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Is the Second Amendment Becoming Irrelevant?

ADAM WINKLER*

I.

It seems beyond question that the Second Amendment has never been more important in constitutional law. In the past decade, the Supreme Court for the first time held that the Second Amendment guaranteed an individual's right to have handguns in the home in *District of Columbia v. Heller*.¹ The Court subsequently expanded the protection for private gun ownership in *McDonald v. City of Chicago*,² incorporating the right to keep and bear arms to the states. The Second Amendment has been even livelier in the lower federal courts, which have decided hundreds of gun rights cases since *Heller* dealing with nearly every type of gun law on the books.

Nevertheless, if we think about the future of the Second Amendment, it may soon become largely irrelevant. That is not to say that *Heller* will be overturned or that the amendment will become less important as a rhetorical theme in debates over gun policy. The opposite appears true; *Heller* is secure as a precedent and gun law opponents continue to invoke the Second Amendment frequently, and with considerable success, on the floors of statehouses nationwide. With the National Rifle Association (NRA) one of the nation's leading political players and gun advocates in control of Congress, the White House, and the majority of state legislatures, the Second Amendment continues to have tremendous cultural and political significance. The Second Amendment, however, may become increasingly irrelevant in one of the most fundamental ways that matter to a constitutional provision: distinguishing lawful polices from unlawful ones. This sorting function is where the proverbial rubber hits the road in constitutional analysis.³

Why might the Second Amendment cease to serve this vital constitutional function? The explanation begins with the difference between how the Second Amendment is invoked in political debates and how the amendment is invoked in court. There are, it seems, two Second Amendments. There is a Judicial Second Amendment comprised of court decisions interpreting the provision, and there is an Aspirational Second Amendment that is used in political dialogue. These two versions of the Second Amendment are different; the aspirational one is far more hostile to gun laws than the judicial one.

Moreover, the Aspirational Second Amendment is overtaking the Judicial Second Amendment in American law. In the vast majority of states, the gun laws that people live with are largely a product of the Aspirational Second Amendment as it has been articulated by gun advocates and elected lawmakers. Ironically, the same political forces that led to the reinvigoration of the Second Amendment and the *Heller*

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1. 554 U.S. 570 (2008).

2. 561 U.S. 742 (2010).

3. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 733 (2007).

decision are also helping to sap the Judicial Second Amendment of its role in separating out good laws from bad ones. This is a sign of gun advocates' political success, not political failure: state law is embracing such a robust, anti-regulatory view of the right to keep and bear arms that the Judicial Second Amendment, at least as currently construed, seems likely to have less and less to say about the shape of America's gun laws.

Of course, the future is unpredictable. And in the paradoxical world of guns, the amendment that seems increasingly irrelevant could alternatively be transformed in the opposite direction to become far more significant in American law than the Second Amendment—or any state constitutional provision guaranteeing the right to bear arms—has ever been.

II.

When an issue of public policy arises with constitutional implications, the traditional analysis of lawyers about the policy's constitutionality will turn on how the underlying constitutional provision has been construed by the courts. For instance, when someone suggests banning hate speech a typical response might be to say, "But the First Amendment does not allow that. The courts have held there is no exception for hate speech." This is an argument based on how the First Amendment is interpreted and applied by the courts. Given the judicial doctrine on free speech, a law punishing hate speech would be unconstitutional. Reference to court decisions is not the only way to make a sound constitutional argument, although it is perhaps the most common way.

If we were to ask a similar question about the constitutionality of a gun law, we might well look to the Judicial Second Amendment for the answer. This version of the Second Amendment is determined by Supreme Court decisions like *Heller*, *McDonald*, and, more recently, *Caetano v. Massachusetts*. In June 2016, the Court unanimously reversed a state supreme court decision holding stun guns were not arms protected by the Second Amendment.⁴ The Court's per curiam opinion in *Caetano*, which included the justices who dissented in *Heller* and *McDonald*, unambiguously endorsed *Heller*, made clear that arms other than handguns were protected by the amendment, and returned the case to the state court for appropriate reconsideration. The decision signals that *Heller* is secure as a precedent.⁵

Under the Supreme Court's decisions, the Second Amendment guarantees individuals the right to have handguns in the home for self-defense. That right applies against both state and federal governments, and it protects access to at least some arms other than handguns.⁶ *Heller* suggested also, without affirmatively deciding, that a number of gun laws did not run afoul of the Second Amendment. In a significant paragraph, Justice Antonin Scalia's majority opinion indicated that the Second Amendment did not call into question bans on possession by felons and the mentally ill, restrictions on guns in sensitive places like schools and government buildings,

4. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

5. *Id.*

6. *See McDonald*, 561 U.S. at 750; *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

and laws regulating the commercial sale of firearms. The Court also observed that while *bearing arms* is not restricted to military use, complete prohibitions on concealed carry had been upheld in some circumstances. “[T]he right secured by the Second Amendment is not unlimited,” Scalia wrote.⁷

The Judicial Second Amendment is also given shape by lower court decisions, such as the rulings of the federal courts of appeals on issues the Supreme Court has yet to decide. *Heller* and *McDonald* spurred a tremendous amount of litigation over gun laws in states across the nation. As a result, the federal circuits have decided Second Amendment cases on a wide variety of issues. Yet there has been remarkable uniformity of results.⁸ The courts have gravitated towards an intermediate form of scrutiny that requires laws burdening activity protected by the amendment to be substantially related to important government interests.⁹ Applying this standard, the circuit courts have upheld a wide variety of laws, including three that are at the center of the current gun debate: discretionary permitting for concealed carry,¹⁰ bans on military-style assault weapons,¹¹ and restrictions on high-capacity magazines.¹²

Although the lower courts have consistently upheld the federal law prohibiting felons and the mentally ill from possessing firearms as against facial challenges,¹³ some courts have held that particular individuals subject to the ban can bring as-applied challenges.¹⁴ If convicted of a nonviolent offense a long time ago or adjudicated mentally ill in an isolated, stale incident, a person might be able to win restoration of her gun rights. Although as-applied challenges are commonplace in

7. *Heller*, 554 U.S. at 626.

8. See LAW CTR. TO PREVENT GUN VIOLENCE, POST-*HELLER* LITIGATION SUMMARY, 4 (2017) <http://smartgunlaws.org/wp-content/uploads/2017/04/Post-Heller-Litigation-Summary-2017-April.pdf> [<https://perma.cc/8U8R-A889>] [hereinafter LITIGATION SUMMARY].

9. See, e.g., *Powell v. Tompkins*, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (listing cases that have employed the two-prong approach); *Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013) (“Like several of our sister circuits, we have found that ‘a two-part approach to Second Amendment claims seems appropriate under *Heller*.’” (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010))).

10. See, e.g., *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013); *Woollard*, 712 F.3d at 879–80; *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). But see *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (invalidating the District of Columbia’s discretionary permitting law).

11. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

12. See, e.g., *Kolbe*, 849 F.3d at 137; *Friedman*, 784 F.3d at 411–12; *Fyock*, 779 F.3d at 996–97.

13. See *United States v. Bogle*, 717 F.3d 281, 282 n.1 (2d Cir. 2013) (per curiam) (listing cases affirming the constitutionality of the restriction from “every other circuit to consider the issue”); see also LITIGATION SUMMARY, *supra* note 8, at 4 (noting that “[b]ecause *Heller* suggested these ‘presumptively lawful’ regulations fall outside the scope of the Second Amendment, most courts have had little trouble upholding them”).

14. See, e.g., *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012); *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011).

constitutional law, in the Second Amendment context they pose unusual challenges. There are millions of people subject to these bans, each of whom may be entitled to an evidentiary hearing in federal court, putting some considerable strain on already overloaded dockets.

Moreover, there is not an obvious judicially manageable standard for determining who should have their rights restored. In a recent case, the Third Circuit suggested relief would be appropriate if one can “show that he is no more dangerous than a typical law-abiding citizen.”¹⁵ That rather abstract question is impossible to answer, as it relies on predictions about the future dangerousness of the challenger and comparisons to a baseline of dangerousness of the average person that cannot ever be known. It also presents quite a burden for prosecutors. Given that those who would petition for a hearing would likely have no recent convictions, prosecutors will have to conduct time-consuming investigations into the details of a petitioner’s personal and work life in a search for signs of dangerousness that are ambiguous at best. And already overloaded prosecutors are unlikely to prioritize such investigations over those designed to solve recent crimes.

Despite the as-applied cases, the broader trend in the courts has been to uphold most forms of gun control.¹⁶ This should come as little surprise. Although the Second Amendment case law is new, nearly every state guarantees individuals the right to bear arms in its own state constitution and there are nearly two hundred years of case law interpreting these provisions. Prior to *Heller*, state supreme courts across the nation read the right to bear arms to permit “reasonable regulation,” which typically meant that gun laws were upheld so long as they did not “destroy” or “nullify” the right entirely.¹⁷ Despite wide demographic and political differences, states before *Heller* were uniform in their use of the reasonable regulation standard for gun laws—red states and blue states, north and south, east and west. As under *Heller*, the overwhelming majority of gun laws survived judicial scrutiny.¹⁸

Although the jurisprudential results of a reinvigorated Second Amendment were predictably similar to the outcomes seen for decades in state court right-to-bear-arms decisions, there have been complaints that the courts have neutered *Heller*. In a 2013 filing with the Court, Paul Clement, a well-respected lawyer who was representing the NRA, argued that the lower federal courts had engaged in “massive resistance to this court’s decisions,” evoking the pushback by southern states to *Brown v. Board of Education*.¹⁹ In June 2017, when the Supreme Court declined to hear *Peruta v. California* on the constitutionality of discretionary permitting for concealed carry,²⁰ Justice Clarence Thomas, joined by the Court’s newest member, Justice Neil Gorsuch, dissented from the denial of certiorari and argued the courts were treating

15. *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011).

16. Of the over 1150 post-*Heller* court decisions tracked by the Law Center to Prevent Gun Violence at the state and federal level, Second Amendment challenges have been rejected ninety-four percent of the time. *Litigation Summary*, *supra* note 8, at 2.

17. Winkler, *supra* note 3, at 688.

18. *See id.*

19. Petition for Writ of Certiorari at 18, *NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 13-137 (U.S. July 29, 2013).

20. *Peruta v. California*, 137 S. Ct. 1995 (2017).

“the Second Amendment as a disfavored right.”²¹ Among the evidence: in the preceding seven years, the Court had not “heard argument” in a single Second Amendment case, compared to “roughly 35 cases where the question presented turned on the meaning of the First Amendment and 25 cases that turned on the meaning of the Fourth Amendment.”²²

Even though Thomas was correct that the Court had not “heard argument” in a Second Amendment case, the Justices had nonetheless decided *Caetano* just the term before. One reason the Court has been able to avoid taking more Second Amendment cases is that there have not been many significant circuit splits. The best predictor of whether the Justices will take a case is the existence of directly contrary decisions by the courts of appeals on an issue.²³ One of the Court’s primary roles is to ensure a measure of uniformity on matters of constitutional law, and when the circuit courts are in agreement the justices often stay out of disputes. When the justices considered whether to take *Peruta*, for example, every circuit court to decide the question had ultimately ruled that discretionary permitting is permissible under the Second Amendment.²⁴ (As this Essay was being published, the D.C. Circuit invalidated a discretionary permitting law; that case was not appealed to the Supreme Court.²⁵) A similar situation exists with regard to restrictions on military-style assault weapons and high-capacity magazines, which have also been upheld by every circuit to rule to date.²⁶ There simply is not that much disagreement in the federal courts of appeals about the scope of the Judicial Second Amendment.

Nonetheless, Thomas’s dissent illustrates the frustration among some that *Heller* has not gone further to undermine restrictive gun laws. One source of this grievance is the fact that we have two Second Amendments: one in the courts and one in the aspirational politics of gun enthusiasts. Justices Thomas and Gorsuch subscribe to a broader, expansive vision of the right to keep and bear arms more in tune with the Aspirational Second Amendment than the Judicial Second Amendment.

III.

The Aspirational Second Amendment is the version of the amendment whose substance derives primarily from political discourse around guns and the arguments of

21. *Id.* at 1999 (Thomas, J., dissenting).

22. *Id.*

23. See SUP. CT. R. 10(a); see also ROBERT L. STERN, EUGENE GRESSMAN, STEPHANIE M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE 226 (8th ed. 2002) (noting that the Supreme Court often “will grant certiorari where the decision of a federal court of appeals . . . is in direct conflict with a decision of another court of appeals”).

24. See, e.g., *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 879–80 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

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

26. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

the gun rights movement. When a gun law comes up for consideration, the Aspirational Second Amendment is the one that the NRA and its allies argue must be followed. Yet the Second Amendment they mean is not the Judicial Second Amendment; advocates do not focus on the judicial decisions authoritatively interpreting the Second Amendment. Rather, they argue that law must comply with a version of the Second Amendment that is informed by political advocacy on behalf of gun rights.

The Aspirational Second Amendment is quite different from the Judicial Second Amendment. According to gun advocates, the right to keep and bear arms goes much further than the current judicial doctrine, requiring more access to guns and prohibiting a far greater range of gun laws than the Second Amendment in the courts. Under the Aspirational Second Amendment, individuals not only have a right to own handguns; they also have a right to military-style assault rifles. High-capacity magazines are also arms protected by the Second Amendment and cannot be banned. Individuals have the right to carry weapons in public, either openly or concealed, and states can only impose minimal, objective requirements to obtain a permit to carry (what is known as “shall-issue” permitting). When carrying their guns in public, people have a right under the Aspirational Second Amendment to go nearly anywhere there is not specialized security such as schools, bars, and churches.

A good example of the Aspirational Second Amendment is the recent push by gun advocates to eliminate all permitting for concealed carry. In recent years, advocates have promoted the idea of “constitutional carry”: the notion that the Second Amendment is the only permit a person needs to be able to carry their guns in public.²⁷ They explicitly ground this understanding of gun rights in the Constitution, even though there has never been an authoritative decision by any federal court (or, for that matter, any state or local court) saying that individuals have a right to carry firearms in public without a permit. Indeed, it is hard to imagine any court in modern society ruling that way. Advocates nonetheless insist that their vision of gun rights is based on the Constitution when it is in fact grounded in an idealized vision of what the Constitution says.

It is common for interest groups to have different understandings of constitutional values than the courts.²⁸ What makes the Second Amendment unusual is that the aspirational version of this right plays a greater role in shaping the law on the ground than the judicial version. Because the gun rights movement has been so successful at the state level, the gun laws of the overwhelming majority of states—forty-one of them as of this writing—by and large reflect the Aspirational Second Amendment. Moreover, this movement has also worked to shape federal gun laws to reflect this version of the amendment. In recent years, gun advocates have defeated efforts to reauthorize the expiring assault weapons ban, expand background checks, and add suspected terrorists to a no-buy list for guns.

When gun laws are proposed, many lawmakers avoid discussion of the Judicial Second Amendment, save perhaps to cite the *Heller* case. Instead, when deliberating

27. See Adam Weinstein, *Understanding ‘Constitutional Carry,’ the Gun-Rights Movement Sweeping the Country*, TRACE (Feb. 28, 2017), <https://www.thetrace.org/2017/02/constitutional-carry-gun-rights-movement-explained> [<https://perma.cc/RY8E-5RML>].

28. See DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016).

and debating a proposed gun law, these lawmakers refer instead to the Aspirational Second Amendment—the one envisioned by the NRA and gun advocates that is far more expansive in its protection for guns. So instead of just arguing that a proposed gun law is good or bad in its public policy impact, these lawmakers justify their support or opposition based on this judicially unmoored understanding of the Second Amendment. Standard arguments about the constitutionality of a law based on judicial doctrine are largely brushed aside. It does not matter much what the courts say the Second Amendment means.

Again, the significance of this variation is largely in the law on the ground. Because lawmakers subscribing to the Aspirational Second Amendment hold the majority in most statehouses and now in Congress, it is that version that is gaining relevance. The judicial one, however, is seemingly becoming increasingly irrelevant to how the gun laws in most of America work. The gun laws of the majority of states have far outpaced judicial doctrine. If the Supreme Court had followed the suggestion of Justices Thomas and Gorsuch and heard *Peruta*, the outcome of the case would not have had any impact on those states, no matter which way the Court ruled. If the Court struck down discretionary permitting or upheld it, the ruling would not impact states that already have shall-issue or no permitting requirements. The same can be said about potential Supreme Court rulings on assault weapons and high-capacity magazines. Given the strength of the gun rights movement at the state and federal level, what the Supreme Court says about the scope of the Second Amendment is all but meaningless in much of the country.

IV.

There are a handful of states for which the Judicial Second Amendment still matters. The gun movement has yet to sway nine states—California, New York, Massachusetts, Maryland, Connecticut, New Jersey, Hawaii, Delaware, and Rhode Island—and the District of Columbia, which have not adopted the Aspirational Second Amendment. That is not to say that gun rights are nonexistent in these holdouts. Under the Judicial Second Amendment they are still required to allow any law-abiding person of age to possess firearms in the home for personal protection. Even prior to *Heller*, gun politics were such that there had been no significant push to prohibit possession of firearms in the home even in these places in decades. (New York City is unusual in that it requires a permit to have any gun in the home.²⁹) Some firearms are off limits, and these states and the District of Columbia have moved to expand those restrictions recently.

Yet while the laws of the holdouts have passed muster under the Judicial Second Amendment, they would run afoul of the Aspirational Second Amendment. Although each of these states and the District of Columbia formally allow people to carry guns in public with a permit, they have discretionary permitting that allows a local law enforcement officer to decide whether a person has a particular individualized need for armed protection in public.³⁰ In practice, this is often equivalent to an effective ban on carrying a concealed weapon in public—and in California, where open carry

29. See R.C.N.Y., tit. 38, §§ 5-01, 5-02 (2010).

30. See *Concealed Carry*, LAW CTR. TO PREVENT GUN VIOLENCE (July 22, 2016),

is prohibited, it can be a total ban on carrying any firearm.³¹ Under the Aspirational Second Amendment, this type of regime is clearly unconstitutional, but under the Judicial Second Amendment, these policies remain permissible. Also found in this handful of states are laws restricting the sale or possession of military-style assault weapons and high-capacity magazines, waiting periods, and universal background checks. All of these laws too would easily pass muster in court—and several have consistently been upheld already—but not if measured against the Aspirational Second Amendment.

The gulf between the states in the two competing camps is only becoming larger in the wake of the Newtown mass shooting in December 2012. The federal government did not pass any new gun legislation after Newtown, despite a strong push from President Barack Obama. In the states, however, there has been a tremendous amount of legislative activity on guns.³² Among the nine states with stricter gun laws, there have been a number of new restrictions enacted. At the same time, many of the other forty-one states have passed laws loosening gun possession even further, as exemplified by Georgia's "guns everywhere" law.³³ In fact, by one count, there have been more laws passed easing gun possession than laws passed restricting guns.³⁴ For some in America, Newtown was a warning that we have to do more to limit guns; for others, it was proof that limits on guns do not work and that more people should be armed.

Proponents of the Aspirational Second Amendment would like to see their vision adopted by the courts, and they have fought to secure such rulings in recent years. In the wake of *Heller*, their success has been limited. Yet they continue to find success in the legislative branches. On concealed carry, gun advocates may well find in Congress the victory over discretionary permitting the courts have denied them. One of the NRA's highest legislative priorities for the Trump administration is a "national reciprocity" law.³⁵ There are two basic reciprocity proposals: a tourist version and a resident version. The tourist version would allow a person who has a concealed carry permit at home to carry a gun while on the

<http://smartgunlaws.org/gun-laws/policy-areas/guns-in-public/concealed-carry> [<https://perma.cc/UQW7-4HPT>].

31. See, e.g., Carol J. Williams, *Gun Owners Hope To Win the Right To Carry Concealed Weapons*, L.A. TIMES (Feb. 20, 2012), <http://articles.latimes.com/2012/feb/20/local/la-me-right-to-carry-20120220/2> [<https://perma.cc/W6KH-ZX3U>] (discussing the difficulty of obtaining permits under California's discretionary "may-issue" law).

32. See Karen Yourish, Wilson Andrews, Larry Buchanan & Alan McLean, *State Gun Laws Enacted in the Year After Newtown*, N.Y. TIMES (Dec. 10, 2013), <http://www.nytimes.com/interactive/2013/12/10/us/state-gun-laws-enacted-in-the-year-since-newtown.html> [<https://perma.cc/H43J-PF8F>] (analyzing the 109 gun laws passed at the state level in 2013).

33. Safe Carry Protection Act, GA. CODE ANN. § 16-11-127 (2014).

34. Of the 109 state gun laws enacted in the year following the Newtown shooting, 70 loosened gun restrictions, while only 39 tightened them. See Yourish et al., *supra* note 32.

35. See Dan Friedman, *National Concealed-Carry 'Reciprocity': The NRA's Next Big Push, Explained*, TRACE (Apr. 27, 2017), <https://www.thetrace.org/2017/04/nra-national-concealed-carry-reciprocity-explained> [<https://perma.cc/9RY2-2TAV>]; see also *Concealed Carry Reciprocity Effort Gains Steam in Congress*, NRA INST. FOR LEGIS. ACTION (June 9, 2017), <https://www.nra.org/articles/20170609/concealed-carry-reciprocity-effort-gains-steam-in-congress> [<https://perma.cc/DJS5-GTQ6>].

road. So a Virginian with a permit who comes to California on vacation can carry while on vacation.³⁶

The resident version of reciprocity would allow a Californian to obtain a permit online from Virginia and carry at home in California. Whereas tourist reciprocity would lead to some more guns on the street, the resident version would effectively gut discretionary permitting. Local residents could easily obtain a permit from a shall-issue state—some, like Virginia, do not require an applicant to be a resident—and carry on his own city’s streets. The discretionary permitting states would become, for all intents and purposes, shall-issue. If resident reciprocity passes, the constitutional debate over discretionary permitting becomes largely meaningless. Whatever the courts say about discretionary permitting will not impact the law on the ground.

Proponents of the Aspirational Second Amendment are promoting another reform that could further marginalize the Judicial Second Amendment: strict scrutiny amendments to state constitutional right-to-bear-arms provisions. As mentioned earlier, state courts traditionally apply a relatively deferential reasonable regulation standard under these state constitutional guarantees. Disappointed with the results, gun advocates have won ballot measures in Louisiana and Missouri amending those states’ constitutions to require courts to apply strict scrutiny to right to bear arms disputes.³⁷ They are explicitly transforming the right to bear arms in the courts to look more like the Aspirational Second Amendment.

Strict scrutiny ballot initiatives further reduce the on-the-ground import of the Judicial Second Amendment. Litigants in the affected states will choose to challenge state gun laws under state constitutional right-to-bear-arms provisions instead of the Second Amendment because of the former’s more rigorous standard of review. Strict scrutiny should mean that more of those challenges succeed than they would under *Heller*—at least in theory³⁸—so lawyers will direct litigation into the state courts. The overall impact of these ballot measures, however, is limited in that they do not apply to federal laws and are most likely to be adopted in states whose laws already reflect the permissiveness of the Aspirational Second Amendment.

V.

While the gap between the Judicial Second Amendment and the Aspirational Second Amendment grows, the strict scrutiny initiatives nevertheless remind us how political movements reshape constitutional doctrine in the courts. Scholars have long described how our fundamental rights are shaped by nonjudicial actors,

36. This terminology of “tourist” reciprocity and “resident” reciprocity is my own. An example of the tourist version is the Senate bill sponsored by Senator John Cornyn, while an example of the resident version is the House bill sponsored by Representative Richard Hudson. See Friedman, *supra* note 35; Michele Gorman, *Guns in America: What Is National Concealed Carry Reciprocity?* NEWSWEEK (Mar. 3, 2017), <http://www.newsweek.com/what-national-concealed-carry-reciprocity-563075> [<https://perma.cc/W6GD-4SNH>].

37. LA. CONST. art. I, § 11 (amended 2012); MO. CONST. art. I, § 23 (amended 2014).

38. See Winkler, *supra* note 3, at 727–28.

such as Congress, presidents, state legislators, interest groups, and common citizens.³⁹ There may be no better example than the Second Amendment.⁴⁰

When *Heller* came down, it was heralded as the “triumph of originalism” because Justice Scalia’s majority opinion purported to base the decision on the original public meaning of the Second Amendment.⁴¹ Yet, *Heller* was also a reflection of how popular movements can change constitutional law. For most of American history, the ambiguity of the Second Amendment’s text was sufficient to raise questions about the scope and nature of the right. While lawyers sometimes claimed the Second Amendment protected an individual right—consider Chief Justice Roger Taney’s statement in *Dred Scott v. Sandford* that citizenship for African Americans would extend to them the right “to keep and carry arms wherever they went”⁴²—the federal courts since the 1930s had adopted a militia-centered view.⁴³ For years, not even the NRA promoted the individual-rights view of the Second Amendment.⁴⁴ In the 1930s, NRA president Karl Frederick wrote that “enlightened public sentiment” and “intelligent legislative action” gave protection to individuals’ access to guns in the home: “It is not to be found in the Constitution.”⁴⁵

Beginning in the 1960s and 1970s, however, a vigorous and active social movement arose that breathed new life into the Second Amendment. In an era of rising crime rates and growing disenchantment with government’s ability to solve social problems, many Americans began to view access to guns for self-defense as a fundamental right.⁴⁶ This shift was reflected in the transformation of the NRA. The organization had supported the ultimate passage of the federal laws known as the Gun Control Act of 1968—which restricted who could purchase a gun, barred the importation of certain firearms, and created the Bureau of Alcohol, Tobacco, and Firearms to enforce federal gun laws⁴⁷—and the leaders of the organization supported a variety of gun safety measures, including waiting periods and restrictive licensing for concealed carry.⁴⁸ Seeking to withdraw from gun politics, the NRA’s leaders even

39. See, e.g., LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (3d ed. 2001); see also Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 10 (2003) (arguing that “constitutional law could not plausibly proceed without incorporating the values and beliefs of nonjudicial actors”).

40. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 194 (2008) (arguing that in the context of the Second Amendment, practices of democratic constitutionalism enable nonjudicial actors to “contest and shape popular beliefs about the Constitution’s original meaning and so confer upon courts the authority to enforce the nation’s foundational commitments”).

41. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008); Linda Greenhouse, 3 *Defining Opinions*, N.Y. TIMES (July 13, 2008), <http://www.nytimes.com/2008/07/13/weekinreview/13greebox.html> [<https://perma.cc/G6SL-DUQU>].

42. 60 U.S. (19 How.) 393, 417 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

43. See *Heller*, 554 U.S. at 637–38 (Stevens, J., dissenting).

44. See ADAM WINKLER, *GUNFIGHT* 65 (2d ed. 2013).

45. *Id.* at 212.

46. See *id.* at 96–97.

47. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213; see also Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

48. WINKLER, *supra* note 44, at 64–65, 210–12, 253–54.

planned to close up the Washington office, move headquarters to Colorado, and focus on hunting. A group of dissident members who thought guns were not for shooting ducks but for self-protection against criminals took over the NRA, rededicating it to waging political battle against gun laws. The new leadership subscribed to a vibrant and expansive Second Amendment far greater in its constitutional protection than that offered by judicial doctrine.⁴⁹

Although *Heller* is perhaps the most high-profile illustration of the NRA's success in furthering its vision, the most significant thing the transformed NRA did for the past forty years was to adopt a political rather than litigation strategy for protecting the right to bear arms. Although active today in court, prior to the *Heller* case the NRA did not focus on trying to persuade judges of its view of the Second Amendment. Instead of pursuing litigation, the NRA focused its efforts on mobilizing citizens, especially gun owners, and electing officials who could repeal restrictive gun laws. Indeed, after 1986, the NRA propelled the wave of reform at the state level to make it easier to carry guns in public, including the replacement of discretionary permitting for concealed carry and lifting of prohibitions on guns in churches, bars, and college campuses. By adopting a political strategy rather than a legal one, the NRA not only changed the state of gun laws in the majority of states but also built up a large coalition of supportive lawmakers across the nation. As a result, the Aspirational Second Amendment has been adopted in most of America through legislation, not judicial decision.

The question for the future is whether the Aspirational Second Amendment, which so effectively shifted judicial doctrine in *Heller*, will eventually propel the courts to embrace an even more vibrant, gun-protective reading of the Second Amendment. Perhaps it will. Scholars have argued that the Supreme Court, rather than being a legal innovator on rights issues, often serves to stamp out outliers who fail to conform to a national consensus.⁵⁰ At least one metric of a national consensus is state law, and the Aspirational Second Amendment has been adopted by the vast majority of states. Indeed, if President Donald Trump or any foreseeable Republican successor names the next few Justices to the Supreme Court, the Judicial Second Amendment might be transformed to look much more like the Aspirational Second Amendment in short order. The Judicial Second Amendment would become far more important, reshaping the law of the nine holdout states and perhaps even that of the federal government.

The impact of such a revamping of state law is hard to estimate, given that gun laws often suffer from widespread noncompliance already. Like laws on recreational drugs, gun laws regulate small, easy to conceal items that people feel passionate about. As a result, many people knowingly disobey gun laws. After Sunnyvale, California, banned the possession of high-capacity magazines in 2013, police reported that no magazines had been voluntarily turned in.⁵¹ That same year, New York

49. *Id.* at 65–68.

50. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 3 (1996).

51. Chip Johnson, *One Gun Control Attempt That Misfires*, S.F. CHRON. (Jan. 28, 2016), <http://www.sfchronicle.com/bayarea/johnson/article/One-gun-control-attempt-that-misfires-6791466.php> [<https://perma.cc/4MTM-PNAG>].

required the registration of assault weapons but only an estimated five percent of the firearms were registered.⁵² So it may be that many of the restrictive gun laws that might be called into question by the Aspirational Second Amendment are not being followed today anyway.

Laws requiring a permit to carry a concealed firearm may be obeyed more often than magazine bans or registration requirements, in part because illegally carrying a gun in public is more likely to be enforced than a law targeting guns or magazine kept at home. Here, there are some numbers that give a hint of how adoption of the Aspirational Second Amendment would impact major cities in those nine states and D.C. Under its current discretionary permitting regime, Los Angeles County, with a population just over 10 million, has less than 400 civilians (other than law enforcement) allowed to carry concealed weapons.⁵³ In Aspirational Second Amendment states that make concealed carry permits readily available, about 4–6% of the population obtains one.⁵⁴ If that number held in Los Angeles, that would mean 400,000–600,000 more residents authorized to carry. A similar explosion in carry permits would be expected in New York City, Washington, D.C., San Francisco, Honolulu, Baltimore, and Trenton.

While those numbers are alarming, they must be understood in the context of the Aspirational Second Amendment's previous success. The gun rights movement has already revised state laws to allow easy concealed carry in many states, and plenty of major cities—Phoenix, Houston, Philadelphia, and Indianapolis—have large numbers of gun carriers. The social science data on the impact of permissive carry laws is inconclusive; many thoughtful and careful empirical studies have been done, some showing that they increase violence and others that they decrease violence.⁵⁵ Probably the best we can say at this point is that we do not know exactly what the impact is. Certainly, the worst fears of opponents of concealed carry, who warned of America becoming a new Wild West, have not materialized. In fact, crime in recent years has been historically low.⁵⁶ And while that is not likely due to permissive carry laws, those laws have certainly not led to huge spikes in crime.

52. Adam Winkler, *Why Gavin Newsom's Gun Law Won't Help*, L.A. TIMES (Apr. 8, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-0408-winkler-gavin-newsom-gun-initiative-20160408-story.html> [https://perma.cc/7G5Y-2BDU].

53. A list of the fewer than 400 Los Angeles County residents permitted to carry a concealed firearm can be found at <https://www.scribd.com/document/125393888/CCW-Licensees-LA-County> [https://perma.cc/84BR-W8BV].

54. See Adam Winkler, *Want Fewer Guns on California Streets? Open Carry May Be the Answer*, L.A. TIMES (Feb. 23, 2014), <http://articles.latimes.com/2014/feb/23/opinion/la-oe-winkler-gun-control-open-carry-20140223> [https://perma.cc/XN6L-RV4B].

55. Compare John J. Donohue, Abhay Aneja & Kyle D. Weber, *Right-To-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 23510, 2017) (concluding that right-to-carry laws “lead to substantial increases in violent crime”), with John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 1 (1997) (finding that “allowing citizens to carry concealed weapons deters violent crimes”).

56. MATTHEW FRIEDMAN, AMES C. GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, *CRIME TRENDS: 1990–2016*, at 1–3 (2017) (finding that America's overall crime rate has “dropped precipitously in the last quarter-century” to historic lows).

Nevertheless, if the Aspirational Second Amendment transforms the Judicial Second Amendment, and with it the laws of nine states, it would be an unprecedented feat for a constitutional right to bear arms provision. Over the course of American history, we have lived under the Second Amendment and dozens of similar state constitution guarantees. Rarely, however, have these provisions been read to broadly reshape the gun laws of even a single state. From time to time, courts have invalidated an important gun law, such as Georgia's ban on concealable weapons in 1846⁵⁷ and Washington, D.C.'s ban on handguns in 2008.⁵⁸ Yet, one of the consistent themes in the constitutional history of the right to bear arms is that courts read such provisions narrowly to allow lawmakers considerable leeway to regulate guns in the interest of public safety. For the Supreme Court to read the Second Amendment to overhaul the gun laws of a significant portion of the country would be not just controversial but historic.

In the end, however, the Aspirational Second Amendment seems destined to continue to dictate the gun laws in most of America, regardless of what happens with the Judicial Second Amendment. If there is an overarching lesson, it is that building a political movement around an aspirational vision of the Constitution can be more effective and durable than high-profile judicial victories. Constitutional values can often be, and in the case of the Second Amendment clearly are, best protected and preserved through political mobilization not the courts.

57. *Nunn v. Georgia*, 1 Ga. 243 (1846).

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