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# PANEL IV: HAS THE CONSTITUTION FOSTERED A PATHOLOGICAL RIGHTS CULTURE? THE RIGHT TO BEAR ARMS

## GUN RIGHTS TALK

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### INTRODUCTION

The Second Amendment plays a massive – some would say outsized – role in our often-dysfunctional national gun debate.<sup>1</sup> It serves as a banner for gun-rights supporters, a common enemy for gun-control advocates, and a consistent headache for scholars, lawyers, and judges. But the full force of the Amendment's influence over the scope and extent of gun control cannot be found in casebooks. Even after the Supreme Court's decision in *District of*

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<sup>1</sup> See Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 569 (2006) (describing the “pathologies that afflict the American gun debate”); B. Bruce-Biggs, *The Great American Gun War*, PUB. INT., Fall 1976, at 37, 38 (“In addition to the usual political charges of self-interest and stupidity, participants in the gun-control struggle have resorted to implications or downright accusations of mental illness, moral turpitude, and sedition.”). The Second Amendment's unique role in the dysfunctional national gun debate also seems to be widely accepted. See, e.g., Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 479 (2004) (“As a matter of legal and political rhetoric, [the debate over the meaning of the Second Amendment] is fascinating and unlike any other area of constitutional law.”).

*Columbia v. Heller*,<sup>2</sup> relatively few gun laws – all of them unusually stringent – have been struck down on Second Amendment grounds.<sup>3</sup>

The Amendment has, however, been an enormously effective tool for keeping those gun laws from taking root in the first place. Indeed, the Second Amendment's underwhelming impact in litigation is largely reflective of its own success: because invocations of the Amendment have been so politically powerful, there is simply not as much left for it to do, legally speaking, as some might suppose.<sup>4</sup> This makes it somewhat difficult to argue that constitutional "dysfunction" itself has blocked the kind of regulations that many gun-control supporters want. After all, most Americans support the "individual" right to keep and bear arms recognized in *District of Columbia v. Heller*,<sup>5</sup> and very few support confiscatory gun control or outright gun bans.<sup>6</sup>

Nevertheless, "gun rights talk" does have drawbacks that contribute to political dysfunction. This does not necessarily make it unique as far as constitutional rhetoric goes. In fact, the basic character of gun rights talk is familiar to critics of rights talk more generally<sup>7</sup>: "[I]ts starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with regard to personal, civic, and collective responsibilities."<sup>8</sup> If anything, the

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<sup>2</sup> 554 U.S. 570, 602 (2008) (holding that the Second Amendment protects an "individual" right to possess a firearm not limited to service in an organized militia).

<sup>3</sup> See generally Anna Stolley Persky, *An Unsteady Finger on Gun Control Laws: Despite 2nd Amendment Cases, Firearms Codes Are Moving Targets*, 96 A.B.A. J. 14, 14 (2010) (arguing that *Heller* and *McDonald* have had a minimal effect on the scope of gun control in the United States).

<sup>4</sup> It is often said that there are 20,000 gun control laws on the books – even 9000 federal ones – but the basis for that claim is murky at best. In 2000, one study counted a total of 300 state laws. Glenn Kessler, *It's Pointless to Argue About the Number of Gun Laws on the Books*, WASH. POST, Feb. 10, 2013, at A2 (arguing that the estimation of 20,000 gun control laws "amounts to false precision").

<sup>5</sup> See Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), <http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-OwnGuns.aspx>, archived at <http://perma.cc/ZCT3-BBW5> (showing that seventy-three percent of Americans believe that the Second Amendment guarantees the right to own guns outside of militia membership).

<sup>6</sup> See Lydia Saad, *Americans Want Stricter Gun Laws, Still Oppose Bans*, GALLUP (Dec. 27, 2012), <http://www.gallup.com/poll/159569/americans-stricter-gun-laws-oppose-bans.aspx>, archived at <http://perma.cc/T5FN-WUX4> (finding that only twenty-four percent of Americans favor banning the possession of handguns).

<sup>7</sup> See RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* (2011) (arguing that over-reliance on rights has perverse effects on equal protection); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*, at xi (1991) (arguing, inter alia, that rights talk undermines the sort of ongoing dialogue upon which civil society ultimately depends).

<sup>8</sup> GLENDON, *supra* note 7, at x.

extreme forms of gun rights talk simply provided an especially powerful illustration of the standard rights talk critique.

The traditional remedy prescribed for overuse of rights talk is to minimize exposure, thereby giving more rhetorical space to underlying – and presumably more soluble – political disagreements.<sup>9</sup> Excavating the gun debate from the constitutional rubble indeed might be a step in the right direction, as it could enable a more direct discussion of the proper role of gun rights and gun control in the United States, free from misunderstandings and misinterpretations of constitutional doctrine.<sup>10</sup> But it would not necessarily cure the disease, as gun rights talk is also a symptom, not simply a cause, of the dysfunction. The deeper one digs, the more it becomes evident that gun rights talk is not just about rights, has even less to do with the Constitution, and may not even be about guns. It is, at root, a debate about culture and values.<sup>11</sup> Clearing away the rights talk might only uncover a culture war, not a political debate. And resolving that cultural dispute will require a kind of public discourse that has thus far proven elusive.

The charge of this Symposium is to focus on the constitutional connections, causes, and cures of America's political dysfunction. As a legal matter, the Second Amendment is not necessarily the villain that advocates of gun control sometimes suspect it to be.<sup>12</sup> Existing doctrine permits reasonable gun control.

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<sup>9</sup> See *infra* Part III.

<sup>10</sup> By this, I do not mean to discourage *disagreement* about what the Constitution does or should mean. *Heller* itself represents the eventual success of what was long a minority position. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 233-34 (2008) (describing the political and social movement that led to the doctrinal shift). But I do think that it is possible to draw a line between aspirational arguments about the Constitution and legitimate claims about what the law currently provides. The Constitution is not just what the courts say it is, but neither is it everything that anyone says it is.

<sup>11</sup> Zell Miller, *The Democratic Party's Southern Problem*, N.Y. TIMES, June 4, 2001, at A17 ("Gun control . . . is about values. What you are for says a lot about who you are and who you aren't."); David Brooks & Gail Collins, *What We Talk About When We Talk About Guns*, N.Y. TIMES OPINIONATOR (July 25, 2012, 1:22 PM), <http://opinionator.blogs.nytimes.com/2012/07/25/what-we-talk-about-when-we-talk-about-guns>, archived at <http://perma.cc/6YRJ-2XTW> ("David Brooks: 'The gun control debate is no longer about guns. It's a culture war between urbanites and rural people.'").

<sup>12</sup> See, e.g., Kurt Eichenwald, *Let's Repeal the Second Amendment*, VANITY FAIR (Jan. 3, 2013, 1:00 PM), <http://www.vanityfair.com/online/daily/2013/01/kurt-eichenwald-lets-repeal-second-amendment>, archived at <http://perma.cc/3MV-P8BG> (calling for a repeal of the Second Amendment because it has "nothing – nothing – to do with Modern America"); Melynda Price, Op-Ed., *Get Rid of the Right to Bear Arms*, Response to *Another Stab at the U.S. Constitution*, N.Y. TIMES (July 8, 2012, 10:01 PM), <http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-do-we-really-need-the-second-amendment>, archived at <http://perma.cc/3HZ7-2G42> ("[T]he Framers didn't envision the kind of gun toting that is permitted across this country today."). The same weekend as this Symposium was held, one of its guiding lights participated in a

The dysfunction, inasmuch as it exists, is not a result of gun rights, but of gun rights talk, and on a deeper level a cultural conflict that lacks a vocabulary for political engagement. Solving that problem will require remedies that lie outside the law, and yet – perhaps counterintuitively – the Second Amendment might still have a useful role to play in facilitating discourse.

### I. *HELLER'S WHIMPER*

As a doctrinal matter, the story of the modern Second Amendment begins with *District of Columbia v. Heller*, which held that the Amendment protects an “individual” right to bear arms for self-defense, and that a citywide ban on handguns in the District of Columbia was an unconstitutional infringement of that right.<sup>13</sup> *McDonald v. City of Chicago* later incorporated that basic holding against the states, without much additional doctrinal elaboration.<sup>14</sup>

*Heller's* primary contribution was establishing what the Second Amendment means – that it is not limited to militia-connected people or arms,<sup>15</sup> as had previously been thought.<sup>16</sup> But for most Americans, knowing the judicially endorsed semantic meaning of the Second Amendment is probably less important than knowing what kinds of gun control it permits. And for most of American history, the answer to that question was straightforward: nearly anything. Prior to the D.C. Circuit's opinion in *Heller*,<sup>17</sup> no federal court of

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panel debate on the historical context of the Second Amendment and whether the Amendment has outlived its usefulness. *Debate: Has the Right to Bear Arms Outlived Its Usefulness*, NAT'L PUB. RADIO (Nov. 21, 2013, 12:45 PM), <http://www.npr.org/2013/11/18/246023431/debate-has-the-right-to-bear-arms-outlived-its-usefulness>, archived at <http://perma.cc/AP99-XA9A> (featuring Sandy Levinson, along with Alan Dershowitz, David Kopel, and Eugene Volokh).

<sup>13</sup> *District of Columbia v. Heller*, 554 U.S. 570, 581, 635 (2008).

<sup>14</sup> *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3050 (2010) (“[T]he Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

<sup>15</sup> *Heller*, 554 U.S. at 584.

<sup>16</sup> In the years leading up to *Heller*, advocates of the individual rights view came to call their approach the Standard Model. See, e.g., Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463, 466 (1995). This is itself a good example of effective rights talk. And indeed, as discussed previously, by the time *Heller* was decided, most Americans had come to believe that the Second Amendment protects an individual right. See Jones, *supra* note 5 (explaining that seventy-three percent of Americans believe that the Second Amendment supports the individual right to bear arms). But whether one believes the individual rights interpretation to be *correct*, it is difficult to claim that as a doctrinal matter it was legally “standard” prior to 2008. Were that the case, *Heller* really would have been much ado about relatively little. It seems more accurate for advocates of this view to say that *Heller* established what the law *should* have been all along, not that it reaffirmed existing doctrine.

<sup>17</sup> *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007) (striking down the District of Columbia's ban on the registration of handguns), *aff'd sub nom. Heller*, 554 U.S.

appeals had ever found a gun control law unconstitutional on Second Amendment grounds.<sup>18</sup> Indeed, few even paused to parse the Amendment in much detail. Many, if not most, courts simply dismissed Second Amendment claims by anyone who was not a member of a recognized militia (that is to say, almost everyone).<sup>19</sup>

For more than two centuries, then, the Second Amendment's legal impact was negligible. One might expect that this would change dramatically in the wake of *Heller*, and that gun control laws across the country would be under threat. Advocates of gun control bemoaned this possibility,<sup>20</sup> even as opponents of gun control celebrated it.<sup>21</sup> Some read the majority's opinion as requiring a relatively rigid historical-categorical test that could sharply limit gun control,<sup>22</sup> and as attempting to forbid the kind of interest-balancing approach advocated in Justice Breyer's dissent and practiced in many other areas of constitutional law.<sup>23</sup>

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<sup>18</sup> Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2008 CATO SUP. CT. REV. 127, 140. To my knowledge, only one district court had done so, and it was reversed on appeal (by the first appellate decision to embrace the "individual" rights view). *United States v. Emerson*, 46 F. Supp. 2d 598, 611 (N.D. Tex. 1999) (striking down, on Second Amendment grounds, a statute prohibiting people subject to restraining orders from possessing firearms), *rev'd*, 270 F.3d 203 (5th Cir. 2001).

<sup>19</sup> See Neily, *supra* note 18, at 129 (stating that federal circuit courts generally held that the Second Amendment provided "no meaningful protection for individual gun ownership").

<sup>20</sup> See Juliet A. Leftwich, 'Heller's' Wake, L.A. DAILY J., June 26, 2009, at 6 (explaining that in response to *Heller*, "the gun lobby immediately began to file lawsuits challenging a wide array of firearms laws nationwide"); Editorial, *Lock and Load*, N.Y. TIMES, June 27, 2008, at A18 (arguing that *Heller* gave "gun-rights advocates a powerful new legal tool to try to strike down gun-control laws"); Patrik Jonsson, *Cities' Gun Restrictions Begin to Topple*, CHRISTIAN SCI. MONITOR (June 20, 2009), <http://www.csmonitor.com/USA/2009/0620/p02s02-usgn.html>, archived at <http://perma.cc/MDN6-M6Q4>.

<sup>21</sup> See Robert A. Levy, *Second Amendment Now Restored to Rightful Place*, ROME NEW-TRIB., July 27, 2008, at D (arguing that *Heller* rightly rediscovered the Second Amendment); Sarah Fay Campbell, *Local Gun Aficionados Love Supreme Court Ruling*, TIMES-HERALD (July 6, 2008), <http://www.times-herald.com/Local/Local-gun-afficionados-love-Supreme-Court-ruling--494866>, archived at <http://perma.cc/JK7K-7K6J> (describing the positive response to *Heller*).

<sup>22</sup> *Heller v. District of Columbia*, 670 F.3d 1244, 1271-72 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (stating that the *Heller* majority upheld bans on "classes of guns" that have been historically and traditionally forbidden, such as dangerous weapons "not typically possessed by law-abiding citizens").

<sup>23</sup> Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 405-11 (2009) (arguing that the *Heller* majority "avoided endorsing a balancing approach"). Professors Jim Fleming and Linda McClain provide a sophisticated explanation and defense of a similar approach in their contribution to this Symposium. See James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with*

In practice, however, it appears that relatively few laws have been struck down on Second Amendment grounds since *Heller*.<sup>24</sup> One reason for this is that *Heller* itself specifically approves a potentially wide range of gun control measures, from bans on possession by felons (probably the most commonly litigated federal gun control law) to bans on “dangerous and unusual weapons.”<sup>25</sup> Another potentially more important reason is that the federal courts seem to be ignoring the majority’s unworkable categoricalism in favor of a two-part test that incorporates the interest-balancing favored by Justice Breyer.<sup>26</sup> Using that test, or some variation thereof, courts have upheld statutes requiring a showing of special need in order to carry a firearm,<sup>27</sup> prohibiting possession of firearms by individuals convicted of misdemeanor domestic violence,<sup>28</sup> forbidding the sale of handguns to persons under the age of twenty-one,<sup>29</sup> and many others.<sup>30</sup> By contrast, most laws that have been struck down have been atypically strict.<sup>31</sup> As a legal matter, then, the post-*Heller* Second

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*Responsibilities and Regulation*, 94 B.U. L. REV. 849, 868-73 (2014) (arguing that the most appropriate framework acknowledges that the right to keep and bear arms is fundamental; and also that many regulations concerning it are “presumptively lawful”).

<sup>24</sup> *Written Testimony of the Law Center to Prevent Gun Violence*, LAW CTR. TO PREVENT GUN VIOLENCE 2 (Feb. 12, 2013), <http://smartgunlaws.org/wp-content/uploads/2013/02/Law-Center-Written-Testimony-for-Feb-2013-Senate-Judiciary-Committee-Hearing.pdf>, archived at <http://perma.cc/C2SZ-F4ER> (stating that “[t]he Law Center is aware of more than 650 . . . decisions” in which “lower courts across the country have overwhelmingly rejected . . . challenges” to gun control laws). Of course, the 650-decisions figure means less without a denominator of all gun control challenges, but it seems that this number can be no higher than 700. *Post-Heller Litigation Summary*, LAW CTR. TO PREVENT GUN VIOLENCE 1 (Aug. 2, 2013), <http://smartgunlaws.org/wp-content/uploads/2013/07/Post-Heller-Litigation-Summary-August.pdf>, archived at <http://perma.cc/54UR-QQ4A> (“We have examined over 700 federal and state post-*Heller* decisions discussing the Second Amendment . . .”).

<sup>25</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

<sup>26</sup> See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 707 (2012) (explaining that “lower courts’ decisions strongly reflect the pragmatic spirit” of Justice Breyer’s dissenting opinion in *Heller*); see also Blocher, *supra* note 23, at 375 (predicting that balancing tests will “almost inevitably” become a part of Second Amendment doctrine, notwithstanding *Heller*’s purported categoricalism).

<sup>27</sup> *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97-101 (2d Cir. 2012).

<sup>28</sup> *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc).

<sup>29</sup> *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 195-98 (5th Cir. 2012).

<sup>30</sup> See, e.g., *United States v. DeCastro*, 682 F.3d 160, 166-68 (2d Cir. 2012) (upholding a statute that prohibited an individual from purchasing firearms in another state and transporting them to his state of residence); *Heller v. District of Columbia*, 670 F.3d 1244, 1252, 1260-64 (D.C. Cir. 2011) (upholding an ordinance prohibiting the possession of semi-automatic rifles and large-capacity magazines under a two-step approach).

<sup>31</sup> See, e.g., *Moore v. Madigan*, 702 F.3d 933, 940-43 (7th Cir. 2012) (invalidating a statute that prohibited carrying readily operable firearms in public); *Ezell v. City of Chi.*,

Amendment seems to be useful primarily as a tool for trimming outliers, not for uprooting “mainstream” gun control.

Of course, a straightforward body count of unconstitutional gun control laws is not the only, nor the best, way to measure *Heller*’s impact. Striking down the laws in D.C. and Chicago, after all, affected tens of millions of people. Even so, as a litigation tool, the new “individual rights” Second Amendment has not dramatically changed the legal landscape in the way that some hoped or feared that it would.

## II. THE SECOND AMENDMENT’S BANG

The somewhat muted legal impact of the newly invigorated Second Amendment right is largely a result of its past political triumphs. The Amendment has been so effective as a rhetorical tool to block gun control that it is rarely needed as a legal tool to strike it down. D.C.’s and Chicago’s laws – those invalidated in *Heller* and *McDonald* – were uniquely restrictive, and most cities and states place relatively minimal restrictions on the ability of individuals to keep and bear arms.<sup>32</sup> To see the impact of the Amendment on gun control in the United States, then, one must look not just to the number or type of gun control laws struck down by courts, but also to the potential gun control laws that were never passed by legislatures.<sup>33</sup> The active agent in this sphere is gun rights talk, not constitutional doctrine.

It has taken many full-length books and articles to do justice to the wide range of gun rights talk and gun rights talkers,<sup>34</sup> and the brief description given here is not intended to minimize the broad and important diversity of views. Nor is the goal to suggest that gun rights talk is categorically “worse” than other forms of rights talk. If nothing else, public discourse since the murders at

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651 F.3d 684, 710 (7th Cir. 2011) (invalidating a municipal statute that banned “[s]hooting galleries, firearm ranges, or any other place where firearms are discharged” (alteration in original)).

<sup>32</sup> Michael P. O’Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 211 (2008) (defining “primary gun culture” as “jurisdictions that both have ‘shall issue’ concealed carry laws and do not treat modern self-loading firearms differently from other common arms”).

<sup>33</sup> Because the Second Amendment’s outsized political impact goes beyond the robustness of the doctrine itself, the Second Amendment is different from legally enforceable rights that have become so internalized that invoking them is no longer necessary. RICHARD THOMPSON FORD, *UNIVERSAL RIGHTS DOWN TO EARTH* 16 (2011) (“[W]hen rights are well established and accepted, we typically respect each other’s rights as a matter of course.”).

<sup>34</sup> See generally OSHA GRAY DAVIDSON, *UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL* (1993) (examining the rise of the NRA and its response to gun-control legislation); ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL*, at xi (1995) (analyzing the politics surrounding gun rights and gun control); Andrew J. McClurg, *Sound-Bite Gun Fights: Three Decades of Presidential Debating About Firearms*, 73 UMKC L. REV. 1015, 1016 (2005) (exploring “how presidential candidates have performed in the gun debate”).

Newtown has shown that within the minority of American households that own guns,<sup>35</sup> and even within the minority of gun owners who are members of the NRA,<sup>36</sup> there are major differences of opinion about gun control and the Second Amendment.<sup>37</sup> Even so, some voices are louder than others, and there are some characteristics common to the dominant forms of gun rights talk. These disparate voices tend to illustrate – sometimes in stark fashion – the traditional rights talk critique.

First, like other forms of rights talk, gun rights talk tends to be absolutist in its constitutional vision. Mary Ann Glendon observes that “in its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over.”<sup>38</sup> Nowhere is this more evident than in gun rights talk. Even the most minor forms of gun control are often described not only as undesirable, but as infringements of the Second Amendment.<sup>39</sup> Recently, the proposed federal background check program was said to represent “an anti-gun agenda that seeks to restrict firearm ownership in America – as much as they can, however

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<sup>35</sup> One could be forgiven for not thinking it is a minority, given the prevalence of gun-related discussions and the prevalence of guns themselves – though possessed by roughly forty percent of the population, there are approximately enough guns in America for every person to have at least one. L. Hepburn et al., *The US Gun Stock: Results from the 2004 National Firearms Survey*, 13 INJ. PREVENTION 15, 18, 19 (2007) (finding that 283 million firearms are owned by thirty-eight percent of American households); Sabrina Tavernise & Robert Gebeloff, *Share of Homes with Guns Shows 4-Decade Decline*, N.Y. TIMES, Mar. 10, 2013, at A1 (“The gun ownership rate has fallen across a broad cross section of households since the early 1970s . . .”).

<sup>36</sup> The NRA claims to have 4.5 million members, but that figure represents only a small fraction of the people – or even households – owning guns. Glenn Kessler, *Does the NRA Really Have More than 4.5 Million Members?*, WASH. POST FACT CHECKER (Feb. 2, 2013, 6:00 AM), [http://www.washingtonpost.com/blogs/fact-checker/post/does-the-nra-really-have-more-than-45-million-members/2013/02/07/06047c10-7164-11e2-ac36-3d8d9dcaa2e2\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/does-the-nra-really-have-more-than-45-million-members/2013/02/07/06047c10-7164-11e2-ac36-3d8d9dcaa2e2_blog.html), archived at <http://perma.cc/BUZ-3ZQK> (“[W]e are inclined to conclude that the NRA is overestimating the size of its membership when it claims more than 4.5 million members.”).

<sup>37</sup> See Mark Glaze, Op-Ed., *Americans, Even NRA Members, Want Gun Reforms*, CNN (Feb. 1, 2013, 7:42 AM), <http://www.cnn.com/2013/01/31/opinion/glaze-gun-control>, archived at <http://perma.cc/3P9R-EDA7> (stating that “74% of NRA members” support background checks); Daniel Webster, Op-Ed., *Room for Debate: N.R.A. Members vs. N.R.A. Leaders*, Response to *Is the Gun Lobby Invincible?*, N.Y. TIMES (Jan. 17, 2014), <http://www.nytimes.com/roomfordebate/2012/12/17/is-the-gun-lobby-invincible/nra-members-vs-nra-leaders>, archived at <http://perma.cc/Q67W-MFCW> (“[E]xtreme stances by the N.R.A. will certainly make some gun owners speak out for common sense reforms . . .”).

<sup>38</sup> GLENDON, *supra* note 7, at 9; see also FORD, *supra* note 7, at 22-23.

<sup>39</sup> GLENDON, *supra* note 7, at 43 (stating that long before *Heller*, “[t]he language of the second amendment . . . has similarly promoted the belief in many quarters that an absolute, or nearly absolute, individual right was thereby created”).



they can, and as soon as they can.”<sup>40</sup> Despite being overwhelmingly popular even with members of the NRA,<sup>41</sup> it failed in the Senate.<sup>42</sup> Strikingly, a Gallup poll found that the most common reason given by those who opposed background checks was that such checks would violate the Second Amendment or the “right to own guns.”<sup>43</sup>

Apocalyptic rhetoric has long been a common ingredient in gun rights talk – each gun-control bill is the worst,<sup>44</sup> and every debate is the last chance to save the right to keep and bear arms.<sup>45</sup> Osha Gray Davidson, in his book-length study of the NRA, provides a few examples of “how the Armageddon Appeal has looked in legislative alerts over a span of several years”<sup>46</sup>:

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<sup>40</sup> *Senate to Take up Anti-Gun Legislation Soon!*, NRA INST. FOR LEGISLATIVE AFFAIRS (Apr. 5, 2013), <http://www.nraila.org/legislation/federal-legislation/2013/4/senate-to-take-up-anti-gun-legislation-soon!.aspx?s=background+check&st=&ps>, archived at <http://perma.cc/8V5G-Y9JU>.

<sup>41</sup> Polls indicated that before the Senate vote, more than ninety percent of Americans favored universal background checks, including seventy-four percent of NRA members. Scott Clement, *90 Percent of Americans Want Expanded Background Checks on Guns. Why Isn't This a Political Slam Dunk?*, WASH. POST FIX (Apr. 3, 2013, 11:10 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/03/90-percent-of-americans-want-expanded-background-checks-on-guns-why-isnt-this-a-political-slam-dunk>, archived at <http://perma.cc/X8E3-KM68> (“Nine in 10 Americans support expanding background checks on gun purchases.”). After the Senate vote, sixty-five percent of Americans believed the Senate should have passed the provision to expand background checks. Frank Newport, *Americans Wanted Background Checks to Pass Senate*, GALLUP (Apr. 29, 2013), <http://www.gallup.com/poll/162083/americans-wanted-gun-background-checks-pass-senate.aspx>, archived at <http://perma.cc/Y3S9-DNXS> (showing that only “29% agree with the Senate’s failure to pass the measure”).

<sup>42</sup> Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN POLITICS (Apr. 18, 2013, 11:02 AM), <http://www.cnn.com/2013/04/17/politics/senate-guns-vote>, archived at <http://perma.cc/C9M3-4EP7>.

<sup>43</sup> See Newport, *supra* note 41 (reporting that when asked an open-ended question about why they opposed expanding background checks, forty percent of people answered “Violates Second Amendment/People have right to own guns”).

<sup>44</sup> DAVIDSON, *supra* note 34, at 92 (“Never has an issue been more distorted or downright lied about than the armor-piercing bullet issue. The anti-gun forces will go to any lengths to void your right to keep and bear arms.” (quoting *Here We Stand*, AM. RIFLEMAN, Nov. 1986, at 6)); *id.* at 110 (“You and I are in the middle of the most urgent and critical federal gun battle we have faced in 12 years.” (quoting Letter from Nat’l Rifle Ass’n to Nat’l Rifle Ass’n Members (Dec. 8, 1987))).

<sup>45</sup> *Id.* at 66-67 (describing a 1986 NRA letter as “clearly illustrat[ing] two of the NRA’s most important grass roots lobbying tactics: portraying every fight over gun legislation as the *final showdown* between gun owners and ‘gun grabbers’; and dividing the world into two mutually exclusive factions: ‘with us’ and ‘against us’”).

<sup>46</sup> *Id.* at 149.

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Unless you call, write, help organize and deliver the vote of your Congressman, I guarantee you that strict, total gun control will be imposed on all of America.

. . . .

[This bill] is the worst gun legislation ever to be seriously considered on Capitol Hill. . . .

It's now or never for our gun rights.

. . . .

You'd better make your calls now. There won't be time later.

*In the entire history of the NRA Institute, American gun owners have never before been under such constant, vicious attacks from the gun banners to which the truth means nothing.*<sup>47</sup>

Sometimes this absolutist rhetoric crosses the line into outright misrepresentation. Opposing a local handgun ban in Morton Grove, Illinois, the NRA claimed that the law contained enforcement provisions "permitting the police to *search* any home, to *seize* and *confiscate* strictly on a suspicion that there may be a gun in the home."<sup>48</sup> The ordinance, however, provided for no such thing,<sup>49</sup> and the Fourth Amendment would have prohibited such unlawful searches and seizures in any event.<sup>50</sup> Another particularly misleading fundraising letter proclaimed that "[i]f you fail to respond to this letter you could face a jail term," prompting an investigation by the New York Attorney General.<sup>51</sup>

An unsubtle corollary of the Armageddon Appeal is the valorization of an idealized past. The past described in gun rights talk is largely populated by self-reliant, independent, patriotic people living on the American frontier.<sup>52</sup> The Framers also make frequent appearances, albeit with a surprising tendency to engage in conveniently quotable gun rights talk. President Thomas Jefferson, for example, allegedly said that "[t]he beauty of the Second

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<sup>47</sup> *Id.* at 150 (alteration in original).

<sup>48</sup> *Id.* at 133.

<sup>49</sup> *Id.* ("The picture painted by the NRA of police making unannounced random raids looking for guns was pure fabrication . . .").

<sup>50</sup> See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .").

<sup>51</sup> DAVIDSON, *supra* note 34, at 151 (explaining that the sentence appeared on the envelope so as to encourage the reader to open the mail).

<sup>52</sup> See SPITZER, *supra* note 34, at 9-12; Bruce-Biggs, *supra* note 1, at 61; Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 454-55 (1999); see also WILLIAM R. TONSO, GUN AND SOCIETY: THE SOCIAL AND EXISTENTIAL ROOTS OF THE AMERICAN ATTACHMENT TO FIREARMS 38 (1982) (highlighting that guns can be "positively or negatively associated with Daniel Boone, the Civil War, the elemental lifestyles [of] the frontier," and other concepts).

Amendment is that it will not be needed until they try to take it,”<sup>53</sup> and Benjamin Franklin quipped that “[d]emocracy has been defined as two wolves and a sheep discussing plans for lunch. Liberty is a well-armed lamb contesting the vote.”<sup>54</sup> Both quotes are modern inventions.<sup>55</sup>

Gun rights talk does not, however, always portray history in sepia tones. Sometimes historical examples are used to invoke and stoke feelings of fear or persecution. It is not uncommon for gun-rights supporters explicitly and self-consciously to draw parallels between their struggles and those of advocates during the civil rights movement,<sup>56</sup> or even Jews in Nazi Germany.<sup>57</sup> The rhetoric of persecution and disempowerment suggests that gun owners can neither expect nor give quarter. Charlton Heston, then Vice President of the NRA, drove the point home in a 1997 speech:

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<sup>53</sup> DAN BAUM, GUN GUYS: A ROAD TRIP 256-57 (2013); *see also* Christina Zdanowicz, *Jefferson: The Face of the Modern Gun Debate*, CNN (July 19, 2013, 1:00 PM), <http://www.cnn.com/interactive/2013/07/us/jefferson-rorschach-guns/index.html>, *archived at* <http://perma.cc/67LU-H2FM> (documenting other pro-gun quotes often misattributed to Jefferson).

<sup>54</sup> BAUM, *supra* note 53, at 256 (“The quote appeared nowhere in Franklin’s writing, and the word *lunch* wasn’t in popular usage . . .”).

<sup>55</sup> *See id.*

<sup>56</sup> *See, e.g.*, Alex Rosenwald, *Organizer of Gun Appreciation Day Calls out the Racist Outcome of Gun Control*, EQUAL GUN RTS. (Feb. 25, 2013), <http://equalgunrights.com/articles/organizer-of-gun-appreciation-day-calls-out-the-racist-outcome-of-gun-control>, *archived at* <http://perma.cc/F6AR-H6DV> (“As civil rights leaders from Gandhi to Martin Luther King Jr. recognized, disarming a population is the first step to oppression. . . . I hope that people across this country will join us at EqualGunRights.com and demand an end to the discrimination that still plagues this country.” (quoting Second Amendment Found., *Equal Gun Rights*, YOUTUBE (Feb. 24, 2013), <http://www.youtube.com/watch?v=UBelF4UdcY>)). Davidson writes that NRA lobbyist Neal Knox has taken things a bit farther, theorizing “that the assassinations of John Kennedy, his brother Robert, and Martin Luther King Jr. were all carried out as part of a master plot to make gun control more palatable to Americans.” DAVIDSON, *supra* note 34, at 300.

<sup>57</sup> *See, e.g.*, DAVIDSON, *supra* note 34, at 300 (stating that NRA Lobbyist Tanya Metaksa wrote a post in an online forum titled “Gun Owners: The Jews of the 90s in a Fascist America”); Aviva Shen, *Parrotting Conspiracy Theorist, Drudge Compares Obama to Hitler and Stalin*, THINKPROGRESS (Jan. 9, 2013, 2:20 PM), <http://thinkprogress.org/justice/2013/01/09/1423991/parrotting-conspiracy-theorist-drudge-compares-obama-to-hitler-and-stalin>, *archived at* <http://perma.cc/7NTW-DNR3> (reporting statements by Alex Jones involving Hitler, Stalin, and Mao in the context of the American gun control debate); *Today’s Gun Owners: Parallels to Jews in Germany in the 1930s*, GUNSSAVELIFE (Jan. 27, 2013), <http://www.gunssavelife.com/?p=5239>, *archived at* <http://perma.cc/4AQM-PRXF> (“Propaganda about gun owners has reached a fever pitch in America today, leaving American gun owners feeling like the Jews in Germany before the Second World War.”). *See generally* Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (a Call to Historians)*, 73 *FORDHAM L. REV.* 653 (2004) (exploring the longstanding argument made by gun-rights advocates that gun control led to the Holocaust).

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Rank-and-file Americans wake up every morning, increasingly bewildered and confused at why their views make them lesser citizens. . . . Heaven help the God-fearing, law-abiding, Caucasian, middle class, Protestant, or – even worse – Evangelical Christian, Midwest, or Southern, or – even worse – rural, apparently straight, or – even worse – admittedly heterosexual, gun-owning or – even worse – NRA-card-carrying, average working stiff, or – even worse – male working stiff, because not only don’t you count, you’re a downright obstacle to social progress. . . . That’s why you don’t raise your hand. That’s how cultural war works. And you are losing.<sup>58</sup>

Absolutism and inflexibility are reasonable positions in the world Heston describes.

Absolutism is intertwined with another characteristic of gun rights talk, and of rights talk more generally, which is its tendency simultaneously to disable normal politics and minimize the importance of personal responsibility. As Richard Thompson Ford observes, “rights hold out the false hope of political change without the messiness and controversy of politics.”<sup>59</sup> Rights talk thus minimizes or even eliminates considerations of personal responsibility and the potentially negative externalities of individual conduct.<sup>60</sup> Ford explains that, “[w]hen we use rights rhetoric indiscriminately, we short-circuit this difficult but necessary type of political judgment and risk ignoring legitimate interests that may be undermined by the right in question.”<sup>61</sup> Glendon describes how a “near-aphasia concerning responsibilities makes it seem legitimate to accept the benefits of living in a democratic social welfare republic without assuming the corresponding personal and civic obligations.”<sup>62</sup>

Coming to grips with the externalities of the right to keep and bear arms remains one of the most difficult issues in Second Amendment rhetoric and doctrine, for many reasons. Many believe that arms bearing imposes externalities that are different in kind and size from those of other rights. As Justice Stevens observed in his *McDonald* dissent, “[y]our interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling

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<sup>58</sup> Charlton Heston, Vice President, Nat’l Rifle Ass’n, Address at the Free Congress Foundation’s 20th Anniversary Gala (Dec. 7, 1997) (alteration in original) (transcript archived at <http://perma.cc/62KF-JFXC>).

<sup>59</sup> FORD, *supra* note 7, at 21.

<sup>60</sup> Robin West, *Rights, Harms, and Duties: A Response to Justice for Hedgehogs*, 90 B.U. L. REV. 819, 821 (2010) (“[W]hen we think of rights as trumps we rhetorically airbrush from consciousness, and eventually from any reckoning, the harms that may be done to both individuals and the collective by the individual activity protected by the right.”); *see also* Fleming & McClain, *supra* note 23, at 855-58 (describing this as one version of the “immunity” critique of rights).

<sup>61</sup> FORD, *supra* note 33, at 14.

<sup>62</sup> GLENDON, *supra* note 7, at xi; *see also id.* at 171.

safe from armed violence.”<sup>63</sup> But the size (and even existence) of those externalities is hard to establish as an empirical matter. Reputable scholars disagree about whether the incidence of defensive gun-use averages 2.5 million per year or just 80,000<sup>64</sup> and whether concealed carry laws reduce crime or increase it.<sup>65</sup> Even basic information about the prevalence of guns can be hard to find.<sup>66</sup> Though suggestions of bad faith are not unknown,<sup>67</sup> and some scholarship has been discredited or disgraced,<sup>68</sup> these scholarly disagreements are just that: debates about whose evidence is better. They do not represent a failure of political engagement, nor a problem of rights talk.

But sometimes gun rights talk displays an almost adamant refusal to accept not the size or existence of externalities, but their relevance. This imperviousness to public policy considerations finds some rhetorical support in *Heller* itself, as the majority appeared to indicate that the right to keep and bear arms is immune to considerations of social cost.<sup>69</sup> This is not exactly

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<sup>63</sup> *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3108 (2010) (Stevens, J., dissenting) (“[I]n evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation.”).

<sup>64</sup> Compare MICHAEL R. RAND, DOJ, NCJ-147003, GUNS AND CRIME: HANDGUN VICTIMIZATION, FIREARM SELF-DEFENSE, AND FIREARM THEFT 1-2 (1994) (finding roughly 80,000 defensive gun uses per year, based on figures from the National Crime Victimization Survey), with Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 184 tbl.2 (1995) (finding an average of 2.5 million defensive gun uses per year, based on a phone survey designed by the authors).

<sup>65</sup> Compare JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 75 (1998) (arguing that concealed-handgun laws, allowing citizens to carry guns, result in an “ensuing decline in crime”), with Ian Ayres & John J. Donohue III, *Shooting down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1202 (2003) (“[T]here is stronger evidence for the conclusion that these [concealed-handgun] laws increase crime than there is for the conclusion that they reduce it.”).

<sup>66</sup> See Editorial, *What We Don’t Know Is Killing Us*, N.Y. TIMES, Jan. 27, 2013, at SR10 (arguing that “we need more data to formulate, analyze, and evaluate [gun] policy” and that “the gun lobby . . . has effectively shut down government-financed research on gun violence for 17 years”).

<sup>67</sup> See STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 133-34 (2005) (recounting “the troubling allegation that Lott actually invented some of the survey data that support his more-guns/less-crime theory” and reporting that, “[w]hen other scholars have tried to replicate his results, they found that right-to-carry laws simply don’t bring down crime”); cf. *Lott v. Levitt*, 556 F.3d 564, 566-67 (7th Cir. 2009) (upholding dismissal of a defamation claim brought by John Lott against Steven Levitt on the basis of this passage).

<sup>68</sup> See generally James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (reviewing MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN Culture* (2000)) (identifying numerous errors and apparent falsifications in Bellesiles’ historical analysis).

<sup>69</sup> Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL’Y 951,

absolutist, for the Court did recognize many forms of historically established gun control as constitutional.<sup>70</sup> It does, however, suggest that government interests in gun control are simply irrelevant, except to the degree that they are reflected in historical practice.

A third and related characteristic of gun rights talk is its hyper-individualism. Again, this is a common critique of rights talk more generally.<sup>71</sup> As Robin West puts it, “[r]ights and rights-consciousness render us unduly atomized,” creating “individualized rights-spun cocoons, increasingly incapable of even approaching each other, much less achieving any meaningful moral or political empathic connections with fellow citizens.”<sup>72</sup> Ford comments that rights can encourage narcissism and extremism.<sup>73</sup>

The desirability of this individualism is deeply contested in the context of guns. For many gun-rights supporters, individualism is not just a byproduct of arms bearing, but the very value the Second Amendment is meant to instantiate.<sup>74</sup> A person who chooses to keep and bear arms is typically asserting a right to armed self-defense against either a tyrannical government or the threat of private violence.<sup>75</sup> Either path represents a conclusion that the *individual* is the proper, and perhaps heroic, repository of armed violence.

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971-72 (2011); Blocher, *supra* note 23, at 379.

<sup>70</sup> District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008) (affirming the constitutionality of “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms”).

<sup>71</sup> See *supra* note 8 and accompanying text.

<sup>72</sup> Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1912-13 (2001); see also FORD, *supra* note 7, at 14 (“Rights go wrong when we lose sight of their highest purposes. Too many people think of rights only as entitlements to be exploited to the maximum extent possible . . . . Civil rights make sense only as part of a social contract of mutual respect and cooperation among citizens . . . .”); GLENDON, *supra* note 7, at 77 (“Buried deep in our rights dialect is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm.”); Michael J. Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 FORDHAM L. REV. 1, 4-6 (1997) (explaining that the “procedural understanding of freedom has gradually eclipsed the civic one,” resulting in a loss to the “project of self-government,” *id.* at 4).

<sup>73</sup> FORD, *supra* note 7, at 23-24 (explaining that rights have “provided a convenient vehicle . . . for a culture of entitlement, self-obsession, and self-righteousness”).

<sup>74</sup> See Dan Baum, *On Gun Control and the Great American Debate over Individualism: The Firearm as an Emblem of Personal Sovereignty*, HARPER’S MAG. (May 17, 2013, 9:00 AM), <http://harpers.org/blog/2013/05/on-gun-control-and-the-great-american-debate-over-individualism>, archived at <http://perma.cc/6J4G-8JMV>.

<sup>75</sup> The right to armed self-defense against the threat of private violence is at the “core” of the *Heller* right. *Heller*, 554 U.S. at 599, 630 (holding that rendering firearms inoperable in the home would make self-defense impossible). The Court does not explicitly endorse the right to such defense against a tyrannical government, but this right plays an important part in Second Amendment rhetoric.

Bearing arms in order to deter or fight off a tyrannical government is, for some, the heart of the Second Amendment.<sup>76</sup> Arms bearing, they say, is about hunting politicians rather than ducks.<sup>77</sup> The mentality is not so much “us versus them” as it is “me versus it.” The individual standing firm against government is a powerful image, captured by “don’t tread on me” bumper stickers,<sup>78</sup> and Heston’s famous “from my cold, dead hands” speech.<sup>79</sup>

A similar kind of distrust and self-reliance can motivate people to acquire guns for self-defense against private violence.<sup>80</sup> The Armageddon Appeal takes on a different but equally powerful form here, as some insist that “the only thing that stops a bad guy with a gun is a good guy with a gun”<sup>81</sup> and that “[i]t’s not paranoia to buy a gun . . . [i]t’s survival.”<sup>82</sup> But this remedy may worsen the disease – at least one study has found that most people feel less safe when those around them acquire guns.<sup>83</sup>

My aim here is not to take sides in empirical debates, nor even to criticize these common forms of gun rights talk and the values underlying them. My goal is simply to establish a sense of what gun rights talk *is*, why it is

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<sup>76</sup> Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1098 (2000) (explaining that some gun-rights theorists believe that the Second Amendment “was designed to create an armed citizenry as a potent threat to governmental tyranny”).

<sup>77</sup> *Id.* at 1097 (quoting Linda Thompson, self-proclaimed Adjutant General of the Unorganized Militia of the United States, as saying that the Amendment “isn’t about hunting ducks; it’s about hunting politicians”).

<sup>78</sup> Diane Macedo, *‘Don’t Tread on Me’ License Plates Become a Growing Trend in the U.S.*, FOX NEWS (Nov. 30, 2010), <http://www.foxnews.com/us/2010/11/30/dont-tread-license-plates-growing-trend>, archived at <http://perma.cc/MV6G-U74M> (explaining that the message was adopted as a statement against big government).

<sup>79</sup> Michael W. Chapman, *FLASHBACK – Charlton Heston: ‘From My Cold, Dead Hands!’*, CNS NEWS (Jan. 14, 2013, 8:16 PM), <http://cnsnews.com/news/article/flashback-charlton-heston-my-cold-dead-hands>, archived at <http://perma.cc/6Q3D-XU44> (explaining that Heston’s phrase has become “synonymous with gun rights in America”).

<sup>80</sup> *Why Own a Gun? Protection Is Now Top Reason*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Mar. 12, 2013), <http://www.people-press.org/2013/03/12/why-own-a-gun-protection-is-now-top-reason>, archived at <http://perma.cc/YZ42-W2VT> (explaining that forty-eight percent of gun owners claim they own guns for protection).

<sup>81</sup> Editorial, *The Gun Lobby Speaks*, WASH. POST, Dec. 22, 2012, at A14 (discussing the NRA’s post-Newtown call for “stationing an armed guard in every school in the country”).

<sup>82</sup> Wayne LaPierre, *Stand and Fight*, DAILY CALLER (Feb. 13, 2013), <http://dailycaller.com/2013/02/13/stand-and-fight>, archived at <http://perma.cc/H5PX-SF7J> (arguing that buying a gun is “responsible behavior” and “law-abiding Americans” should be encouraged to do so).

<sup>83</sup> David Hemenway et al., *Firearms and Community Feelings of Safety*, 86 J. CRIM. L. & CRIMINOLOGY 121, 124 (1995) (“For the entire population – gun owners and non-gun owners together – 71% feel less safe and 19% feel more safe when others in the community acquire firearms.”). When only gun owners are asked, the numbers of respondents that feel less safe is roughly equal to the number of respondents that feel safer. *Id.*

important, and how it diverges from gun rights doctrine. As the discussion has shown, gun rights talk has much in common with other forms of rights talk, but the degree of its success may well be unique. As Robin West presciently observed prior to *Heller*:

[I]t is constitutionally-mindful militias, minutemen, gun collectors, hunters, and libertarians that have been most successful in employing popular constitutionalism. Gun collectors fashioned the Second Amendment right to bear arms with little or no help from courts, no significant resistance from liberals, and astounding success in public opinion and the legislature.<sup>84</sup>

*Heller* doctrinalized that vision, but it was effectively already established in American law. Understanding that tremendous achievement is essential to understanding the Second Amendment itself.

### III. THE CULTURAL ROOTS OF GUN RIGHTS TALK

The primary remedy for over-reliance on rights talk may not be easy to implement,<sup>85</sup> but is simple enough to describe: cut back on absolutist, individualist, no-compromise invocation of the Constitution, and give normal politics some room to breathe.<sup>86</sup> Maybe gun-debate partisans would leave their trenches more often if they did not fear being put under constitutional fire.

There is much to like about this vision. Casting some political light onto the Second Amendment's dark shadow could encourage a useful convergence between constitutional rhetoric and constitutional doctrine, perhaps enabling the former to become as nuanced and flexible (comparatively speaking) as the latter. Political debates over guns then might be able to engage more directly with the difficult questions that rights talk often masks, such as how to accommodate the legitimate interests arrayed on both sides and how to answer the hard policy questions about what kinds of gun control actually work.

But minimizing rights talk might not actually be enough to solve the problems. The straightforward reason for this is that rights talk is in part a symptom, not a sole cause, of dysfunction in the gun-rights debate. Stripping it away might not unearth a robust political discussion about guns and gun control, but rather a raw culture war in which normal politics and facts are

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<sup>84</sup> Robin West, *Constitutional Culture or Ordinary Politics: Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1481 (2006) (footnotes omitted).

<sup>85</sup> GLENDON, *supra* note 7, at xiii ("The prospects for such a project are not especially bright. The energy, skill, and goodwill required to bring a new sort of dialogue into the public square through the barriers of sound-bites, mutual distrust, and the gridlock of special interests would be formidable.").

<sup>86</sup> *Cf.* West, *supra* note 84, at 1466 ("[T]he more sensible response to the hubris and over-reach of the Supreme Court's monopolization of constitutionalism in this culture may be to give ordinary politics long overdue respect. To do so, it might sometimes be wise to curb our inclination to cast political views and values in the framework of constitutional argument." (footnote omitted)).



nearly powerless. Indeed, Second Amendment scholars on all sides of the debate increasingly seem to agree that culture is an essential – if not necessarily exclusive<sup>87</sup> – part of the story.<sup>88</sup> Donald Braman and Dan Kahan, whose work on cultural cognition has special purchase in the context of gun control, argue that “competing cultural visions . . . drive the gun control debate.”<sup>89</sup>

Such cultural critiques are not incompatible with the traditional rights talk story; indeed, they appear to be intertwined. Rights talk, as observed above, sometimes exhibits and encourages a kind of hyper-individualism that minimizes personal responsibility for the activities covered by the right.<sup>90</sup> Cultural cognition scholars, in turn, point out that individualism as a cultural outlook is enormously predictive of a person’s outlook on gun control.<sup>91</sup> Whether rights talk is prior to, or simply a product of, this “cultural” individualism is hard to say. It seems likely that the two are mutually constitutive and reinforcing.

Gun rights talk is a powerful weapon for gun rights supporters in these cultural debates, as it has a tendency not just to enable, but to *ennoble* the ownership and use of guns. Decades ago, Justice Scalia bemoaned the fact that “[t]here is a perhaps inevitable but nonetheless distressing tendency to equate the existence of a right with the *nonexistence* of a responsibility” – that having a legal right to do something suggests that it is “*proper* and perhaps even *good*” to do it.<sup>92</sup> Twenty years later, he gave a speech to a hunting rights

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<sup>87</sup> Philip J. Cook & Jens Ludwig, *Fact-Free Gun Policy?*, 151 U. PA. L. REV. 1329, 1329 (2003) (“Why can’t both culture *and* consequences matter? The fallacy is the same as in the old question: Do you walk to school or carry your lunch?”).

<sup>88</sup> See, e.g., ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 14 (2011) (“The debate over guns is usually portrayed as a cultural battle between urban and rural, with the latter seeing guns as part of their cultural heritage of hunting.”); Donald Braman et al., *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 SOC. JUST. RES. 283, 285 (2005) (“[C]ulture is prior to facts in resolving the gun debate.”); Chemerinsky, *supra* note 1, at 481 (“The political and value choice [about gun control] . . . must be understood in the larger cultural context. Society is obviously deeply divided over the issue of gun control and the meaning of the Second Amendment. There appears to be no bridge between the two sides.”); Brannon P. Denning, *In Defense of a “Thin” Second Amendment: Culture, the Constitution, and the Gun Control Debate*, 1 ALB. GOV’T L. REV. 419, 420 (2008) (“The gun control debate is at bottom a cultural debate.”).

<sup>89</sup> Braman & Kahan, *supra* note 1, at 571.

<sup>90</sup> See *supra* notes 73-75 and accompanying text.

<sup>91</sup> Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3, 8 (2003) (“[M]ore egalitarian and communitarian a person’s outlook, the more supportive of control, but the more hierarchical and individualistic a person is, the more opposed [sic] to it.”).

<sup>92</sup> Antonin Scalia, *Law, Liberty and Civic Responsibility*, in *RIGHTS, CITIZENSHIP AND RESPONSIBILITIES* 3, 3 (Bradford P. Wilson ed., 1985); see also JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 5 (2013)

organization in which he called for efforts to change “[t]he attitude of people associating guns with nothing but crime.”<sup>93</sup> That same year, he penned the majority opinion in *Heller* that may have helped to achieve that very goal for the same reasons he described as “distressing” a few years earlier – the constitutional cadence of *Heller*’s individual right provides rhetorical and political support to the cultural valorization of guns and gun owners.<sup>94</sup>

But perhaps the post-*Heller* Second Amendment can still be a useful tool for gun-control advocates (who, after all, were losing their political battles against the Amendment long before their legal defeat in *Heller*). *Heller* and *McDonald* should give members of the gun culture “less reason to fear creeping confiscation.”<sup>95</sup> This in turn should lessen the impact of the “slippery-slope arguments [that] play a large role in anti-gun-control rhetoric,”<sup>96</sup> and permit the passage of “sensible gun control laws – those aimed at disarming criminals, not ordinary citizens.”<sup>97</sup>

Then again, this might be hoping for too much from the gun debate. Cultural cognition theory suggests that people can be convinced to compromise “when figures – who share their cultural identity and whose commitment to it are beyond question – assure them the compromise is acceptable.”<sup>98</sup> And unfortunately, *Heller* seems not to have given gun rights talkers like the NRA the reassurance they need.<sup>99</sup> This means that compromise may be just as far away as it was before the case was decided. For example, prior to *Heller*

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(describing, without endorsing, the view that “legal rights equal moral rightness”); Mary Ann Glendon, *Introduction: Forgotten Questions*, in SEEDBEDS OF VIRTUE 1 (Mary Ann Glendon & David Blankenhorn eds., 1995).

<sup>93</sup> Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 388 n.15 (2009) (explaining that Justice Scalia is an avid hunter (citing Clay Carey, *Scalia Champions Hunting and Conservation*, TENNESSEAN, Feb. 26, 2006, at 1B)).

<sup>94</sup> See West, *supra* note 60, at 826 (“This person is not a redneck gun-toting potentially dangerous renegade; he is now a constitutional icon – a rights-bearing hero bucking the tide of an intrusive and potentially totalitarian nightmare state.”).

<sup>95</sup> Glenn Harlan Reynolds, Letter to the Editor, REASON, June 1996, at 10, *archived at* <http://perma.cc/HQS6-53VU>.

<sup>96</sup> MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN’T END THE BATTLE OVER GUNS 129 (2007); see also Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 84-89 (1992) (criticizing the use of slippery slope arguments in the gun-control debate); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1033-34 (2003) (describing slippery slope arguments as they relate to gun registration and confiscation).

<sup>97</sup> Reynolds, *supra* note 95 (arguing that gun-control advocates should utilize the individual-right approach to their benefit).

<sup>98</sup> Braman & Kahan, *supra* note 1, at 587 (calling this phenomenon “identity vouching” (emphasis omitted)).

<sup>99</sup> BAUM, *supra* note 53, at 256 (“The NRA’s *American Rifleman* magazine warned, bizarrely, that after *Heller*, ‘our firearm freedoms may be in greater danger.’”).

Braman and Kahan proposed a “big trade” through which, “[i]n exchange for control proponents acknowledging that the Second Amendment creates a genuine *individual right* to gun ownership, control opponents should assent to universal registration of handguns.”<sup>100</sup> That trade has apparently been rejected. The individual right is now established both as a matter of law and politics, but registration remains off the table. Indeed, the specter of registration was used to sink the recent background check proposal,<sup>101</sup> despite the fact that the proposal itself explicitly *forbade* registration requirements.<sup>102</sup>

Rights talk combined with the underlying culture war can be paralyzing, but there seems to be no choice but to fight through the resulting mess.<sup>103</sup> And perhaps the Second Amendment, whatever discursive pathologies it sometimes encourages, can still play a positive role in facilitating this debate. For although people disagree deeply about what the Second Amendment means, no one can legitimately deny its relevance. In that way, it provides common ground – what David Strauss calls a “focal point.”<sup>104</sup> Indeed, the Amendment may be able to facilitate what Kahan and Braman describe as “social-meaning overdetermination,” which occurs when cultural conflict becomes “so abundantly rich in meanings that members of all cultural groups can simultaneously find their values and hence their identities affirmed by it.”<sup>105</sup>

For this to work, gun control proponents – including those who operate in the large but mostly silent middle – will also have to find their peace with the Amendment. That, in turn, will be easier to achieve if the Amendment can be understood as strongly protecting the core of an important right – the position that constitutional doctrine happens to take – rather giving absolute protection

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<sup>100</sup> Braman & Kahan, *supra* note 1, at 599.

<sup>101</sup> See Erich Pratt & Michael Hammond, *Current Gun Control Proposals Threaten Your Rights*, GUN OWNERS AM. (Feb. 12, 2013, 3:50 PM), <http://gunowners.org/congress02122013.htm>, archived at <http://perma.cc/5F4-9TX3> (arguing that registration will “give bureaucrats a roadmap for gun confiscation”).

<sup>102</sup> *Obama Says Bipartisan Background Check Plan “Outlawed Any (Gun) Registry,”* TAMPA BAY TIMES POLITIFACT (Apr. 18, 2013, 4:37 PM), <http://www.politifact.com/truth-o-meter/statements/2013/apr/18/barack-obama/obama-says-bipartisan-background-check-plan-outlaw>, archived at <http://perma.cc/AM8N-EN7T> (rating as “True” President Obama’s statement that the bipartisan background check amendment “outlawed any (gun) registry. Plain and simple, right there in the text”).

<sup>103</sup> Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1318 (2003) (“The only philosophically cogent way to resolve the gun control controversy is to address explicitly, through democratic deliberations, the question of what stance the law should take toward the competing cultural visions that animate the gun control debate.”).

<sup>104</sup> See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 111-12 (2010) (arguing that the Constitution establishes a “common ground” that “narrow[s] the range of disagreement” on controversies, thus facilitating resolution).

<sup>105</sup> Braman & Kahan, *supra* note 1, at 587.

to all guns and forms of arms-bearing. Indeed, sometimes the Second Amendment will work against pro-gun interests.<sup>106</sup>

As a matter of political rhetoric, the alternatives seem far worse. Some of these alternatives would ground the right to keep and bear arms outside the legal system entirely, rather than in the Constitution.<sup>107</sup> *Heller* itself said it was simply recognizing a “pre-existing” right,<sup>108</sup> and some have seized on this language to suggest that the right to keep and bear arms is truly inalienable and unregulable.<sup>109</sup> Such arguments are rights talk on stilts. They leave little room for debate or reason, because the rights they describe are, almost by definition, non-negotiable and immune to politics.

#### CONCLUSION

In his recent investigation of American gun culture, Dan Baum writes: “It wasn’t so much the Constitution or its authors that gun guys loved; it was guns.”<sup>110</sup> This Article suggests that there is some truth to this observation. Gun rights talk is quite different from constitutional law. This divergence between constitutional rhetoric and constitutional doctrine, and over-reliance on the former, carries significant costs that are familiar to critics of rights talk.

But when it comes to gun rights talk, the usual remedies may not be sufficient. The absolutism, individualism, and denial of individual responsibility that characterize the most lamentable areas of the gun debate will not disappear even if the Second Amendment’s role in political rhetoric were trimmed to a more reasonable size. This is because the Great American Gun Debate is not just about the Constitution, nor rights, nor even just guns. It

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<sup>106</sup> See, e.g., Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 50-54 (2012) (arguing that the Second Amendment includes a right not to keep or bear arms which would render various “pro-gun” laws unconstitutional); Joseph Blocher, *Hunting and the Second Amendment* (Feb. 25, 2014) (unpublished manuscript) (on file with author) (arguing that hunting and recreation – perhaps the most common reasons for gun ownership in the United States – are covered peripherally, if at all, by the Second Amendment).

<sup>107</sup> BAUM, *supra* note 53, at 210 (“Second Amendment this, Second Amendment that. What if the Second Amendment were repealed? I’m talking about something that precedes the Second Amendment by eons. I’m talking about something that comes from *God*.” (quoting Aaron Zelman of Jews for the Preservation of Firearms Ownership)).

<sup>108</sup> *District of Columbia v. Heller*, 554 U.S. 570, 592 (2007) (“The very text of the Second Amendment implicitly recognizes the pre-existence of the right [to keep and bear arms].”).

<sup>109</sup> See Chris W. Cox, *Congress Moves Closer to Restoring a Key Second Amendment Freedom*, NRA INST. FOR LEGISLATIVE AFFAIRS (Oct. 24, 2011), <http://www.nra.org/about-nra-ila/directors-archive/congress-moves-closer-to-restoring-a-key-second-amendment-freedom.aspx?s=%22The+National+Right+to+Carry+Reciprocity+Act%22&st&ps>, archived at <http://perma.cc/UCD8-67B9> (stating that the Second Amendment “is an inalienable right that neither the federal government, nor any state government, may infringe upon”).

<sup>110</sup> BAUM, *supra* note 53, at 257.

is, in large part, a cultural debate – even a culture war – about identity and values.

In this debate, rights talk and cultural cognition present distinct but interrelated challenges to the goal of a liberal discourse based on public reason. Enabling genuine engagement between different cultural viewpoints is perhaps even more difficult than curing our over-reliance on rights talk, and is certainly a bigger obstacle than constitutional law itself. But it remains the best hope for a functional gun politics.<sup>111</sup>

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<sup>111</sup> Dan M. Kahan et al., *A Cultural Critique of Gun Litigation*, in *SUING THE GUN INDUSTRY* 105, 106 (Timothy D. Lytton ed., 2005) (“The only way to resolve the American gun debate is to make its cultural underpinnings explicit.”).