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Do Courts Change Politics? Heller and the Limits of Policy Feedback Effects

Kristin A. Goss

Matthew J. Lacombe

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DO COURTS CHANGE POLITICS? *HELLER* AND THE LIMITS OF POLICY FEEDBACK EFFECTS

*Kristin A. Goss**
*Matthew J. Lacombe***

ABSTRACT

District of Columbia v. Heller was a landmark ruling in which the Supreme Court established that citizens have a constitutional right to possess firearms in their homes for self-protection. The 5-4 decision—along with the Court's subsequent ruling in McDonald v. Chicago—upended the prevailing wisdom that the Second Amendment protected the right of the states to assemble militias for collective security. In this Article, we examine the effects of these rulings on gun regulation in the United States and, more to the point, on gun politics. We situate our analysis within several related theoretical frameworks, most notably those focused on policy feedback and on the role of courts in producing social change. We argue that the effects of Heller (together with the parallel decision in McDonald) have been rather limited. We examine the rulings' first-order effects on pre-existing gun control laws, as well as second-order effects on a number of related outcomes. We find that Heller and its progeny have had generally small or non-existent impacts on gun policy, on the organizational capacities and political strategies of pro-gun and pro-regulation groups, and on public attitudes toward gun regulation. Our findings support a constrained view of the Court's ability to drive social and political change. We conclude, however, by noting that recent developments—particularly hints that some Supreme Court Justices are eager to develop Second Amendment jurisprudence—have the potential to alter these conclusions.

* Kevin D. Gortler Professor of Public Policy and Political Science, Sanford School of Public Policy, Duke University.

** Assistant Professor of Political Science, Barnard College-Columbia University.

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INTRODUCTION

On June 26, 2008, the U.S. Supreme Court handed down its landmark ruling in *District of Columbia v. Heller*.¹ The ruling struck down several of the city's strict gun laws, including an effective ban on possession of functional handguns.² For the first time, the Court ruled that citizens have a constitutional right to possess such a firearm in the home for self-protection.³ The Court majority cautioned that the Second Amendment, like other constitutional rights, is not unlimited.⁴ But the 5-4 decision upended the prevailing wisdom that the Second Amendment only protected the right of the states to assemble militias for collective security.⁵ In doing so, the ruling endorsed a perspective on guns and citizenship that legal scholars (including some liberals) and pro-gun advocates had been developing for many years.⁶

In the contentious world of gun politics, *Heller* was a momentous ruling. Pundits on all sides of the gun debate rushed to weigh in. Wayne LaPierre, Chief Executive of the National Rifle Association (NRA), called the decision “a great moment in American history.”⁷ Ironically, the nation's largest gun rights organization had declined to bring the lawsuit that resulted in the *Heller* decision; the organization's reluctance stemmed in part from a lack of certainty that it would prevail.⁸ Aside from the strategic desire to avoid a legal loss, however, the NRA may also have had a political desire to avoid a *win* in front of the country's highest court.⁹ After all, the organization's ability to mobilize its members into politics had relied on claims that gun rights were threatened with extinction.¹⁰ Such appeals may have lost credibility if the Court chose to protect an individual constitutional right to own guns.¹¹ Nevertheless, even

¹ 554 U.S. 570, 635 (2008).

² *Id.*

³ *Id.* at 636.

⁴ *Id.* at 626–27.

⁵ ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 95–97, 105–13 (2011).

⁶ DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 118–19 (2016); WINKLER, *supra* note 5, at 105–13.

⁷ *Heller: The Supreme Decision*, NRA-ILA (June 27, 2008), <https://www.nraila.org/articles/20080627/heller>.

⁸ WINKLER, *supra* note 5, at 56–58, 60 (noting that the NRA brought a parallel lawsuit pursuing what the organization saw as a safer legal strategy).

⁹ *Id.* at 57.

¹⁰ *Id.* at 57–58.

¹¹ *Id.* at 58.

though it had not brought the lawsuit, the NRA was publicly happy to embrace the *Heller* ruling.¹²

Less pleased were political leaders favoring stricter gun laws. For example, Chicago Mayor Richard Daley called *Heller* “a very frightening decision.”¹³ In 1982, Chicago had instituted a “freeze” on civilian handgun possession, meaning that people wishing to acquire and possess a handgun thereafter were effectively barred from doing so. In addition, several Chicago suburbs had banned handguns. Daley’s comment turned out to be prescient. Two years later, using *Heller* as precedent, an equally divided Supreme Court ruled these policies unconstitutional in the case of *McDonald v. City of Chicago*.¹⁴

While the NRA rejoiced, and Mayor Daley feared the worst, longtime gun control advocacy groups glimpsed a silver lining amid the clouds.¹⁵ To their eye, the Court had signaled that virtually all common gun restrictions would still pass constitutional muster.¹⁶ What is more, by reinforcing that the Constitution protected gun owners, the Court might have deflated the gun rights lobby’s argument that any new gun law could result in firearms confiscation and open the door to tyranny.¹⁷ By undermining the “slippery slope” narrative, some gun control advocates thought, the Court might have created space for bipartisan compromise on firearms policy.¹⁸ As the chief of the Brady Campaign to Prevent Gun Violence put it, “[t]he Court . . . rejected the absolutist meaning of the 2nd Amendment. [Gun restrictions] can now be debated on their merits without distractions of fear or ideology.”¹⁹

Each of these perspectives—from a gun rights lobbyist, an anti-gun politician, and a gun control organization—serves as a hypothesis for the question at hand: What did *Heller* do? The array of viewpoints described above highlights both the importance of understanding the ruling’s downstream effects

¹² See *Heller: The Supreme Decision*, *supra* note 7 (publicly supporting the *Heller* ruling).

¹³ Alex Altman, *The Future of Gun Control*, TIME (June 26, 2008), <http://content.time.com/time/nation/article/0,8599,1818325,00.html>.

¹⁴ 561 U.S. 742, 750 (2010).

¹⁵ Chris Good, *Interview: Brady Campaign President Paul Helmke on Why the Gun Ruling Isn't So Bad*, ATLANTIC (June 28, 2010), <https://www.theatlantic.com/politics/archive/2010/06/interview-brady-campaign-president-paul-helmke-on-why-the-gun-ruling-isnt-so-bad/58849/> (explaining that the *McDonald* ruling was a very narrow ruling).

¹⁶ See *id.*; Altman, *supra* note 13.

¹⁷ See, e.g., Altman, *supra* note 13.

¹⁸ Paul Helmke, *My Formal Statement in the Heller DC Gun Case, Plus Remarks in Front of the Supreme Court*, HUFFPOST. https://www.huffpost.com/entry/my-formal-statement-on-to_b_109492 (last updated Dec. 6, 2017).

¹⁹ *Id.*

and the lack of obvious expectations about what these effects might be. In this Article, we assemble a wide range of empirical evidence to examine the ruling's impact on firearm laws and on elite- and mass-level gun politics. We situate our analysis within a number of related theoretical frameworks, most notably those focused on policy feedback and on the courts as engines of political change.

We argue that the effects of *Heller* (together with the parallel decision in *McDonald*) have, in general, been rather limited. We examine the ruling's first-order effects on preexisting gun control laws, as well as its second-order effects on a number of related outcomes. We find that the ruling has had generally small or nonexistent impacts on gun policy, legislative agendas, the organizational capacities and political strategies of pro-gun and pro-regulation groups, and public attitudes about gun regulation. Our findings support a constrained view of the Court's ability to drive social and political change. We conclude, however, by noting that recent developments have the potential to alter our conclusions moving forward.

I. THE (HOLLOW?) HOPE: GUN RIGHTS, FEEDBACK EFFECTS ON POLITICS, AND THE CONSTRAINED COURT

In the context of constitutional jurisprudence, court rulings are tantamount to statements of public policy. As such, they might be expected to have what we will call first-order and second-order effects on policymaking and politics. First-order effects can be thought of as the direct and foreseeable impacts of a ruling on public policy. They might include the repeal or revision of unconstitutional statutes or regulations; state imposition of incentives or costs to induce compliance with the court ruling; and changes in social or economic behavior in response to the ruling.²⁰ These are the conventional ways that court rulings are understood to have influence—as striking down (or upholding) laws and reordering (or not) state and social practices associated with these laws.²¹

But court rulings as statements of public policy might have second-order effects, as well—namely, on the political dynamics surrounding the issue at hand.²² Such impacts are known as “policy feedback” effects.²³ Feedback theory

²⁰ See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9–36 (1991). See generally R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994).

²¹ ROSENBERG, *supra* note 20, at 9–36.

²² See Suzanne Mettler & Mallory SoRelle, *Policy Feedback Theory*, in THEORIES OF THE POLICY PROCESS 103–34 (Christopher M. Weibe & Paul A. Sabatier eds., 4th ed. 2018); Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595, 599 (1993).

²³ See *supra* note 22 and accompanying text.

holds that policies may affect citizens' political capacity, their stake in defending or challenging the state, and their sense of civic inclusion or status.²⁴ Policies may also operate through political organizations, shaping their capacity to mediate between the state and the citizenry.²⁵ For example, policies may support organizations in their roles as incubators of civic skills, as fora for civic inclusion, as arenas for political recruitment, as amplifiers of political influence, and as mobilizers of collective action. Policies may work on organizations to frustrate these goals, as well.²⁶ Finally, policies may have feedback effects on political elites, who learn from public policy and make decisions based on this learning.²⁷

While most policy feedback work emphasizes positive cycles, whereby policy shapes subsequent political attitudes and behaviors, feedback effects do not occur in all cases and are often contingent on particular conditions being met.²⁸ In some cases, policies can even produce negative feedback, in which

²⁴ See, e.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990); ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE* (2003); AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (2014); SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* (2005); SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011); DEONDR A ROSE, *CITIZENS BY DEGREE: HIGHER EDUCATION POLICY AND THE CHANGING GENDER DYNAMICS OF AMERICAN CITIZENSHIP* (2018); E. E. SCHATTSCHNEIDER, *POLITICS, PRESSURES, AND THE TARIFF* (1935); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 58–59 (1992); Mettler & SoRelle, *supra* note 22, at 103–34; Suzanne Mettler & Joe Soss, *The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics*, 2 *PERSP. ON POL.* 55, 60 (2004); Pierson, *supra* note 22, at 599; Anne Schneider & Helen Ingram, *The Social Construction of Target Populations: Implications for Politics and Policy*, 87 *AM. POL. SCI. REV.* 334, 338–39 (1993); Joe Soss, *Lessons of Welfare: Policy Design, Political Learning, and Political Action*, 93 *AM. POL. SCI. REV.* 363, 364 (1999).

²⁵ See generally IRENE BLOEMRAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* 161–88 (2006); KRISTIN A. GOSS, *THE PARADOX OF GENDER EQUALITY: HOW AMERICAN WOMEN'S GROUPS GAINED AND LOST THEIR PUBLIC VOICE* (2012); CHLOE N. THURSTON, *AT THE BOUNDARIES OF HOME OWNERSHIP: CREDIT, DISCRIMINATION, AND THE AMERICAN STATE* (2018); JACK L. WALKER JR., *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* (1991); Kristin A. Goss, *Civil Society and Civic Engagement: Toward a Multilevel Theory of Policy Feedbacks*, 6 *J. CIV. SOC'Y* 119, 123 (2010); Kristin A. Goss, Carolyn Barnes & Deondra Rose, *Bringing Organizations Back In: MultiLevel Feedback Effects on Individual Civic Inclusion*, 47 *POL'Y STUD. J.* 451, 452 (2019); Matthew Lacombe, *Gunning for the Masses: How the NRA Has Shaped Its Supporters' Behavior, Advanced Its Political Agenda, and Thwarted the Will of the Majority* (Mar. 2019) (unpublished Ph.D. dissertation, Northwestern University) (on file with author).

²⁶ Goss, Barnes & Rose, *supra* note 25, at 463.

²⁷ Peter A. Hall, *Policy Paradigms, Social Learning, and the State*, 25 *COMP. POL.* 275, 288–90 (1993); Pierson, *supra* note 24, at 610. See generally HUGH HECLLO, *MODERN SOCIAL POLITICS IN BRITAIN AND SWEDEN* (1974).

²⁸ Daniel J. Galvin & Chloe N. Thurston, *The Democrats' Misplaced Faith in Policy Feedback*, 15 *FORUM* 333, 334–35 (2017); see also Joe Soss & Sanford F. Schram, *A Public Transformed? Welfare Reform as Policy Feedback*, 101 *AM. POL. SCI. REV.* 111, 114 (2007); Soss, *supra* note 24, at 376. See generally METTLER,

policies contain self-undermining features that contribute to their own demise.²⁹ These findings suggest that even major policies may not produce significant and durable political effects.

Whether examining the mass, organizational, or elite level, policy feedback theory predicts that policies have the potential to reshape politics. Policy feedback constitutes a growing area of inquiry among social scientists.³⁰ Interestingly, however, feedback theory has developed almost exclusively through studies of distributive, redistributive, and regulatory policies developed by legislatures and implemented by executive agencies and their nonprofit contractors and grantees.³¹ There has been very little thought given to the courts as producers of public policy with the potential to produce feedback effects on politics.

An early and prominent exception is the work of Gerald Rosenberg.³² His important book *The Hollow Hope: Can Courts Bring About Social Change?* was published just as political science was rediscovering early insights about policy's effects on politics,³³ organizing these works under the rubric of policy feedback, and building a new body of work. Without using the term "feedback effects," Rosenberg was adding to this literature.

Particularly relevant for our purposes, Rosenberg explores whether the seminal Supreme Court ruling in *Brown v. Board of Education* altered the politics of civil rights in America.³⁴ Rosenberg's primary concern is with the ruling's first-order effects—whether *Brown* desegregated the public schools.³⁵ Finding no evidence that it did, Rosenberg asks whether the ruling might have produced second-order, political impacts of the sort that scholars now term

supra note 24.

²⁹ ERIC M. PATASHNIK, REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY REFORMS ARE ENACTED 2–3, 32 (2008); Alan M. Jacobs & R. Kent Weaver, *When Policies Undo Themselves: Self-Undermining Feedback as a Source of Policy Change*, 28 GOVERNANCE 441, 443 (2015); Eric M. Patashnik, *Limiting Policy Backlash: Strategies for Taming Countercoalitions in an Era of Polarization*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 47, 48 (2019); Eric M. Patashnik & Julian E. Zelizer, *The Struggle to Remake Politics: Liberal Reform and the Limits of Policy Feedback in the Contemporary American State*, 11 PERSP. ON POL. 1071, 1072, 1077, 1083 (2013).

³⁰ Mettler & SoRelle, *supra* note 24, at 104.

³¹ See generally CAMPBELL, *supra* note 98; Mettler & Soss, *supra* note 24; Mettler & SoRelle, *supra* note 24.

³² GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

³³ See, e.g., SCHATTSCHEIDER, *supra* note 24, at 283; Theodore J. Lowi, *American Business, Public Policy, Case-Studies, and Political Theory*, 16 WORLD POL. 677, 677 (1964).

³⁴ ROSENBERG, *supra* note 32, at 40.

³⁵ *Id.* at 39–54.

policy feedback effects.³⁶ He explores a number of logical possibilities, including a boost to the civil rights movement,³⁷ increases in African-American voter registration, a rise in civil rights bills and co-sponsorships citing the ruling,³⁸ reductions in racist attitudes among the general public,³⁹ changes in textbooks' portrayals of African-Americans,⁴⁰ and so forth. Again, the data show few if any such effects.⁴¹ Put in terms of feedback theory, he reached a series of null findings.

Rosenberg sees these findings as evidence for the “constrained court” view of the judiciary’s influence.⁴² In this view, courts in and of themselves are seldom agents of social change.⁴³ The constrained court perspective stands in contrast to the “dynamic court” view, which places more faith in courts’ influence.⁴⁴ The constrained court perspective finds support in Federalist 78, in which Alexander Hamilton argued that the Supreme Court’s impact would be limited because it had neither the sword—that is, authority to enforce implementation of its rulings—nor the purse—that is, financial resources to encourage compliance.⁴⁵ Rosenberg returns to these insights to argue that interest groups and social movements expect too much from the Court and that, indeed, such contemporary expectations are historically “odd.”⁴⁶ Stating that courts provide a “hollow hope” to reformers, Rosenberg argues that “[w]hat is radical is the belief that litigation can produce significant social reform, that rights triumph over politics.”⁴⁷ Rosenberg concedes that the Court can facilitate significant reform under certain conditions,⁴⁸ but his analysis casts doubt on the capacity of rulings to produce substantial change on their own.

Drawing on Rosenberg’s approach and policy feedback theory more broadly, we assess whether *Heller* and its progeny had political or policy impacts beyond the first-order, geographically delineated effects on the specific types of laws implicated in the rulings. We investigate effects in three broad categories: (1) laws and other indicators of policymakers’ agendas; (2) the political capacity

³⁶ *Id.* at 40–41.

³⁷ *Id.* at 131–56.

³⁸ *Id.* at 124.

³⁹ *Id.* at 125–31.

⁴⁰ *Id.* at 116.

⁴¹ *Id.* at 155.

⁴² *Id.* at 157.

⁴³ *Id.* at 10.

⁴⁴ *Id.* at 22.

⁴⁵ THE FEDERALIST NO. 78 (Alexander Hamilton).

⁴⁶ ROSENBERG, *supra* note 32, at 430.

⁴⁷ *Id.*

⁴⁸ *Id.* at 431.

and strategies of advocacy organizations; and (3) mass attitudes. With one exception, we find that these decisions had somewhere between minimal and no effects. The exception is that *Heller* and its progeny led gun groups to increase their use of litigation (largely unsuccessfully) to achieve legal and social change. Viewed as a whole, the evidence presented here suggests that roughly a decade after they were decided, *Heller* and its progeny have delivered more symbolic assurances than tangible outcomes.

II. WHAT DID *HELLER* DO? THE RULING'S DIRECT EFFECTS ON LAW AND POLICY

Heller was the first Supreme Court ruling to find a constitutional protection for private gun ownership.⁴⁹ It invalidated several District of Columbia gun laws that, combined, effectively prohibited the possession of a functional firearm in the home.⁵⁰ Under the Firearms Control Regulations Act of 1975, the District barred the possession, sale, or transfer of handguns, except those that had been registered before the law went into effect (September 24, 1976) and then reregistered within sixty days thereafter.⁵¹ Under the law, any firearm kept at home, including long guns, had to be stored unloaded and disassembled or secured by a trigger lock.⁵² Writing for the majority, Justice Antonin Scalia found that these laws violated the Second Amendment,⁵³ which reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁵⁴ Drawing on seventeenth and eighteenth century English history, early state right-to-bear-arms provisions, and eighteenth century semantic conventions, Justice Scalia reasoned that the founders understood the amendment to enshrine a broad right of self-defense, irrespective of people’s service in the militia.⁵⁵ The ruling established the core legal principles and an ambiguous framework for evaluating Second Amendment challenges to American gun laws at the local, state, and federal levels.⁵⁶

⁴⁹ Robert Barnes, *Justices Reject D.C. Ban on Handgun Ownership*, WASH. POST (June 27, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062600615.html>.

⁵⁰ *District of Columbia v. Heller*, 554 U.S. 570, 574–75 (2008).

⁵¹ Edward D. Jones III, *The District of Columbia’s “Firearms Control Regulations Act of 1975”: The Toughest Handgun Control Law in the United States—or Is It?*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 139 (1981). The Act became D.C. Law 1-85. *Id.*

⁵² *Id.* at 140.

⁵³ *Heller*, 554 U.S. at 635.

⁵⁴ U.S. CONST. amend. II.

⁵⁵ *Heller*, 554 U.S. at 606–11.

⁵⁶ *See Pena v. Lindley*, 898 F.3d 969, 975 (9th Cir. 2018) (holding that the court’s Second Amendment analysis is “is framed by a two-step inquiry established in *Heller*”); Eric Ruben & Joseph Blocher, *From Theory*

Heller also served as the foundation for a handful of especially salient progen rulings by the U.S. Supreme Court (*McDonald v. City of Chicago*, 2010),⁵⁷ by the U.S. Court of Appeals for the Seventh Circuit (*Moore v. Madigan*, 2012),⁵⁸ by the U.S. District Court for the District of Columbia (*Palmer v. District of Columbia*, 2014),⁵⁹ and by the U.S. Court of Appeals for the D.C. Circuit (*Wrenn v. District of Columbia* and *Grace v. District of Columbia*, both in 2017).⁶⁰ This small handful of rulings had significant but geographically limited effects in three areas: Washington, D.C.; Chicago and its environs; and certain enclaves of San Francisco.

Within a few weeks of *Heller*, the D.C. City Council repealed the District's ban on handguns but passed legislation requiring that firearms be kept locked, unloaded, or disassembled unless there was a "threat of immediate harm to a person" within the home.⁶¹ The storage requirement later was downgraded to a recommendation,⁶² but D.C. gun laws remain among the most restrictive in the nation.⁶³ They require that firearms be registered with the police; that the registrant not be subject to standard federal prohibitors or have a recent history of violent behavior or of firearms negligence causing death or injury; and that the registrant take precautions to prevent minors from accessing any loaded firearm on the premises.⁶⁴

Besides these changes to D.C.'s firearms law, *Heller* led to the swift repeal of handgun bans in four Chicago suburbs—Evanston, Morton Grove, Wilmette, and Winnetka—as well as in public housing complexes operated by the City of San Francisco.⁶⁵ *Heller* also served as a precedent for a second Supreme Court case, *McDonald v. City of Chicago*, which extended *Heller*'s individual-rights holding to jurisdictions beyond the federal capital.⁶⁶ The ruling struck down

to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After *Heller*, 67 DUKE L.J. 1433, 1439–42 (2018).

⁵⁷ *McDonald v. City of Chi.*, 561 U.S. 742, 749–50 (2010).

⁵⁸ *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012).

⁵⁹ *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 178 (D.D.C. 2014).

⁶⁰ *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017).

⁶¹ Nikita Stewart & Bill Turque, *D.C. Gun Ban Is Out, but Regulations Stay*, WASH. POST, July 16, 2008, at B1.

⁶² *Firearm Registration General Requirements—Study Guide*, METRO. POLICE DEP'T, <https://mpdc.dc.gov/page/firearm-registration-general-requirements-study-guide> (last visited Feb. 7, 2020).

⁶³ *District of Columbia Gun Laws*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/state-law/district-of-columbia/> (last visited Feb. 7, 2020).

⁶⁴ *Firearm Registration*, *supra* note 62.

⁶⁵ David B. Kopel, *Gun Rights and the Constitution: Was *Heller* Insignificant?*, CATO INST. (Mar. 26, 2009), <https://www.cato.org/publications/commentary/gun-rights-constitution-was-heller-insignificant>.

⁶⁶ *McDonald v. City of Chi.*, 561 U.S. 742, 750 (2010).

Chicago's longstanding handgun freeze.⁶⁷ A twenty-five-year-old ban on assault weapons in Cook County, which includes Chicago and many of its suburbs, remains in place.⁶⁸ The *McDonald* ruling also led a fifth Chicago suburb, Oak Park, to repeal its handgun ban.⁶⁹

The precedent set by *Heller* and reinforced by *McDonald* extended to three especially important rulings at the district court and circuit court levels. In *Moore v. Madigan*, the Seventh Circuit Court of Appeals invalidated Illinois' ban on the carrying of concealed firearms in public.⁷⁰ The law had carved out exceptions for certain categories of people (e.g., law enforcement officers, hunters, shooting-club members) and for certain locations (e.g., on private property, in one's home, at a fixed place of business).⁷¹ But even with these provisions, it had been the strictest state law in the nation.⁷² After *Moore*, Illinois joined the ranks of "shall issue" states, meaning that law enforcement must grant concealed carry licenses to people who meet basic legal requirements (e.g., they are not disqualified from owning a firearm).⁷³ That said, Illinois law includes a process whereby law enforcement officers who fear that an applicant may pose a threat to himself or others may take their concerns to a review board, which has the power to deem the applicant ineligible to obtain the license.⁷⁴

Heller also had an effect on gun laws that the District of Columbia enacted to replace the unconstitutional handgun ban. In *Palmer v. District of Columbia*, for example, the United States District Court for the District of Columbia struck down the city's relatively new ban on the carrying of concealed firearms.⁷⁵ In response to the *Palmer* ruling, the Council amended its concealed-carry law to grant licenses to citizens who could demonstrate "good reason" to fear injury to themselves or their property, based on "special need" grounded in "specific threats or previous attacks."⁷⁶ In *Wrenn v. District of Columbia* (2017) and its

⁶⁷ *Id.*

⁶⁸ Jonah Meadows, *Cook County Assault Weapons Ban Upheld by Federal Appeals Court*, PATCH (Aug. 30, 2019, 12:18 PM), <https://patch.com/10llinois/highlandpark/cook-county-assault-weapons-ban-upheld-federal-appeals-court>.

⁶⁹ *Oak Park Gun Laws: Gun Advocates Say Suburb Developing 'Blueprint' for Statewide Crackdown*, HUFFPOST (Jan. 25, 2012, 12:01 PM), https://www.huffpost.com/entry/oak-park-gun-laws-gun-adv_n_1230947.

⁷⁰ *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

⁷¹ *Id.* at 934.

⁷² *Moore v. Madigan: Law Center Files Briefs in Significant Second Amendment Cases*, GIFFORDS L. CTR. (June 13, 2012), <https://lawcenter.giffords.org/tag/moore-v-madigan/>.

⁷³ Firearm Concealed Carry Act, 430 ILL. COMP. STAT. ANN. 66/10 (West Supp. 2015).

⁷⁴ Firearm Concealed Carry Act, 430 ILL. COMP. STAT. ANN. 66/20(g) (West 2014).

⁷⁵ *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 183 (D.D.C. 2014).

⁷⁶ *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) (quoting D.C. Code Ann. § 7-

companion case, *Grace v. District of Columbia* (2017), the D.C. Circuit Court of Appeals struck down the “good reason” law on the grounds that it effectively deprived most residents of their Second Amendment right to carry in self-defense.⁷⁷

To the question, “What did *Heller* and its progeny do?” the first and most direct answer is that they struck down blanket bans on handgun possession and carrying in a handful of jurisdictions. However, these bans had always been anomalous, representing the far reaches of modern gun control efforts.⁷⁸ What is more, these laws stood out as particularly anachronistic in an era when the federal government and many states had been moving for a decade or more to deregulate firearms.⁷⁹ Finally, these laws also had limited reach. The District of Columbia, San Francisco, and Illinois are home to about 4–5% of the U.S. population,⁸⁰ and only a fraction of this number would have been directly affected by the newly relaxed gun laws (meaning people would now choose to exercise Second Amendment rights previously denied to them).⁸¹

Thus, *Heller* and its progeny had an immediate effect on public policy that was real yet quite geographically limited. However, the previously discussed theories of public policy—of which court rulings are a form—counsel us to look for effects beyond those that are immediately visible.

III. POLICY FEEDBACK & POLICY LEARNING: EFFECTS ON LAWMAKERS

Beyond its first-order effects, rulings like *Heller* may also produce less direct, second-order effects that can restructure the political strategies and attitudes of lawmakers, advocacy groups, and even the mass public. In this Part,

2059.11(1)(A) (West 2015)).

⁷⁷ *Id.* at 667; *Grace v. District of Columbia*, No. 15-2234, 2017 U.S. Dist. LEXIS 171367, at *2–3 (D.D.C. Oct. 17, 2017).

⁷⁸ PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* 95 (2014).

⁷⁹ KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 10, 197 (2006).

⁸⁰ See *QuickFacts: United States; District of Columbia; San Francisco City, California; Illinois*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US,DC,sanfranciscocitycalifornia,IL/PST045219> (last visited Feb. 22, 2020).

⁸¹ See JOHN R. LOTT JR., CRIME PREVENTION RESEARCH CENTER, *CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES: 2017* 29 (2017) (noting that there were 243,254 active concealed carry permits in Illinois as of May 31, 2017); U.S. DEP’T OF HOUS. & URBAN DEV., *SAN FRANCISCO HOUSING AUTHORITY: FIVE YEAR PLAN 2016–2021*, at 5 (2013) (noting that there are approximately 6,100 public housing units); *District of Columbia Gun Laws*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/state-law/district-of-columbia/> (last visited Feb. 22, 2020) (noting that even though handguns are now legal, the licensing requirements remain strict).

we examine the feedback effects of *Heller* and progeny on the actions of lawmakers.

If policy has feedback effects on politics, one should expect to detect such effects on the behavior of political elites. One such effect is policy learning. As formulated by Hugh Hecl, Peter Hall, and Paul Pierson, among others, learning typically refers to the process by which policies produce lessons of success and failure that shape policymakers' decisions about how to amend or perhaps discard a given law or regulation.⁸² Although not conventionally part of the literature on policy learning, court rulings may offer lessons to policymakers about what kinds of policies are possible, desirable, or forbidden.

What did policymakers learn from *Heller*? As discussed above, lawmakers and implementing agencies in the three affected jurisdictions discarded unconstitutional laws or, in most cases, replaced them with regulations believed to be in conformity with the courts' interpretation of the Second Amendment. Perhaps a more interesting question is whether, beyond providing policy mandates, these rulings provided political lessons to policymakers about new possibilities in gun regulation or deregulation. In particular, we ask whether the courts liberated lawmakers, particularly pro-gun lawmakers, to dismantle regulations that perhaps would not be unconstitutional but that would fit uncomfortably in a new legal order providing some deference to individual gun rights.

To evaluate whether *Heller* and progeny had such a learning effect, we assess three hypotheses:

- H1) that lawmakers would cease introducing handgun-ban bills;*
- H2) that lawmakers would move to repeal state bans on "junk guns";*
- H3) that lawmakers would enact more gun rights provisions at the state level.*

A. State Handgun Ban Proposals

The *Heller* Court found that the District of Columbia's effective ban on handguns unconstitutionally infringed individuals' Second Amendment rights.⁸³ Although *Heller* applied only to the District of Columbia, a unique federal district, the Court's holding cast grave doubt on the constitutionality of all such

⁸² HECL, *supra* note 27, at 306; Hall, *supra* note 27, at 277–78; Pierson, *supra* note 24, at 612.

⁸³ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

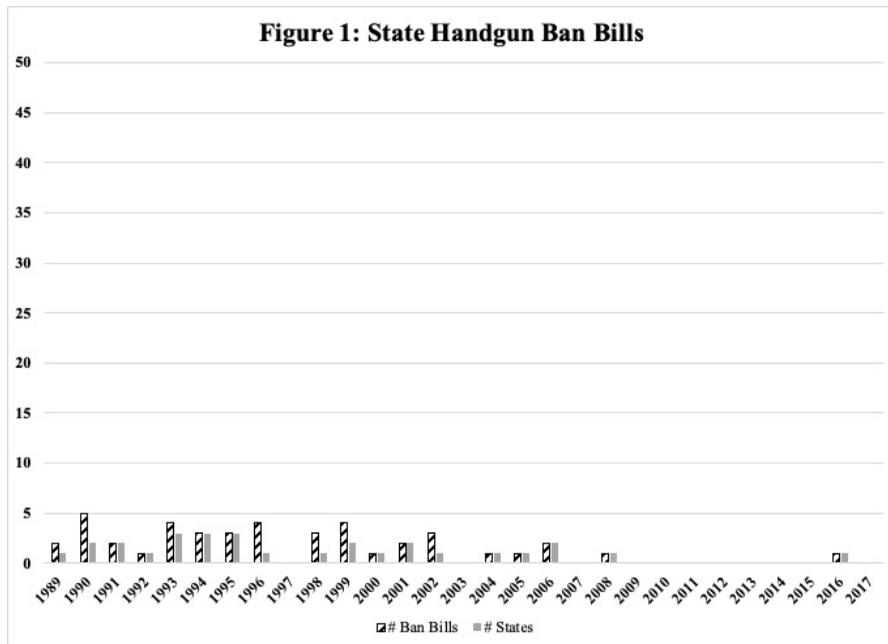
bans nationwide.⁸⁴ Two years later, the *McDonald* Court affirmed this supposition.⁸⁵ Thus, if these cases were to have an impact on lawmaker agendas, the most direct effect would be on efforts to ban handguns. We would expect to see a decrease in handgun-ban bills after 2008, and an even more precipitous drop after 2010, as lawmakers learn that such bills would be likely to draw, and highly unlikely to survive, a court challenge.

To assess whether *Heller* and its progeny affected the agendas of state lawmakers, we compiled an original dataset of bills introduced in state legislatures to ban handguns.⁸⁶ We interpreted the term “ban” broadly to include blanket bans on handguns (such as S.B. 46, introduced in the Tennessee Senate in 1989), on “cop killer” handguns (such as S.B. 2113, introduced in the Massachusetts Senate in June 2005), and on guns deemed unsafe (such as A.B. 2245, introduced in the California State Assembly in February 2016). Figure 1 shows the number of handgun-ban bills introduced in the eighteen years before *Heller*, in 2008 (when the ruling came down), and in the nine years afterward—as well as the number of states in which such bills were introduced.

⁸⁴ COOK & GOSS, *supra* note 78, at 95.

⁸⁵ *McDonald v. Chicago*, 561 U.S. 742, 750 (2010).

⁸⁶ We compiled these bills from LexisNexis State Capital. We used these search terms: [handgun] AND [prohibit OR ban] for the years 1990–2017. (The State Capital database has since migrated to a platform called State Net.) The dataset includes bills regarding so-called junk guns or other handguns meeting certain criteria, as well as bills seeking a broad handgun ban via other entities (e.g., Congress, state referenda). These are the types of “ban” bills that might have been constitutionally suspect under *Heller*. If we were to see a feedback effect, we would expect to see it in the introduction of these types of bills. At the same time, our dataset excluded bills that, in our reading of *Heller*, would have been presumptively constitutional, including bans on possession by or transfers to minors, felons, or other generally prohibited people; bans on place-based carry restrictions (e.g., schools, bars); bans on undetectable firearms; and bans on more than one handgun purchase per month. This data is on file with the author.



The Figure is consistent with a slight *Heller* effect—there are no handgun-ban bills of any type in the first seven years after the ruling. However, this finding must be placed in context: in the two decades prior to *Heller*, very few such bills were introduced (typically 0–3 per year), and then only in a handful of states (0–3 states per year, with 11 states represented over the 29-year period). These bills constituted either a nonexistent or negligible fraction of legislative proposals introduced in any given state in any given year. If *Heller* reoriented lawmakers’ policy agendas, this data series suggests that this reorientation was not especially profound. Put simply, state lawmakers introduce thousands of bills each year. Handgun ban legislation was so rare by 2008 that with or without *Heller*, its disappearance thereafter might have passed without note.

B. Junk Gun Bans

“Junk guns” is a colloquial term used to describe a variety of inexpensive, poorly made handguns that may be at elevated risk of misfiring or being used in crime.⁸⁷ These guns, sometimes called Saturday Night Specials, have been

⁸⁷ Eva H. Shine, Comment, *The Junk Gun Predicament: Answers Do Exist*, 30 ARIZ. ST. L.J. 1183, 1183, 1185–86 (1998).

targets of state and federal regulation at least since the 1970s.⁸⁸ The *Heller* ruling did not specifically address the constitutionality of this category of handgun, but to pro-gun lawmakers the ruling might have provided a political opening to revisit the constitutional status of existing junk-gun bans.

Using data compiled by Michael Siegel and colleagues at Boston University's School of Public Health, we assembled a time series of state junk-gun bans from 1991 (eighteen years before *Heller*) through 2018 (ten years after).⁸⁹ The series shows that within that time frame, the number of states having such bans rose from five (1991) to seven (2001), then dropped to six bans four years after *Heller*. The story is similar to that of handgun-ban bills above. These laws were rare before *Heller* and rare afterward. This legislative stasis is hard to square with a *Heller* effect.

C. Pro-Gun Policies

The National Rifle Association, the nation's largest and most politically prominent gun rights organization, has long opposed stricter gun laws.⁹⁰ However, since the late 1970s, when a hardline faction took over the organization's board, it has developed a strategic approach to *relax* gun laws on both the federal and (especially) state levels.⁹¹ The organization has selected a handful of top priority policy reforms and, taking advantage of its federated structure, gone from state to state to lobby for their enactment.⁹² Beyond the NRA, many states have highly politicized gun rights organizations that are often to the right of the NRA and equally capable of mobilizing members for political action.⁹³ These forces have traditionally held advantages in many state legislatures (which frequently favor rural areas, where many gun owners live) and have not been matched by a countermovement of local gun control activists.⁹⁴

These political dynamics allow us to assess two competing hypotheses. If courts have learning effects on policymakers, we might expect the number of pro-gun laws to rise in the year or two after *Heller*. If the courts have no such

⁸⁸ See David T. Hardy & John Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62, 113 (1974).

⁸⁹ Michael Siegel, *State Firearms Laws*, ST. FIREARM LAWS DATABASE, <http://www.statefirearmlaws.org/> (last visited Feb. 7, 2020).

⁹⁰ Lacombe, *supra* note 25, at 45.

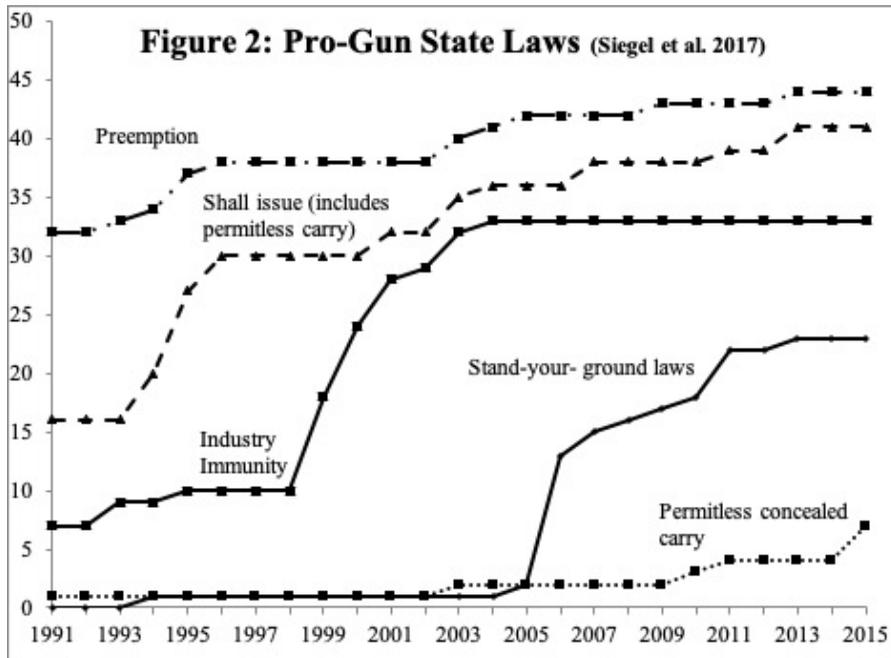
⁹¹ COOK & GOSS, *supra* note 78; GOSS, *supra* note 79.

⁹² COOK & GOSS, *supra* note 78, at 193–94, 199–200; ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 125 (2018).

⁹³ COOK & GOSS, *supra* note 78, at 191–93.

⁹⁴ GOSS, *supra* note 79, at 172–73.

effects, we might expect to see an uninterrupted trend line. Figure 2, compiled by Michael Siegel and his colleagues, provides a rough account of the diffusion of policies prioritized by pro-gun organizations from 1991 to 2016.⁹⁵ (Note the counts are cumulative in the sense that they represent laws on the books in any given year, not laws enacted in any given year.) As the chart shows, the number of states with pro-gun provisions had been increasing at a modest and occasionally rapid pace before 2008, and this pace did not become visibly more rapid after *Heller*.



Although these patterns again appear inconsistent with a pronounced *Heller* effect, we offer one caveat. The number of states adopting “permitless concealed carry” laws—which allow people entitled to own guns to carry them concealed in public without a license—has ticked up in the years since *Heller*.⁹⁶ The year 2009 appeared to be a switch point, albeit a minor one, for permitless carry—described by gun rights forces as “constitutional carry.” The elimination of concealed carry licensing has been a key policy goal of pro-gun organizations

⁹⁵ Michael Siegel et al., *Firearm-Related Laws in All 50 US States, 1991–2016*, 107 AM. J. PUB. HEALTH 1122, 1127 fig.2 (2017) (adapted and used with permission).

⁹⁶ *Permitless Concealed Carry*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/wp-content/uploads/2017/10/Permitless-Carry-Factsheet-1.pdf> (last visited Feb. 22, 2020).

and the focus of sustained state-level advocacy.⁹⁷ *Heller*, which did not deal explicitly with carrying but implied that bans would be constitutionally suspect, may have encouraged activists to take a more assertive approach to the dismantling of license-to-carry laws. However, it may also be the case that the timing of permitless carry's advancement vis-a-vis *Heller* was coincidental insofar as this policy reform represents the logical next step in a long effort to deregulate guns in public spaces—an effort that began many years before *Heller*.

With some possible modest exceptions, we find that *Heller* and progeny had little direct impact on state gun laws beyond those at issue in the rulings themselves.

IV. POLICY FEEDBACK: EFFECTS ON POLITICAL ORGANIZATIONS

Many of the most important recent works on policy feedback have focused on political engagement at the level of the individual, and to a lesser extent, at the level of organizations and movements.⁹⁸ Individuals, organizations, and movements are logical places to look for feedback effects in regimes (such as the United States) that have decentralized systems of interest group pluralism and strong constitutional protections for political speech and association. Rosenberg's case studies, particularly of *Brown v. Board of Education*, pursued this intuition. Here we consider organization-level feedback effects, and in the next Section we consider effects at the level of the mass public.

Both the *Heller* and *McDonald* cases inspired a good deal of political engagement from organizations and individuals in policy communities concerned with gun rights and gun control. In *Heller*, for example, sixty-seven *amicus curiae* briefs were submitted on behalf of scores of organizations, individuals, and networks of experts.⁹⁹ Advocates for the gun rights position (70% of briefs) included gun owner associations, think tanks and litigation organizations, the U.S. Vice President and conservative members of Congress, certain states, former government officials and military officers, and civil liberties groups.¹⁰⁰ On the gun regulation or neutral side (30% of briefs) were gun control advocacy organizations, cities, liberal members of Congress, civil

⁹⁷ Chris W. Cox, *Working Together to Save the Second Amendment Part II: State Success Stories*, NRA-ILA (May 21, 2019), <https://www.nra.org/articles/20190521/working-together-to-save-the-second-amendment-part-ii-state-success-stories>.

⁹⁸ See Andrea Louise Campbell, *Policy Makes Mass Politics*, 15 ANN. REV. POL. SCI. 333, 351 (2012); Mettler & SoRelle, *supra* note 24, at 104; Mettler & Soss, *supra* note 24, at 60.

⁹⁹ *District of Columbia v. Heller Case Files*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/dc-v-heller/> (last visited Feb. 7, 2020).

¹⁰⁰ *Id.*

rights groups, academics, lawyers, and pediatricians.¹⁰¹ In short, *Heller* drew broad organizational engagement while under consideration. This level of institutional engagement—coupled with the salience of gun violence, gun ownership, and the “great American gun war”¹⁰²—gives us reason to expect that *Heller* and its progeny might produce organization-level feedback effects. We assess three hypotheses along these lines:

- H4) that the rulings changed the policy agendas of gun regulation groups;*
- H5) that the rulings altered the political strategies of pro-gun groups;*
- H6) that the rulings changed the organizational capacity of both pro-gun and gun regulation organizations.*

A. Policy Agendas of Gun Regulation Groups: Legislation

The politics of gun regulation is defined by scores of local, state, and national advocacy organizations. Thus, if policy shapes politics, it is logical to look to advocacy organizations’ political strategies for evidence of a *Heller* effect. We examine the policy agendas of the three dominant national gun regulation groups before and immediately after the two-year span of time encompassing the *Heller* and *McDonald* rulings.¹⁰³ These groups are the Coalition to Stop Gun Violence, Mayors Against Illegal Guns (a precursor to Everytown for Gun Safety), and the Brady Campaign to Prevent Gun Violence. We assess whether the sorts of policies prioritized by these groups changed following *Heller* and its progeny, specifically with regard to policies deemed unconstitutional by the Court.

We first assessed the Coalition to Stop Gun Violence. Prior to *Heller*, the Coalition emphasized three sets of policy priorities. The first—labeled “Closing Illegal Gun Markets”—focused on enacting policies that would make it more difficult for individuals prohibited from owning guns to buy them on the secondary market.¹⁰⁴ Such proposals included extending background checks to cover sales made at gun shows, passing gun licensing and registration requirements, making it easier to trace guns used in crimes, and banning “assault” weapons.¹⁰⁵ The second—“International Arms Trade”—focused on

¹⁰¹ *Id.*

¹⁰² B. Bruce-Briggs, *The Great American Gun War*, 45 PUB. INT. 37, 37 (1976).

¹⁰³ We used the WayBackMachine Internet Archive, a repository of no-longer-live webpages, to reconstruct the pre- and post-*Heller* agendas of these organizations.

¹⁰⁴ *Closing Illegal Gun Markets*, COALITION TO STOP GUN VIOLENCE (Dec. 8, 2007), http://www.csgv.org/site/c.muLYJ7MMKrH/b.2819031/k.8F4D/Closing_Illegal_Gun_Markets.htm [https://web.archive.org/web/20071208163028/http://www.csgv.org/site/c.muLYJ7MMKrH/b.2819031/k.8F4D/Closing_Illegal_Gun_Markets.htm].

¹⁰⁵ *Id.*

preventing the flow of firearms to criminal groups across international borders.¹⁰⁶ Finally, the third—“Guns, Democracy and Freedom”—was a bit broader, but focused on preventing employees from being able to bring guns to work, opposing laws giving immunity to gun manufacturers for accidents and crimes committed with weapons they produced, and fighting the spread of what the Coalition describes as “shoot first laws” (more commonly known as “stand-your-ground laws”).¹⁰⁷ In addition, the “Guns, Democracy, and Freedom” initiative included a defense of Washington, D.C.’s gun laws during the period in which *Heller* was pending.¹⁰⁸

To what extent did the Coalition’s policy goals shift after *Heller* and later *McDonald*? The answer is, not much. In the months after *Heller*, the Coalition’s website listed a broadly similar set of policy priorities, just slightly rearranged.¹⁰⁹ The group acknowledged the *Heller* decision and noted that it would assist the city with revising its gun laws to be in accordance with the Supreme Court’s ruling.¹¹⁰ By early 2011—after *McDonald*—the group’s policy priorities still had not shifted substantially.¹¹¹ The Coalition again acknowledged the Court’s decision but did not signal that it would alter its agenda in any way as a result.¹¹² The absence of a shift is no doubt due to the fact that the Coalition’s pre-2008 priorities were presumptively constitutional even under the *Heller*

¹⁰⁶ *International Arms Trade*, COALITION TO STOP GUN VIOLENCE (Dec. 9, 2007), http://www.csgv.org/site/c.muLYJ7MMKrH/b.2820489/k.7959/International_Arms_Trade.htm. [https://web.archive.org/web/20071209201802/http://www.csgv.org/site/c.muLYJ7MMKrH/b.2820489/k.7959/International_Arms_Trade.htm]

¹⁰⁷ *Guns, Democracy, and Freedom*, COALITION TO STOP GUN VIOLENCE (Feb. 7, 2008), http://www.csgv.org/site/c.muLYJ7MMKrH/b.2820491/k.7DFD/Guns_Democracy_and_Freedom.htm. [https://web.archive.org/web/20080207130218/http://www.csgv.org/site/c.muLYJ7MMKrH/b.2820491/k.7DFD/Guns_Democracy_and_Freedom.htm].

¹⁰⁸ *Democracy and DC Gun Laws*, COALITION TO STOP GUN VIOLENCE (Feb. 26, 2008), <http://www.csgv.org/site/c.muLYJ7MMKrH/b.2821475/>. [<https://web.archive.org/web/20080226103545/http://www.csgv.org/site/c.muLYJ7MMKrH/b.2821475/>].

¹⁰⁹ *Issues & Campaigns*, COALITION TO STOP GUN VIOLENCE (Apr. 12, 2009), http://www.csgv.org/site/c.pml5JnO7KzE/b.3509211/k.AA0C/Issues_Campaigns.htm [https://web.archive.org/web/20090412053823/http://www.csgv.org/site/c.pml5JnO7KzE/b.3509211/k.AA0C/Issues_Campaigns.htm].

¹¹⁰ *Democracy and DC Gun Laws*, COALITION TO STOP GUN VIOLENCE (Nov. 27, 2008), http://www.csgv.org/site/c.pml5JnO7KzE/b.3509333/k.5FD1/Democracy_and_DC_Gun_Laws.htm [https://web.archive.org/web/20081127024105/http://www.csgv.org/site/c.pml5JnO7KzE/b.3509333/k.5FD1/Democracy_and_DC_Gun_Laws.htm].

¹¹¹ *Issues & Campaigns*, COALITION TO STOP GUN VIOLENCE (Feb. 3, 2011), <http://www.csgv.org/issues-and-campaigns> [<https://web.archive.org/web/20110203051653/http://www.csgv.org/issues-and-campaigns>].

¹¹² *Supreme Court and the Second Amendment*, COALITION TO STOP GUN VIOLENCE (Feb. 3, 2011), <http://www.csgv.org/issues-and-campaigns/guns-democracy-and-freedom/supreme-court-and-the-second-amendment> [<https://web.archive.org/web/20110203061958/http://www.csgv.org/issues-and-campaigns/guns-democracy-and-freedom/supreme-court-and-the-second-amendment>].

court's reading of the Second Amendment.¹¹³ The Coalition, which was founded as the National Coalition to Ban Handguns, had long since ceased advocating such a policy goal.¹¹⁴

We also assessed Mayors Against Illegal Guns, which was founded in 2006 and held its first summit in April of that year.¹¹⁵ At the summit, hosted by New York City Mayor Michael Bloomberg and Boston Mayor Thomas Menino, the assembled mayors established guiding principles for the organization, which focused on punishing individuals and gun dealers who “possess, use, and traffic in illegal guns,” making it easier for cities to trace guns used in crimes, and building collaborations between cities that would assist in these objectives.¹¹⁶

These priorities indicate that the organization was careful to place its focus on *illegal* guns, and none of the principles advocated for legislation that would eventually be precluded by *Heller* or *McDonald*. Indeed, in a press release following the event, Mayor Bloomberg explicitly stated: “This is not a question of ideologies or a referendum on the Second Amendment. This is about public safety and making sure that illegal guns never make their way into the hands of criminals and onto our streets.”¹¹⁷

At its 2007 summit in Washington, D.C., the group chose to emphasize the importance of the “Tiahrt Amendments,” which have been attached to Department of Justice appropriations bills since 2003 and restrict access to federal data that may be useful for tracking illegal guns and their dealers.¹¹⁸ The featured state and local legislation on the Mayors group's website as of 2007 did not advocate any proposals that would ban weapons and could potentially be deemed unconstitutional post-*Heller*.¹¹⁹

¹¹³ See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

¹¹⁴ GOSS, *supra* note 79, at 153, 197.

¹¹⁵ *Mayor Bloomberg, Boston Mayor Menino and Mayors from Around the United States Stand Up Together in the Fight Against Illegal Guns*, OFFICIAL WEBSITE N.Y.C. (Apr. 26, 2006), <https://www1.nyc.gov/office-of-the-mayor/news/129-06/mayor-bloomberg-boston-mayor-menino-mayors-around-united-states-stand-up-together-in#/1>.

¹¹⁶ *Id.*; *Coalition Principles*, MAYORS AGAINST ILLEGAL GUNS (July 2, 2007), <http://www.mayorsagainstillegalguns.org/html/about/principles.shtml> [<https://web.archive.org/web/20070702003247/http://www.mayorsagainstillegalguns.org/html/about/principles.shtml>].

¹¹⁷ *Mayor Bloomberg*, *supra* note 115.

¹¹⁸ *Federal Legislation*, MAYORS AGAINST ILLEGAL GUNS (July 2, 2007), <http://www.mayorsagainstillegalguns.org/html/federal/federal.shtml> [<https://web.archive.org/web/20070702090924/http://www.mayorsagainstillegalguns.org/html/federal/federal.shtml>]. Gun rights advocates view these amendments as a way to protect the privacy of gun owners and guard against the creation of a national gun registry. *Tiahrt Amendments*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/federal-law/other-laws/tiahrt-amendments/> (last visited Feb. 22, 2020).

¹¹⁹ *State & Local Legislation*, MAYORS AGAINST ILLEGAL GUNS (July 3, 2007), <http://www.mayorsagainstillegalguns.org/html/state-local-legislation.shtml>.

Mayors' agenda had expanded a bit by the post-*Heller* period, but not in ways that seem likely to be related to the ruling. In addition to advocating elimination of the Tiahrt Amendments, the organization's federal legislative positions as of December 2008 emphasized expanding background checks, precluding individuals on terror watch lists from being allowed to buy guns, preventing gun dealers that were being shut down due to illegal sales from being able to sell the rest of their inventory, and requiring gun dealers to conduct background checks of their employees.¹²⁰ The organization's state and local priorities at this time focused on requirements to report lost/stolen firearms, creation of gun offender registries, establishment of regional gun data-sharing programs, and expanded mental health reporting.¹²¹ As in prior years, these policies focused more on enforcement of existing guns laws than on establishing the sorts of gun-ban policies deemed unconstitutional by the Supreme Court. These priorities had not changed in substantial ways by the end of 2011, after the *McDonald* ruling.¹²²

Finally, we also examined the policy agenda of the Brady Campaign. Prior to *Heller*, Brady emphasized expanding background checks, closing gaps in the National Instant Criminal Background Check System (NICS), and requiring gun manufacturers to "child-proof" guns.¹²³ As of the beginning of 2009—after *Heller*—Brady's website continued to push for expanding background checks, enacting policies to help law enforcement agencies to solve gun-related crimes, removing the Tiahrt Amendments, banning individuals on the terror watchlist from buying guns, and opposing laws that would expand individuals' ability to buy and carry guns.¹²⁴ In early 2011—post-*McDonald*—Brady continued to

mayorsagainstillegalguns.org/html/local/local.shtml [https://web.archive.org/web/20070703121911/http://www.mayorsagainstillegalguns.org/html/local/local.shtml].

¹²⁰ *Federal Legislation*, MAYORS AGAINST ILLEGAL GUNS (Dec. 26, 2008), <http://www.mayorsagainstillegalguns.org/html/federal/federal.shtml> [https://web.archive.org/web/20081226081323/http://www.mayorsagainstillegalguns.org/html/federal/federal.shtml].

¹²¹ *State & Local Legislation*, MAYORS AGAINST ILLEGAL GUNS (Dec. 27, 2008), <http://www.mayorsagainstillegalguns.org:80/html/local/local.shtml> [https://web.archive.org/web/20081227010923/http://www.mayorsagainstillegalguns.org:80/html/local/local.shtml].

¹²² *State & Local Legislation*, MAYORS AGAINST ILLEGAL GUNS (Sept. 2, 2011), <http://www.mayorsagainstillegalguns.org:80/html/local/local.shtml> [https://web.archive.org/web/20110902003337/http://www.mayorsagainstillegalguns.org:80/html/local/local.shtml] (describing the group's state and local policy agenda); *Federal Legislation*, MAYORS AGAINST ILLEGAL GUNS (July 23, 2011), <http://www.mayorsagainstillegalguns.org/html/federal/federal.shtml> [https://web.archive.org/web/20110723121453/http://www.mayorsagainstillegalguns.org/html/federal/federal.shtml] (describing the group's federal policy agenda).

¹²³ *State and Federal Legislation*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (June 26, 2007), <http://www.bradycampaign.org/legislation/> [https://web.archive.org/web/20070626051410/http://www.bradycampaign.org/legislation/].

¹²⁴ *State and Federal Legislation*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (Jan. 18, 2009), <http://www.bradycampaign.org/legislation/> [https://web.archive.org/web/20090118014557/http://www.bradycampaign.org/legislation/].

emphasize expanded background checks and child safety measures, along with provisions to crack down on gun dealers who violate the law.¹²⁵

When considered together, the policy agendas of the three most prominent gun-regulation advocacy groups show little evidence of a *Heller* effect. In all three cases, this result is mostly because the groups' pre-*Heller* agendas were relatively moderate and did not include policies that would have been affected by the Supreme Court's decisions.

B. Political Strategies of Pro-Gun Groups: Litigation

Even if *Heller* and its progeny had little effect on pro-regulation organizations, it is possible that the rulings might have affected the strategies of pro-gun groups. We examine two strategies, selected because there is reason to believe that they would have been especially responsive to pro-gun-rights rulings.

The first of these strategies is Second Amendment litigation. We expect that *Heller* and its progeny will have a positive effect on the use of litigation as a political strategy. Although less common than many other policy-reform strategies, litigation is commonly pursued by interest groups across the political and issue spectrum.¹²⁶ The strategy's popularity may stem in part from the fact that federal law provides tax preferences for nonprofit organizations that seek change through the courts. Legal defense funds and other public-interest litigation organizations may qualify as public charities under Section 501(c)(3) of the Internal Revenue Code, entitling them to receive grants from charitable foundations and tax-deductible donations from individuals.¹²⁷ By contrast, nonprofit groups whose primary strategy is legislative advocacy may not accept foundation grants (except in carefully supervised circumstances¹²⁸), nor can individual donors take a tax deduction for their contributions. Nonprofit groups

campaign.org/legislation/].

¹²⁵ *Legislation*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (Jan. 13, 2011), <http://www.bradycampaign.org/legislation/> [https://web.archive.org/web/20110113193840/http://www.bradycampaign.org/legislation/].

¹²⁶ JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY 175–77* (3d ed. 1997); WALKER, *supra* note 25, at 109; Paul M. Collins, Jr., *Interest Groups in the Judicial Arena*, in *NEW DIRECTIONS IN INTEREST GROUP POLITICS* 221 (M. Grossmann ed., 2014); Kay Lehman Schlozman & John T. Tierney, *More of the Same: Washington Pressure Group Activity in a Decade of Change*, 45 *J. POL.* 351, 357 tbl.1 (1983).

¹²⁷ INTERNAL REVENUE SERV., *LITIGATION BY IRC 501(C)(3) ORGANIZATIONS* (1984); *see also* INTERNAL REVENUE SERV., *PUB. NO. 526: CHARITABLE CONTRIBUTIONS 3* (2019) [hereinafter *PUB. NO. 526*]; INTERNAL REVENUE SERV., *PUB. NO. 4221-PF: COMPLIANCE GUIDE FOR 501(C)(3) PRIVATE FOUNDATIONS 3* (2014) [hereinafter *PUB. NO. 4221-PF*].

¹²⁸ *See* *PUB. NO. 4221-PF, supra* note 127, at 5–8 (discussing expenditure responsibility).

whose primary mission is supporting candidates or parties, or otherwise influencing elections, cannot receive money from foundations; and private donations are not deductible and are publicly reportable (above a certain level).¹²⁹ Thus, of the three major strategies for reforming public policy—elections, advocacy, and litigation—litigation receives the most generous treatment under the law. Public policy creates a financial incentive structure for policy entrepreneurs to pursue social change through the courts.¹³⁰

For these reasons and others that are specific to the gun case, we expect *Heller* and its progeny's feedback effect on the use of the litigation strategy to be positive. First, *Heller* and *McDonald* recognized a broad "new" individual right but did so in the context of fairly narrow rulings (striking down anomalous bans on handguns kept by law-abiding gun owners in the home).¹³¹ To put it bluntly, the cases produced landmark rulings that would have a direct effect on very few laws. This disconnect—a big precedent with few effects—would be expected to invite litigation to align the rulings' impact with their symbolic import. Second, *Heller* was focused squarely on handgun bans; it mentioned a handful of other "presumptively" constitutional firearms laws in passing,¹³² but left many other gun laws unaddressed. In so doing, the ruling invited pro-gun litigants to see how expansively the courts would interpret *Heller*. Third, the *Heller* and *McDonald* decisions did not specify the level of scrutiny that courts should use in evaluating the constitutionality of gun laws. The level of scrutiny applied is critical to determining whether a law stands or falls. Thus, in addition to the law itself, gun groups might have pursued litigation to establish a level of scrutiny that would make gun regulations as difficult as possible for their defenders to justify as constitutional.

To assess this litigation hypothesis, we compiled a dataset of state and federal cases in which a gun law was challenged on Second Amendment grounds. These cases included, for example, challenges to state and federal laws

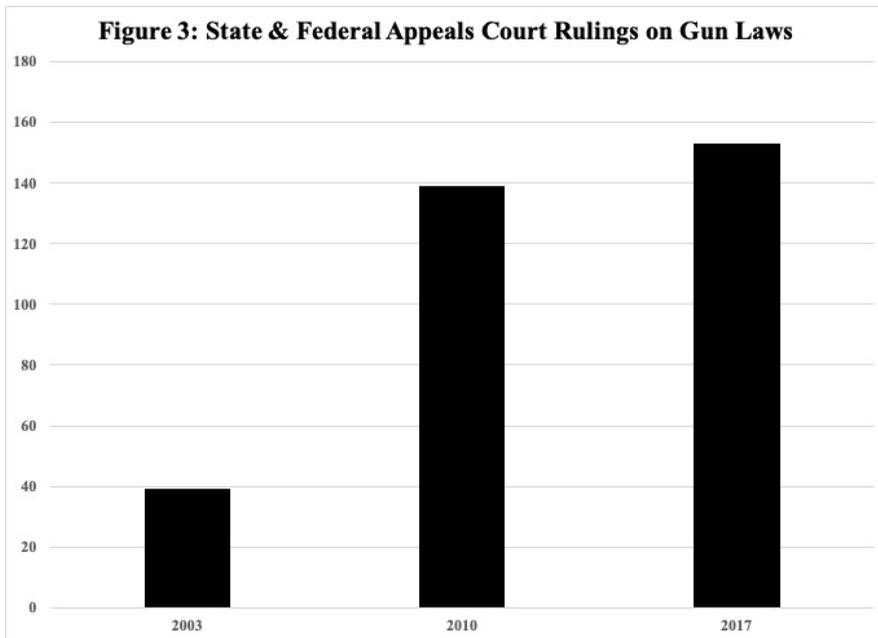
¹²⁹ PUB. NO. 526, *supra* note 127, at 6; PUB. NO. 4221-PF, *supra* note 127, at 6–7; FED. ELECTION COMM'N, FEDERAL ELECTION COMMISSION CAMPAIGN GUIDE: CONGRESSIONAL CANDIDATES AND COMMITTEES 90 (2014).

¹³⁰ GOSS, *supra* note 25, at 131.

¹³¹ *McDonald v. City of Chi.*, 561 U.S. 742, 750 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

¹³² *Heller*, 554 U.S. at 626–27 (noting that nothing in the opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms"). The accompanying footnote states: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

barring certain categories of people (e.g., felons, domestic abusers, drug addicts) from possessing a firearm, challenges to state restrictions on the right to carry a concealed weapon in public, state gun licensing laws, firearm taxes, and place-based restrictions on firearm use, among other issues. These cases were numerous, and given time constraints, we present data from three years: 2003 (seven years before *McDonald*), 2010 (the year *McDonald* was decided), and 2017 (seven years after *McDonald*).¹³³ These three years encompassed 331 cases. Figure 3 shows the trend, which as hypothesized represents a departure from the “null effects” narrative. There does seem to be a positive effect on Second Amendment litigation in the post-*Heller* legal environment.



To the extent that the post-*Heller* litigation was brought by organizations on behalf of individuals, we would infer a feedback effect on organizational

¹³³ NEXIS UNI, <https://www.nexisuni.com> (follow “Legal” hyperlink and select U.S. cases; search “Second Amendment challenge”; then under the timeline, enter “01/01/2003” into the start date and “12/31/2017” into the end date; then follow “Select multiple” hyperlink and select all federal cases and state cases at the appellate level). Cases are counted only once—that is, a case that moves through the district, appeals, and supreme courts would count as one case, not three. We have excluded “as applied” challenges, in which individuals convicted of gun law violations seek to overturn these convictions, or those that relied upon them, but not to overturn the law entirely. We also have excluded cases brought by individuals whose Second Amendment complaint constitutes an extraneous claim in a case brought on other grounds.

strategy and, perhaps, on resource allocation decisions. Because these lawsuits need to be financed, we likewise might infer that *Heller* and its progeny also had a feedback effect on funders interested in gun issues. Future research might investigate the degree of gun groups' and funders' engagement in this litigation.

C. Frameworks of Gun Rights Discourse

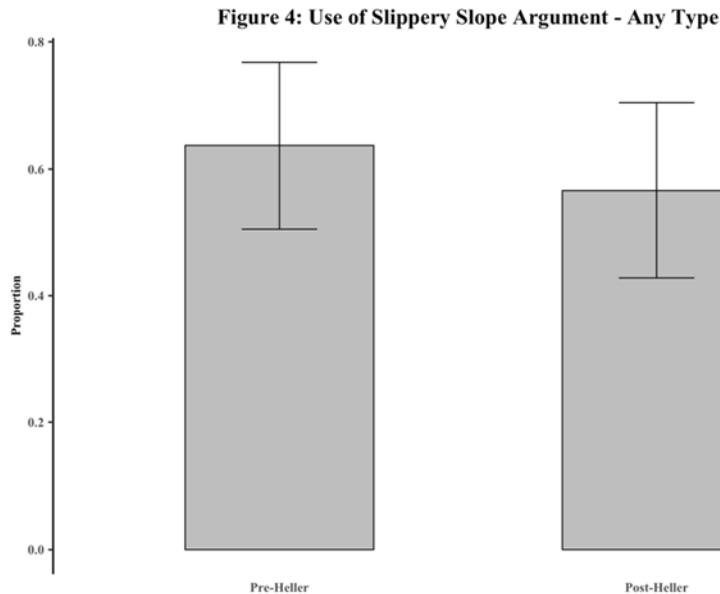
Although gun control groups did not agree with the *Heller* ruling, some gun control leaders thought it might contain a silver lining. By assuring law-abiding gun owners that their handguns were constitutionally protected, the thinking went, *Heller* and its progeny would remove the threat of confiscation and thereby calm political discourse.¹³⁴ For decades, the NRA had relied on the “slippery slope” argument to create or dramatize policy threats, which proved successful in mobilizing gun owners into politics.¹³⁵ To gun control groups, the slippery slope argument—that any modest proposal would put America on the road to tyranny—forestalled political bargaining and eliminated the possibility that lawmakers could enact reasonable gun legislation supported by polling majorities. If gun rights groups could no longer plausibly assert that legislation would lead to tyranny, perhaps the parties to the great American gun war could call a truce, and good-faith armistice talks could begin.

Did *Heller* and progeny shift gun rights discourse by influencing the range of plausible claims? To assess this question, we coded uses of slippery-slope style arguments in editorials published in the NRA's flagship magazine, *American Rifleman*. The examined editorials, typically written by the organization's chief executive, cover a nine-year window (2004–2012) centered on 2008, when the Court decided *Heller*.¹³⁶ As Figure 4 shows, there was a slight decline in threat rhetoric after *Heller*, and because we considered the entire population of editorials, this decline is not due to sampling error.

¹³⁴ Helmke, *supra* note 19.

¹³⁵ GOSS, *supra* note 79, at 172–73; Matthew J. Lacombe, *The Political Weaponization of Gun Owners: The National Rifle Association's Cultivation, Dissemination, and Use of a Group Social Identity*, 81 J. POL. 1342, 1353 (2019); Lacombe, *supra* note 25, at 142.

¹³⁶ The Court issued its *Heller* ruling on June 26, 2008. *Heller*, 554 U.S. at 570. *American Rifleman* first wrote about the ruling in the August 2008 issue. We coded each of the 108 editorials published from 2004 through 2012 in terms of whether it argues that particular gun control policies or political outcomes (e.g., elections) will eventually lead to gun bans. We coded two different conceptions of gun bans. First, we focused on the use of slippery-slope arguments that end with *universal* bans on the ownership of guns—that is, the total elimination of the right to own firearms in the United States. Second, we focused on the use of slippery slope arguments that end with *partial* gun bans or *additional controls* on firearms that are more severe than those currently being debated. Each of the figures depicts the proportion of editorials published pre- and post-*Heller* that use these sorts of arguments; the figures include 95% confidence intervals.



However, even with the modest dip, the substantive takeaway is that the slippery slope argument remained a prominent framework. For years it had proved critical to the construction of a politicized gun owner identity.¹³⁷ Part of this identity involved gun owners' understanding of themselves as a besieged community.¹³⁸ Policy threats to the gun owner identity had proved effective in mobilizing NRA members into politics.¹³⁹ The court rulings did not fundamentally alter this dynamic.

Using the same data, we examined more closely the substantive claims contained in the slippery-slope narrative. We ask: Where, according to the NRA, does this slippery slope eventually lead? Here we see a possible effect of *Heller*. As Figures 5 and 6 show, the editorials shifted from a claim that gun regulation would lead to a universal ban on firearms (the dominant pre-*Heller* framing) to a claim that gun regulation would lead to partial gun bans or other sorts of future restrictions (the dominant post-*Heller* framing).

¹³⁷ Lacombe, *supra* note 25, at 22, 37.

¹³⁸ *Id.* at 139–41.

¹³⁹ Lacombe, *supra* note 135, at 1352–53.

Figure 5: Use of Slippery Slope Argument - Universal Gun Bans

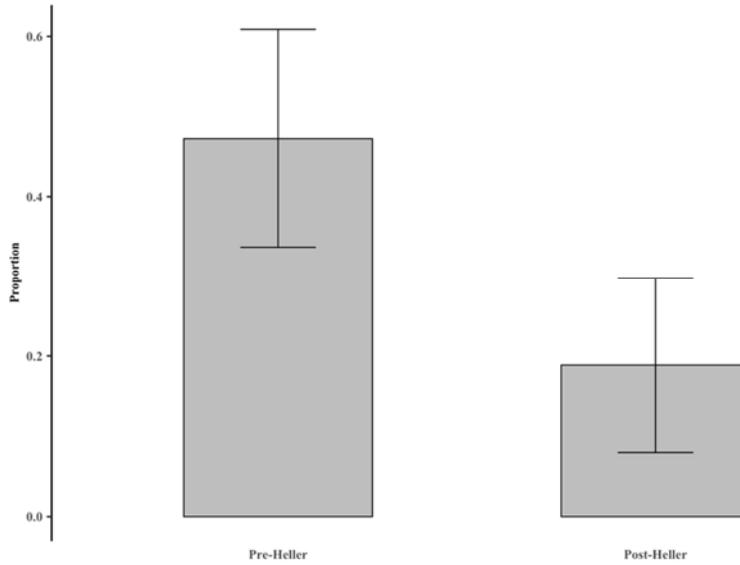
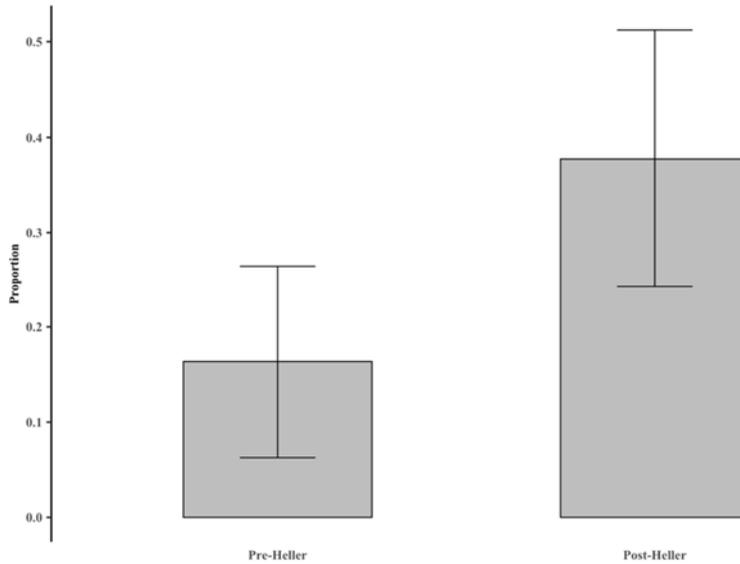


Figure 6: Use of Slippery Slope Argument - Partial Gun Bans or Additional Controls



Taken together, these figures suggest that the NRA updated its threat framework to accommodate the *Heller* and *McDonald* rulings. In the new discourse, there was perhaps a limit on how far the slippery slope could descend—but it remained slippery. Court rulings that might have undermined the political power of these mobilizing frameworks appear to have just reoriented the rhetoric toward slightly different types of policy threats.

D. Organizational Capacity of Gun-Related Organizations

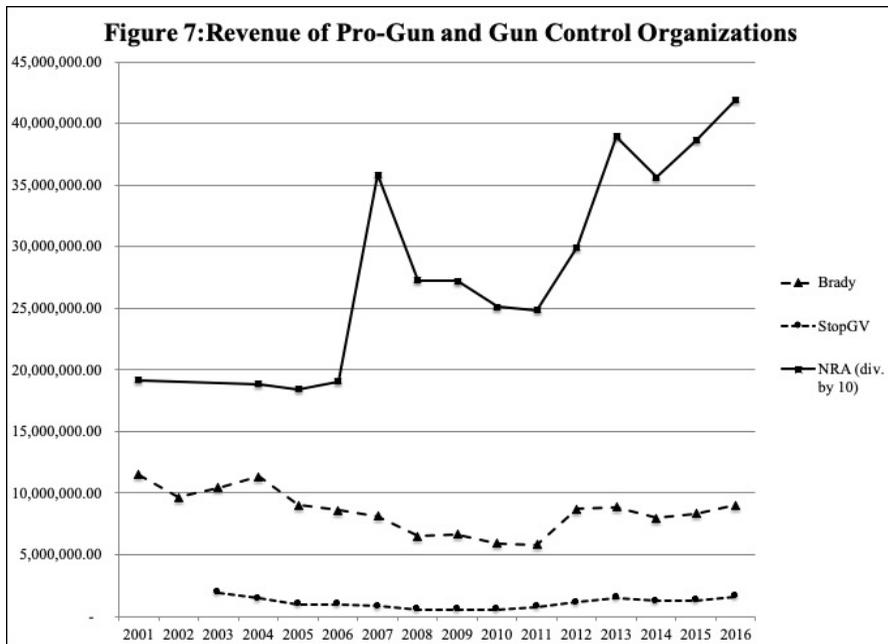
Public policies can affect the capacity of organizations to engage in politics. Policies may expand or shrink organizations' financial resources; provide or remove political opportunities for membership growth; or offer other goods such as data, access to convenings and networks, and authoritative validation.¹⁴⁰ Public policy has operated on or through gun-related groups via all of these mechanisms.¹⁴¹ Here, we consider financial and membership resources.

To track the relative financial resources pre- and post-*Heller*, we examined the informational tax returns of three leading legislative advocacy organizations, organized under Section 501(c)(4) of the Internal Revenue Code, and their charitable affiliates, organized under Section 501(c)(3).¹⁴² These organizations were the NRA (and the NRA Foundation), the Brady Campaign to Prevent Gun Violence (and the Brady Center to Prevent Gun Violence), and the Coalition to Stop Gun Violence (and the Educational Fund to Stop Gun Violence). The Figure captures the combined revenue of the (c)(4) and the related (c)(3) for each entity. The NRA's resources have been divided by ten to fit on the scale.

¹⁴⁰ GOSS, *supra* note 79, at 73–90; Campbell, *supra* note 98, at 337; Mettler & SoRelle, *supra* note 24, at 110–13; Mettler & Soss, *supra* note 24, at 62. *See generally* Goss, Barnes & Rose, *supra* note 25.

¹⁴¹ GOSS, *supra* note 79, at 73–90; SPITZER, *supra* note 92, at 132–34.

¹⁴² Nonprofit organizations recognized under Sections 501(c)(3) or 501(c)(4) that have normal annual revenues of at least \$50,000 are required to file these informational tax returns, known as Form 990, each year. We obtained these forms from the online repository Guidestar.org (now Candid.org).



As the Figure shows, *Heller* appears to have had no discernible effect on organization revenues on either side of the gun debate. The flat or downward slope observed before *Heller* continued afterward.

Of course, it is possible that these lines would have looked different in the absence of *Heller*. Perhaps the NRA's revenues would have held steady longer instead of declining; perhaps the gun control groups' revenues would have ticked up a bit. Such counterfactuals are unmeasurable and ultimately unknowable. That said, it is reasonable to infer from the data that if *Heller* had produced a major *independent* impact on organizational revenues, this effect must have been offset by one or more other major forces to produce the observed (largely flat) trend lines. If *Heller* mattered, what offsetting forces might have mattered enough to obscure the ruling's effect? Two plausible possibilities present themselves: (1) the Great Recession and (2) the election of Democratic President Barack Obama and a Democratic Congress. Theory tells us that both events would have been expected to produce a positive effect on NRA revenues. Both the recession and the election of a unified Democratic government (headed by the first African-American president) were easily framed as threats to gun owner rights, which we would expect to produce increased revenues flowing to the NRA. Of course, the recession also reduced many people's disposable

income, which would have been expected to produce a revenue loss. Because NRA revenues declined not only during the worst of the recession, but also through 2012, when the worst of the recession was over, we feel confident in our conclusion that *Heller* had little if any effect on organizational revenues.

The uptick in revenues occurred in 2012–2013, especially for the NRA but also for the two gun control groups. Press accounts suggest that these increases were the result of the Sandy Hook Elementary School shooting, which occurred in mid-December 2012.¹⁴³ The shooting claimed the lives of twenty first-graders and six educators, traumatized and mobilized gun control sympathizers, and pushed gun policy reform to the top of the congressional agenda, as well as that of many state legislatures.¹⁴⁴ While organizational-revenue data presented here do not allow for a fine-grained analysis, the patterns are consistent with Rosenberg's conclusion that litigation is a less potent force than politics in spurring political participation.

A second measure of organizational capacity is membership. Membership is valuable because lawmakers are accountable to voters for their jobs and thus are attentive to organizations that can mobilize large numbers of people.¹⁴⁵ Mass membership organizations also have played a key role in influencing the development and passage of major social legislation.¹⁴⁶ Indeed, organizations frequently cite the size of their membership and its policy sophistication to establish their authority before lawmakers.¹⁴⁷ However, in many policy domains, mass membership organizations have faded, giving way to interest groups led by professionals without an organized grassroots base.¹⁴⁸ Thus,

¹⁴³ Alana Abramson, *Membership in Gun Groups Is Spiking After the Florida Shooting*, TIME (Mar. 2, 2018, 4:20 PM), <https://time.com/5176471/national-rifle-association-membership-florida-shooting/>; Maggie Astor, *Newtown Wasn't an End for Gun Control. It Was a Beginning.*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/politics/newtown-parkland-guns.html>. See generally Kristin A. Goss, *Whatever Happened to the 'Missing Movement'? Gun Control Politics Over Two Decades of Change*, in GUN STUDIES: INTERDISCIPLINARY APPROACHES TO POLITICS, POLICY, AND PRACTICE 136 (Jennifer Carlson, Kristin A. Goss & Harel Shapira eds., 2018).

¹⁴⁴ Reid Wilson, *Seven Years After Sandy Hook, Politics of Guns Has Changed*, HILL (Dec. 14, 2019, 6:00 AM), <https://thehill.com/homenews/state-watch/474479-seven-years-after-sandy-hook-the-politics-of-guns-has-changed>.

¹⁴⁵ Jeff Stein, *The NRA Is a Powerful Political Force—But Not Because of Its Money*, VOX (Oct. 5, 2017, 1:40 PM), <https://www.vox.com/policy-and-politics/2017/10/5/16430684/nra-congress-money-no>. See generally GOSS, *supra* note 25.

¹⁴⁶ EDWIN AMENTA, *WHEN MOVEMENTS MATTER: THE TOWNSEND PLAN AND THE RISE OF SOCIAL SECURITY* 24 (2006); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 76 (1992).

¹⁴⁷ GOSS, *supra* note 25, at 26.

¹⁴⁸ *Id.* at 156; THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 199–200* (2003).

organizations that can retain and mobilize a mass base have political advantages. Recent research has shown, for example, that lawmakers afford outsized deference to citizens who show up and make noise, even if they do not represent the median voter in the lawmaker's district.¹⁴⁹ Thus, if court rulings are capable of influencing the size or enthusiasm of an organization's membership, they could have potentially important policy feedback effects.

With respect to *Heller* and related rulings, assessing the feedback effects on membership capacity is complicated. To our knowledge, there is no consistent, valid, and reliable measure of membership in gun control groups over time. This deficiency relates to the observation above that many organizations have moved from a model of influence based on mass memberships to a model based on professional experts funded by elite donors—what Theda Skocpol terms the evolution from “membership to management.”¹⁵⁰ However, this insight gives us confidence that the financial trends presented above accurately capture the *Heller* effect on gun control groups' “membership”—in this case, the non-effect.

On the gun rights side, the data are more accessible. Members of the NRA are allowed to choose one of the organization's official magazines to receive as a benefit of membership.¹⁵¹ Magazine subscriptions are reported to the Alliance for Audited Media (AAM).¹⁵² The Alliance certifies magazine-circulation figures for the benefit of advertisers, who typically pay rates based on the number of potential readers the ad might reach and thus need assurance that the readership figures are accurate. The AAM makes magazines' aggregate circulation figures publicly available. In the case of the NRA, these circulation figures provide a reasonable proxy for total membership. Likewise, the trends in total NRA magazine subscriptions provide a reasonable proxy for the trends in NRA membership.

¹⁴⁹ David E. Broockman & Christopher Skovron, *Bias in Perceptions of Public Opinion Among Political Elites*, 112 AM. POL. SCI. REV. 542, 544 (2018); Alexander Hertel-Fernandez, Matto Mildemberger & Leah C. Stokes, *Legislative Staff and Representation in Congress*, 113 AM. POL. SCI. REV. 1, 2 (2019).

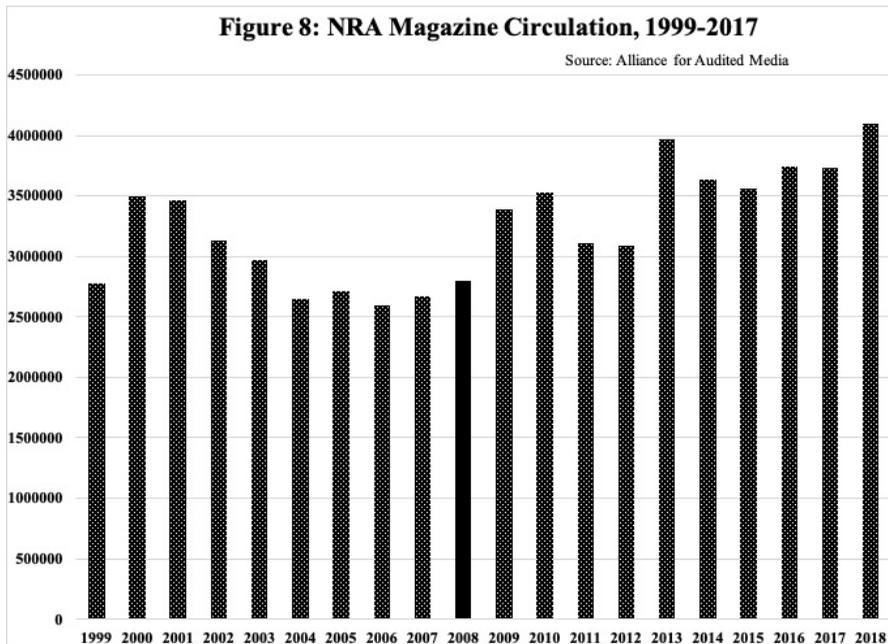
¹⁵⁰ SKOCPOL, *supra* note 148, at 127.

¹⁵¹ *Membership*, NRA, https://membership.nra.org/MultiStep/Joins?gclid=EA1aIQobChMIq4SSzLDP5wIVzJ6zCh31-wppEAAyASAAEgI22vD_BwE (last visited Feb. 22, 2020).

There were three magazines through mid-2016—*American Rifleman*, *American Hunter*, and *America's 1st Freedom*. In mid-2016, the NRA added a fourth selection—*Shooting Illustrated*. The circulation totals in Figure 8 count subscriptions to *Shooting Illustrated* in 2017 and 2018, but not in 2016, when the magazine was new and had not been adopted by many members. That said, the total 2016 magazine circulation figure might slightly underestimate the NRA's membership in that year.

¹⁵² *Who We Are*, ALLIANCE FOR AUDITED MEDIA, <https://auditedmedia.com/about/who-we-are> (last visited Feb. 22, 2020).

Figure 8 shows NRA magazine circulation figures from 1999–2017—a period that encompasses roughly a decade before and a decade after the *Heller* and *McDonald* rulings.¹⁵³ The pattern is ambiguous. The uptick in membership after 2008 (corresponding with *Heller*) is consistent with a *Heller* effect, a recession effect, and/or an Obama/Democratic takeover effect. The dip in 2011–2012 is also consistent with each explanation—the recession was fading, Obama was not making any moves on gun control, and *Heller* had not sparked the sort of political controversy that causes people to join advocacy groups. The post-2011 pattern, in particular the 2013 (post-Sandy Hook) and 2018 (post-Parkland) jumps in membership are consistent with the effects of mass shootings on gun politics.



To summarize, *Heller's* timing—in the midst of a great recession and an especially consequential national election—makes it hard to assess its independent effect on organizational memberships. Besides being unfriendly to control advocates, *Heller* was not especially helpful to empirical social scientists seeking to understand the feedback effects of court decisions on politics. Our assessment is that *Heller* was reassuring to gun owners. Accustomed to

¹⁵³ We are grateful to Michael Siegel, of Boston University's School of Public Health, for sharing these NRA magazine circulation figures with us.

mobilizing based on policy or identity threats, this affirmational ruling probably had little impact on gun owners' political participation. Threats posed by focusing events and electoral shifts likely mattered more.

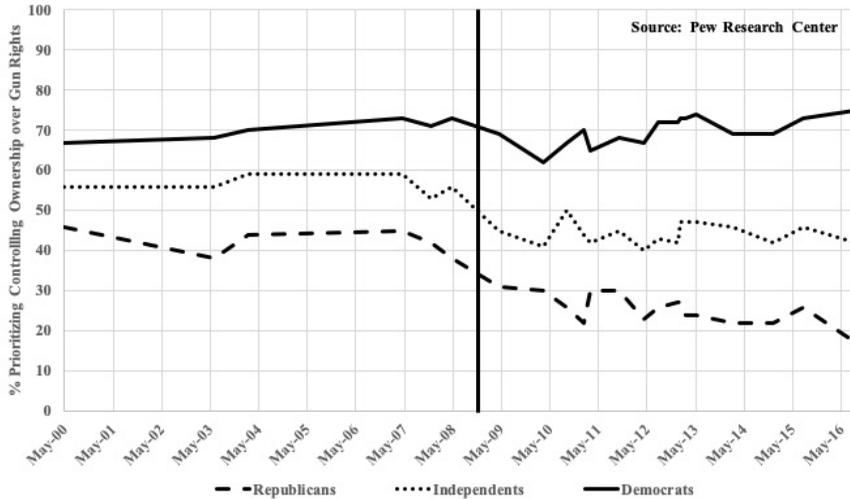
Like *Brown v. Board of Education* and *Roe v. Wade*, the Supreme Court's two gun cases—*Heller* and *McDonald*—involved a salient social issue easily understood by the mass public. Gun control had been the topic of intense political conflict at least since the 1960s.¹⁵⁴ The decade leading up to *Heller* had included the mass shooting at Columbine High School (1999), the largest ever public demonstration for gun control (the Million Mom March, 2000), and the massacre of students and instructors at Virginia Tech (at that time, the deadliest such incident in American history, 2007). Aside from the political ramifications, *Heller* and *McDonald* had the potential to affect a broad swath of the population. In 2008, an estimated 35% of American households had a firearm of some type, and about 20% had a handgun—whose prohibition by the D.C. government was at issue in *Heller*.¹⁵⁵ In sum, the gun cases stood out from the more common types of Supreme Court cases, which involve narrow, technical matters of concern only to small policy communities.

We lack a consistent, reliable measure of mass-level participation around gun regulation. However, polling organizations have asked generic questions aimed at assessing individuals' posture toward the gun issue. For example, for many years, the Pew Research Center asked: "What do you think is more important—to protect the right of Americans to own guns, OR to control gun ownership?"¹⁵⁶ Figure 9 shows the percentage of respondents who prioritized gun control, broken down by political party identification. As the Figure suggests, pro-control sentiment had started to decline before the *Heller* ruling was announced, in June 2008 (indicated by the vertical line). And the decline did not visibly accelerate afterward.

¹⁵⁴ GOSS, *supra* note 79, at 29.

¹⁵⁵ Figures generated by authors from the General Social Survey's online data tool, GSS DATA EXPLORER, <https://gssdataexplorer.norc.org/trends/Civil%20Liberties?measure=owngun> (last visited Feb. 7, 2020).

¹⁵⁶ 2014 Political Polarization Survey, PEW RES. CTR. (June 12, 2014), <https://www.people-press.org/2014/06/12/gun-rights/gun-control/>.

Figure 9: Public Opinion: Prioritize Regulation over Rights

The Gallup Organization’s version of the generic question asks: “In general, do you feel that the laws covering the sale of firearms should be made more strict, less strict, or kept as they are now?”¹⁵⁷ The trend lines show no disruption in 2008. In the years preceding *Heller*, there had been a gradual erosion in the fraction of Americans wanting stricter laws and a concomitant rise in the fraction wanting the status quo; the fraction wanting less strict laws was low (generally 5–10%) and stable.¹⁵⁸ These data are consistent with the other evidence suggesting that the court rulings did not alter mass politics.

V. COURTS, CHANGE, AND A CAVEAT

When taken together, our findings indicate that the effects of the landmark *Heller* ruling have, at least to date, been rather limited. Together with *McDonald*, the *Heller* ruling did lead to the repeal of some of the country’s most restrictive handgun laws. Although these changes were significant, their effects were geographically narrow, pertaining only to Washington, D.C., San Francisco, and the Chicago area.¹⁵⁹ Beyond the direct effects of the rulings on existing gun policies, we also examined these rulings’ impacts on three main categories of outcomes: (1) other handgun laws and policymaker agendas; (2) the political capacity and strategies of pro- and anti-gun advocacy organizations; and (3)

¹⁵⁷ *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx> (last visited Feb. 22, 2020).

¹⁵⁸ *Id.*

¹⁵⁹ *See supra* Part III.

mass attitudes about gun control. With the exception of gun rights litigation, we find that the rulings had either miniscule or non-existent impacts on the political and social outcomes we examined.¹⁶⁰ Neither the hopes, nor the worries, of advocates have borne out.

Our findings support the constrained view of the Court advanced by Rosenberg. Notably, however, Rosenberg builds his argument around cases that *progressives* hoped would spur widespread change.¹⁶¹ Our analysis, on the other hand, focuses on a pair of cases that *conservatives* hoped would drive broader changes aligned with their beliefs. In finding that the conservative victories delivered by the *Heller* and *McDonald* cases were mostly symbolic, our conclusion validates Rosenberg's basic claim—that courts are poor substitutes for politics as engines of change—but also suggests that hollow hopes may bedevil conservatives as well as progressives.¹⁶²

Our findings are consistent with other work finding that courts are cautious about getting too far out in front of public opinion.¹⁶³ Such caution is logical insofar as courts, lacking both sword and purse, typically must rely on moral suasion to ensure compliance with their rulings. The *Heller* and *McDonald* rulings affected laws that were generally out of step with U.S. public opinion.¹⁶⁴

If court rulings are lagging indicators of broader political dynamics, there is reason to expect that courts will have muted feedback effects on politics writ large. The effect of *Heller* and its progeny was noticeable only in the realm of litigation and to a small extent in NRA rhetoric. Regarding litigation, the rulings appeared to encourage more Second Amendment challenges to gun regulations, but most of these challenges were unsuccessful.¹⁶⁵ The feedback effect on litigation was predictable, narrowly defined, and not especially meaningful in terms of producing social change.¹⁶⁶ Regarding NRA rhetoric, the rulings led to minor semantic adjustments only; the longstanding slippery-slope argument remained a trusty weapon in the organization's political arsenal.¹⁶⁷

¹⁶⁰ See *supra* Part V.

¹⁶¹ See *supra* Part II.

¹⁶² See *supra* Part II.

¹⁶³ Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 75 (2011).

¹⁶⁴ See *supra* Part III.

¹⁶⁵ See *supra* Part V.B.

¹⁶⁶ See *supra* Part V.B.

¹⁶⁷ See *supra* Part V.C.

Beyond these minor exceptions, the pro-gun rulings had undetectable feedback effects. The rulings appeared to produce no meaningful changes in the resources or strategies of gun control organizations, which had long since adjusted to the same forces weighing on the Court, or on the strategies of lawmakers, who presumably also had bent to the shifting realities of gun politics.¹⁶⁸ The NRA did not receive a detectable *Heller* bounce in members or revenue. In addition, the rulings had little effect on public opinion, which was a leading indicator of the pro-gun drift in American politics. By 2008, the zone of political conflict over guns had become demarcated in such a way as to sideline older disputes over draconian gun bans.¹⁶⁹ This development arguably gave the Court the political space to issue its landmark rulings without fear of backlash or broad resistance. A corollary to the Court's having such political space is that the rulings' feedback effects would probably be minimal to nil.

Interestingly, gun rights advocates have grown alarmed by *Heller* and progeny's minimal effects on gun law and politics. The NRA and conservative legal activists are frustrated that in their view the courts have treated the Second Amendment as a "second-class right"—a phrase first used by Justice Clarence Thomas referring to the lack of post-*Heller* rulings striking down gun laws based on the Second Amendment's right to bear arms.¹⁷⁰ The conservatives' position is that *Heller* should have set off a cascade of pro-gun rulings and, presumably, accelerated a political shift favoring the gun-rights movement.¹⁷¹ Such frustrations reinforce the conclusion that courts may offer a hollow hope to reformers not only on the left, but also on the right.

On a broader level, our findings connect the scholarly literature on policy feedback to the study of courts. In so doing, this case study suggests that—like other forms of public policy—court rulings may have a limited role in reshaping politics. Political actors (including activists, politicians, and party officials) seeking to advance a policy agenda and build durable political power can thus learn from *Heller*. The case reminds us that despite courts' attractiveness as agents of change amid legislative gridlock and polarization, they may not be strong substitutes for more traditional forms of political influence.

¹⁶⁸ See *supra* Parts IV.A–C, V.D.

¹⁶⁹ See *supra* Part V.A.

¹⁷⁰ Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?* 102 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Series, Working Paper No. 18-43, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247773; David B. Kopel, *Heller's Precarious Situation*, NAT'L REV. (Sept. 12, 2019, 12:25 PM), <https://www.nationalreview.com/magazine/2019/09/30/hellers-precious-situation%E2%80%88/>.

¹⁷¹ Kopel, *supra* note 170.

We end with an important caveat. As we concluded this Article, the Supreme Court dismissed the case of *New York State Rifle and Pistol Association v. City of New York*, which had challenged a New York City law that had strictly regulated the transportation of handguns.¹⁷² After the Supreme Court agreed to hear the case, the city repealed the law in hopes of curtailing Court review; this move led the Court to rule that the case had become moot.¹⁷³ Although the Court's restraint in this case aligns with the argument we have made throughout this Article, the ruling nonetheless leaves the door open to future cases. Writing in dissent, Justice Samuel Alito—joined by Justices Neil Gorsuch and Clarence Thomas—made clear that the Court should consider future challenges to gun regulations on Second Amendment grounds.¹⁷⁴ Moreover, Justice Brett Kavanaugh—despite agreeing with the majority about the case's mootness—wrote separately to express his openness to future challenges.¹⁷⁵ Subsequent rulings, therefore, could call into question the constitutionality of common state and local laws, such as those that give law enforcement discretion in granting concealed-carry licenses. Indeed, it is possible that future court rulings that threaten longstanding gun control laws or open the door to gun liberalization could produce the sorts of feedback effects that have gone largely undetected thus far.

¹⁷² 140 S. Ct. 1525 (2020).

¹⁷³ *Id.*; Robert Barnes, *New York Eased Gun Law Hopeful Supreme Court Would Drop Second Amendment Case—but that Hasn't Happened Yet*, WASH. POST (Aug. 11, 2019, 7:00 AM), https://www.washingtonpost.com/politics/courts_law/new-york-eased-gun-law-hopeful-supreme-court-would-drop-second-amendment-case—but-that-hasnt-happened-yet/2019/08/10/9031682e-bab6-11e9-a091-6a96e67d9cce_story.html.

¹⁷⁴ Robert Barnes, *Supreme Court dismisses anticipated New York gun rights case because the law in question has been rescinded*, WASH. POST (Apr. 27, 2020, 5:58 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-dismisses-anticipated-new-york-gun-rights-case-because-the-law-in-question-has-been-rescinded/2020/04/27/d05c39e6-8893-11ea-9dfd-990f9dcc71fc_story.html

¹⁷⁵ *Id.*