding 10+ rounds
1995				Various Chicago suburbs pass assault weapons bans U.S. v Lopez: SCOTUS rules Gun Free School Zone Act unconstitutional (not via Second Amendment); Congress reauthorizes
1996				Texas goes from "may issue" to "shall issue" concealed carry state under Governor George W. Bush Dickey Amendment first passed to limit CDC research on firearms Civilian Marksmanship Program spun off from Army into a nonprofit, it still sells surplus U.S. military arms
1997				Printz v. United States: SCOTUS holds background check on Brady law unconstitutional
1998				New Orleans starts the tort litigation against the firearms industry, followed by Chicago Jonesboro, Arkansas, school shooting, 5 killed, 10 injured National Instant Criminal Background Check System (NICS), mandated by Brady Law in 1993 and launched by FBI
1999	34%	64%	2%	Smith & Wesson settles with Clinton administration Columbine, Colorado, school shooting, 13 killed, 24 injured
2000	36%	62%	2%	
2001				Attorney General John Ashcroft interprets Second Amendment as an individual right U.S. v. Emerson: in 5th Circuit, first appeals court to rule the Second Amendment is an individual right
2002	32%	65%	3%	
2003	32%	67%	1%	First lawsuits filed against D.C. gun ban in federal court Tiahrt Amendment, prohibits ATF from publicly releasing gun sales trace data



2004	36%	63%	1%	Federal Assault Weapons Ban expires Illinois legislature overrides Gov. Blagojevich's veto and passes PA 93-1048, overriding local handgun bans in self-defense cases Law Enforcement Officers Safety Act: active and retired law enforcement officers can carry concealed weapons w/o regard to state/local law, w/some exceptions Protection of Lawful Commerce in Arms Act ends gun control tort litigation San Francisco votes via Prop. H to ban handguns Chief Justice Roberts, a jurist who supports an individual right interpretation of the Second Amendment, joins SCOTUS, replacing Chief Justice Rehnquist San Francisco handgun ban ruled unconstitutional under state law Justice Alito, a jurist who supports an individual right interpretation of Second Amendment joins SCOTUS, replacing the moderate Justice O'Connor Virginia Tech shooting, 32 killed, 17 injured D.C. v. Heller: SCOTUS declares Second Amendment is individual right, D.C. handgun ban unconstitutional George W. Bush signs the National Instant Criminal Background Check Improvement Act in response to the Virginia Tech shooting Wilmette, Winnetka, Evanston, Morton Grove repeal their handgun bans Northern Illinois University shooting, 5 dead, 17 injured Fort Hood terrorist attack, 13 killed, 32 wounded McDonald v. Chicago: SCOTUS incorporates Second Amendment, Chicago and Oak Park handgun bans unconstitutional Tucson, Arizona, shooting, 6 killed, 11 injured including U.S. Rep. Gabrielle Giffords Ezell v. Chicago: 7th Circuit rules Chicago's ban on gun ranges unconstitutional Newtown, Connecticut, school shooting, 27 killed, one injured Aurora, Colorado, theater shooting, 12 killed, 58 injured Moore v. Madigan: 7th Circuit strikes down Illinois's total ban on concealed carry
2005	34%	64%	1%	
2006	32%	66%	2%	
2007	30%	68%	2%	
2008	29%	71%	1%	
2009	28%	71%	1%	
2010	29%	71%	1%	
2011	24%	74%	2%	
2012	25%	74%	2%	

2013	25%	73%	1%	<p>Illinois legislature overrides Gov. Quinn's veto, the last state in the Union to get concealed carry Nelson, Georgia, passes ordinance, with exceptions, requiring each household to have a gun</p> <p>President Obama makes various gun control executive orders when gun control efforts stall in the Senate</p> <p>Successful recall elections of Colorado state Democrats J. Morse and A. Giron for passing gun control; laws not repealed despite several attempts</p> <p>Attorney General Eric Holder's Justice Dept. starts "Operation Choke Point," which targets the gun industry for regulatory scrutiny</p> <p>"Liberator" 3D printed pistol proof tested and plans made available online before being pulled using export regulations</p> <p>Beretta moves from Maryland to Tennessee due to state gun control</p> <p>Chicago eliminates its ban on gun stores, but no stores open inside city limits</p> <p>Magpul, a gun accessories company, moves from Colorado to Wyoming and Texas due to state gun control</p>
2014	26%	73%	1%	<p>Kahr Arms moves from New York to Pennsylvania due to New York SAFE Act gun control</p> <p>Charleston, South Carolina, church shooting, 9 killed, 3 injured</p> <p>Orlando, Florida, nightclub terrorist attack, 49 killed, 58 injured</p> <p>SCOTUS reverses Massachusetts court upholding bans on stun guns, remands case</p> <p>Las Vegas strip shooting, 59 killed, 527 injured</p> <p>Sutherland Springs, Texas, church shooting, 26 killed, 20 injured</p> <p>Operation Choke Point ended</p> <p>Justice Gorsuch, a jurist who supports individual right interpretation of Second Amendment joins SCOTUS, replacing Justice Scalia, author of Heller</p> <p>Assassination attempt against several Republican members of Congress at a baseball field, 5 wounded</p>
2015	27%	72%	1%	
2016	23%	76%	1%	
2017	28%	71%	1%	

2018

People v. Chairez: Illinois Supreme Court rules ban on guns in parks unconstitutional  
Parkland, FL school shooting, 17 killed, 17 wounded  
Justice Kavanaugh, a jurist who supports Second Amendment, joins SCOTUS, replacing  
moderate Justice Kennedy  
Gun control advocates create wave of corporate gun control by private organizations, mostly  
banks

Silicon Valley “deplatforming” of gun orgs  
New York Gov. Cuomo uses financial regulation to attack the NRA, NRA sues for viewpoint  
discrimination  
President Trump eases firearms export regulations; rewrites regulations to ban “bump stocks,”  
which spurs litigation

2019

Pittsburgh synagogue shooting, 11 killed, 6 injured  
SCOTUS hears the first Second Amendment case since McDonald, New York State Rifle & Pistol  
Association v. City of New York

2020

Firearms sales surge during coronavirus pandemic  
New York State Rifle & Pistol Association v. City of New York is moot as a result of law changes

## Appendix B

### *State Political Culture and Brady Score Index*

#	State	Elazar Culture Type	Culture Scale	Brady Score	#	State	Elazar Culture Type	Culture Scale	Brady Score
1	MN	Moralistic	1	33.5	26	IL	Individualistic/ moralistic	4.72	59
2	WA	Moralistic/ individualistic	1.66	33.5	27	AK	Individualistic	5	7
3	CO	Moralistic	1.8	28.5	28	NV	Individualistic	5	15.5
4	IA	Moralistic/ individualistic	2	28	29	OH	Individualistic/ moralistic	5.16	24
5	MI	Moralistic	2	29	30	AZ	Traditionalistic/ moralistic	5.66	6
6	ND	Moralistic	2	16	31	HI	Individualistic/ traditionalistic	6	72.5
7	OR	Moralistic	2	25	32	IN	Individualistic	6.33	18.5
8	UT	Moralistic	2	12	33	DE	Individualistic/ traditionalistic	7	48.5
9	WI	Moralistic	2	27	34	MD	Individualistic/ traditionalistic	7	80.5
10	ME	Moralistic	2.33	17	35	NM	Traditionalistic/ individualistic	7	14
11	NH	Moralistic/ individualistic	2.33	19.5	36	TX	Traditionalistic/ individualistic	7.11	15.5
12	VT	Moralistic	2.33	10	37	WV	Traditionalistic/ individualistic	7.33	17
13	ID	Moralistic/ individualistic	2.5	14	38	KY	Traditionalistic/ individualistic	7.4	10.5
14	CT	Individualistic/ moralistic	3	84	39	FL	Traditionalistic/ individualistic	7.8	17
15	MT	Moralistic/ individualistic	3	11	40	VA	Traditionalistic	7.86	21

16	RI	Individualistic/ moralistic	3	55.5	41	LA	Traditionalistic/ individualistic	8	2
17	SD	Moralistic/ individualistic	3	9.5	42	OK	Traditionalistic/ individualistic	8.25	15
18	CA	Moralistic/ individualistic	3.55	89	43	NC	Traditionalistic/ moralistic	8.5	15.5
19	NY	Individualistic/ moralistic	3.62	79.5	44	TN	Traditionalistic	8.5	16
20	KS	Moralistic/ individualistic	3.66	10	45	AL	Traditionalistic/ individualistic	8.57	17.5
21	MA	Individualistic/ moralistic	3.66	74.5	46	SC	Traditionalistic	8.75	15
22	NE	Individualistic/ moralistic	3.66	20.5	47	GA	Traditionalistic/ individualistic	8.8	16
23	NJ	Individualistic	4	82.5	48	AR	Traditionalistic/ individualistic	9	15
24	WY	Individualistic/ moralistic	4	9	49	MS	Traditionalistic	9	10
25	PA	Individualistic	4.28	33.5	50	MO	Individualistic/ traditionalistic	9	13.5

## Appendix C

### *Brady Gun Control Scoring Methodology*

#	Policy Area Description	Specific Policy	Points
1	<b>Additional Background Checks:</b> Laws that regulate firearms sales by persons who are not licensed by the federal government (federal law requires only federally licensed dealers to conduct background checks and complete and maintain records of sales)	Require background checks for all unlicensed sales Require background checks for unlicensed sales of select firearms only or at gun shows only Require a permit to purchase that is valid for 30 days or less	11 6 3
2	<b>Mental Health Reporting:</b> Laws requiring that relevant mental health records are sent to the FBI for the purpose of firearm purchaser background checks	Require that records are sent to the FBI for inclusion in the National Instant Criminal Background Check System	2
3	<b>Categories of Prohibited People:</b> Laws that establish categories of persons deemed ineligible to purchase or possess firearms	Prohibit violent and firearms-related misdemeanants Prohibit individuals listed on terror watch list or “no fly” list Prohibit drug or alcohol abusers Prohibit juvenile offenders Prohibit those with history of serious mental illness Point of contact state for all firearms Point of contact state for handguns only	1 1 1 1 1 1 0.5
4	<b>Background Check Procedures:</b> Laws that regulate the background check process used to identify persons who are not legally permitted to purchase or possess firearms	Removal of firearms at a domestic violence scene	2
5	<b>Domestic Violence and Firearms:</b> Laws intended to keep firearms out of the hands of domestic violence perpetrators	Require removal of firearms when a protective order is issued	2
6	<b>Dealer Regulations:</b> Laws that require firearms dealers to be licensed and/or laws that impose other requirements on dealers such as record-keeping, security practices, or employee background checks	Require dealer license No dealer license required, but other regulations on dealers (e.g., ban residential dealers, require employee background checks, security require sales and/or loss or theft reporting)	6 3
7	<b>Maintaining Records of Gun Sales:</b> Laws that require firearms sellers to send records to a centralized database where they are maintained by a government agency	Require records of sales be sent to law enforcement	6
8	<b>Purchase and Sales of Multiple Firearms:</b> Laws that restrict the number of firearms that may be purchased by or sold to an individual within a given time frame	Require records of sales of handguns and some other firearms only be sent to law enforcement Restrict multiple purchase or sales	3 6

12	<b>Lost/stolen Guns:</b> Laws that require individuals to report the loss or theft of their firearms within a specified period of time	Require reporting of lost or stolen firearms	6
13	<b>Concealed Carry of Guns:</b> Laws that regulate the carrying of concealed firearms	Discretionary “may issue” permitting system “Shall issue” permitting system	5 0
14	<b>Open Carry of Guns:</b> Laws that regulate the open carrying of firearms	Allow concealed carry with no permit Prohibit the open carry of all firearms	-3 1
15	<b>Guns in Public Places:</b> Laws that allow guns in bars, on school property and in other sensitive areas	Prohibit the open carry of some firearms or require a permit Allow concealed carry of guns in bars	0.5 -1
16	<b>Guns in Parking Areas:</b> Laws that require employers and/or other businesses to allow firearms to be stored in parking areas on private property	Allow concealed carry of guns on campus and/or K-12 Allow concealed carry of guns in state parks	-1 -1
17	<b>“Stand Your Ground” Laws:</b> Laws that remove the “duty to retreat” from an area outside of the home prior to the use of deadly force in self-defense	Allow concealed carry of guns in houses of worship Requires businesses to allow guns in vehicles in parking areas	-1 -2
18	<b>“Assault rifles” or “modern sporting rifle”:</b> Laws that ban or regulate semiautomatic firearms with certain military features, such as a pistol grip and detachable ammo magazine, such as the AR-15	Remove “duty to retreat” anywhere outside the home Remove “duty to retreat” when in vehicle only	-3 -1
19	<b>Large Capacity Ammo Magazines:</b> Laws that ban detachable magazines with a capacity to store more than 10 rounds of ammunition	Ban of “assault rifles” or “modern sporting rifles” Regulation of “assault rifles” or “modern sporting rifles” or bans on certain models only	3 1
20	<b>.50 Caliber Rifles:</b> Laws that ban certain types of large caliber rifles such as those manufactured by Barrett that are also used in the military for long range sniping	Ban of magazines that hold over 10 rounds Ban of magazines that hold over 15 rounds	3 2
21	<b>Ammunition Regulation:</b> Laws that regulate the transfer of firearm ammunition	Ban of .50 caliber rifles Ban of select .50 caliber rifles or regulations of .50 caliber rifles Require license to purchase, sell, or possess ammunition	1 0.5 6



22	<p><b>Purchase Age:</b> Laws that restrict possession and/or purchase of firearms to minors. Federal law is 18 to purchase a long gun and 21 to purchase a handgun, but 18–20-year-olds can own handguns</p>	<p>Higher requirements than federal law for possession or purchase of guns</p>	2
23	<p><b>Safe Storage:</b> Laws that require the sale and/or use of a wide range of disabling devices (such as a “trigger lock”) designed to keep unauthorized users from gaining access to guns</p>	<p>Require use of a locking device when gun is stored Require the sale of a locking device with the sale of a firearm</p>	2 1
24	<p><b>Personalized Guns:</b> Laws that require firearms to be equipped with technology (such as a RFID wristwatch) that allows them to be fired only by an authorized user (note, there is no commercially available self-defense firearm that meets this requirement)</p>	<p>Personalized firearms law</p>	1
25	<p><b>Child Access Prevention:</b> Laws that impose liability on adults who leave firearms accessible to children or otherwise allow children access to firearms and the firearms is misused</p>	<p>Negligence-based law Knowing or intentional or recklessness-based law</p>	1 0.5
26	<p><b>Handgun Design Standards:</b> Laws that require firearms to meet design and construction standards with the goal of reducing the risk of unintentional death and injury</p>	<p>Require specific design and safety standards such as a chamber load indicator or magazine disconnect mechanism and/or allow only sale of approved guns listed on an official roster</p>	2
27	<p><b>Microstamping:</b> Laws that require firearms to be equipped with technology that stamps a code on to the cartridge casing when the gun is fired. The code identifies the firearm that fired the round (note, there is no firearm maker that produces such guns)</p>	<p>Require firearms to be equipped with microstamping technology</p>	2
28	<p><b>No state pre-emption:</b> State law allows municipalities local authority to regulate firearms</p>	<p>Allow broad local regulation Allow substantial local regulation</p>	6 4

Declare federal law inapplicable

29 **Nullification:** State laws that declare firearms and/or ammunition made and kept inside the state are exempt from federal law as they are not involved in interstate commerce, the vehicle by which most gun control happens (current case law on this topic is that nullification laws are not valid)

Penalize providers for discussing firearms with patients

30 **Medical Gag Rule:** Laws that penalize medical providers from discussing firearms ownership and/or storage with patients (“docs vs. Glocks”—current case law is that a medical gag rule is an infringement of medical providers’ First Amendment rights)

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*Note:* A state may have adopted only a partial version of a given policy. Those points are awarded instead of, not in addition to, the total possible points for the policy.



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