

# THE MODERN SECOND AMENDMENT: A PROGRESSIVE APPROACH TO LIMITING INDIVIDUAL RIGHTS UNDER THE SECOND AMENDMENT

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*When a country with less than five percent of the world's population has nearly half of the world's privately owned guns and makes up nearly a third of the world's mass shootings, it's time to stop saying guns make us safer.*

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## I. INTRODUCTION

Gun ownership is a protected American right under the Second Amendment, which the Supreme Court has interpreted to include an individual right to own guns.<sup>2</sup> This interpretation stems from the sense of need by individual rights proponents for safety or defense against some threat, and a fear that the removal of guns will lead to an erosion of rights. But what if this very right is itself a source of fear and intimidation? Guns have pervaded almost every aspect of American society. Children cannot go to school without the possibility of a shooter coming onto campus and taking lives.<sup>3</sup> People cannot visit places of worship without the threat of religiously-motivated gun violence.<sup>4</sup> Protestors cannot peacefully take to the streets to promote a message of racial justice without potentially encountering armed opposition from citizens who do not agree with their cause.<sup>5</sup> Election workers cannot even count votes without the threat of gun violence from citizens who are unhappy with election results.<sup>6</sup> When guns are used to threaten and intimidate, it is time to question whether our country's originalist conception of individual rights truly upholds our values as Americans, or whether we need to look at the bigger picture and take

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<sup>1</sup> DaShanne Stokes (@DaShanneStokes), TWITTER (Oct. 27, 2018, 12:55 PM), <https://twitter.com/DaShanneStokes/status/1056273207081271299> [<https://perma.cc/QJQ4-MJC5>].

<sup>2</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 602 (2008).

<sup>3</sup> See Aliza Vigderman & Gabe Turner, *A Timeline of School Shootings Since Columbine*, SECURITY.ORG (Aug. 9, 2021), <https://www.security.org/blog/a-timeline-of-school-shootings-since-columbine> [<https://perma.cc/R9QC-2XJS>].

<sup>4</sup> See generally *A List of Some US House of Worship Shootings Since 2012*, ASSOCIATED PRESS (Oct. 27, 2018), <https://apnews.com/article/0b2a73fdcf944d19aaafa620bb1d94c0>.

<sup>5</sup> See Sam Knef, *Violence at Protests Sparks Conversation on Open-Carry Gun Laws in Michigan*, NEWSCHANNEL 3 (Aug. 28, 2020), <https://wwmt.com/news/local/violence-at-protests-sparks-conversation-on-open-carry-gun-laws-in-michigan> [<https://perma.cc/K2KB-E4E2>].

<sup>6</sup> See Tim Sullivan & Adam Geller, *Increasingly Normal: Guns Seen Outside Vote-Counting Centers*, STARTRIBUNE (Nov. 7, 2020, 7:20 AM), <https://www.startribune.com/protesters-crying-foul-over-vote-counts-stir-safety-concerns/572993422> [<https://perma.cc/4F5R-QMS9>].

progressive steps to limit individual gun rights in order to protect our other rights, such as the right to assemble or vote, discussed further below.

This Note will assert that individual gun rights in the modern world have led to an environment of fear and intimidation, seen as recently as the 2020 racial justice and election protests, and this environment warrants a progressive approach to limiting the individual right to own guns under the Second Amendment. Part II of this Note will provide a brief history of the Second Amendment in America, including social movements that have arisen surrounding gun control. Part III will overview originalism, and how it was used by the Supreme Court in its *District of Columbia v. Heller* decision. Part IV will briefly survey progressive constitutionalism and propose a progressive view of the Second Amendment. Part V will discuss how guns are currently used in American society and relevant factors that the Court should consider when deciding gun control cases. Finally, Part VI will make suggestions for how the Court should consider competing social movements when interpreting the Second Amendment.

## II. HISTORY OF THE SECOND AMENDMENT

A closer look into the history of the Second Amendment and its interpretation by courts reveals a better understanding of what rights the Second Amendment currently preserves, as well as who owns these rights. The text of the Second Amendment 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.”<sup>7</sup> A major source of conflict comes from what exactly the phrases “well regulated Militia,” “security of a free State,” and “right of the people” mean.<sup>8</sup> In particular, there is debate about whether these phrases should be read to protect only an “exclusively state’s right” to maintain military units or whether they should be read to guarantee an “individual right” to gun ownership.<sup>9</sup>

### A. EARLY HISTORY

Before diving into the theory behind the Supreme Court’s interpretation of the Second Amendment, it is helpful to take a general look at gun regulations throughout American history. A survey of gun regulation allows a deeper understanding about why certain pieces of legislation arose at specific points in American history, and of the theoretical perspectives that drove these decisions.

At the time the Framers drafted the Constitution, the public generally distrusted federal government and feared tyranny.<sup>10</sup> Militias were seen as an internal police force, and they were military forces drawn from citizen populations.<sup>11</sup> During the Revolutionary Era, militia service was expected of men of a certain age, and because they were expected to bring their own

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<sup>7</sup> U.S. CONST. amend. II.

<sup>8</sup> *Id.*

<sup>9</sup> Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983).

<sup>10</sup> See generally MICHAEL WALDMAN, *One: Patriot’s Day, in THE SECOND AMENDMENT: A BIOGRAPHY* (2014).

<sup>11</sup> MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 6, 16 (2014).

guns for service, bearing arms was a requirement, not a right.<sup>12</sup> The Framers drafted the Second Amendment with the militia, a small number of men who would use their weapons only for a short time each year, in mind.<sup>13</sup> As the early conception of a militia fell out of use, modern gun rights gradually evolved in America as the country expanded westward and state constitutions began to protect the right to keep guns in the home while regulating other types of gun use.<sup>14</sup>

The first substantive regulations on guns in America were not implemented until the 1900s, with the National Firearms Act (“NFA”) in 1934.<sup>15</sup> The Act imposed a tax on making and transferring firearms, as well as an occupational tax on those engaged in the business of “importing, manufacturing, and dealing” in firearms.<sup>16</sup> The Act also required all NFA firearms—including shotguns, rifles with barrels less than eighteen inches in length, machine guns, mufflers, and silencers—to be registered with the Secretary of the Treasury.<sup>17</sup> While not directly related to the right to own a firearm, the Act established regulation of firearms, opening the door for future regulations.

Later, the Federal Firearms Act of 1938 (“FFA”) established even more regulations, including requiring gun manufacturers, dealers, and importers to have a license.<sup>18</sup> The FFA was later repealed and replaced by the Gun Control Act of 1968 (“GCA”), which, among other things, established a minimum age for gun purchase, required all firearms to have a serial number, and expanded previous categories of persons prohibited from owning guns.<sup>19</sup> While all of this legislation established that regulation of guns is possible under the Constitution, it is also appropriate to look to Supreme Court history when specifically analyzing the individual right to own guns in America.

## B. SUPREME COURT DECISIONS RELATING TO THE SECOND AMENDMENT

Early American court history established that guns ownership is not an individual right under the Second Amendment. For example, in 1876, the Supreme Court decided in *United States v. Cruikshank* that the right to bear arms “is not a right granted by the Constitution.”<sup>20</sup> However, the Court also stated that the right to bear arms is “not dependent upon [the Constitution] for its existence.”<sup>21</sup> Instead, as asserted in *Cruikshank* and reaffirmed in *Presser v. Illinois* in 1886, the Second Amendment “has no other effect than

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<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 78.

<sup>14</sup> *Id.*

<sup>15</sup> *National Firearms Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES (Apr. 7, 2020), <https://www.atf.gov/rules-and-regulations/national-firearms-act> [<https://perma.cc/V4AH-G4R8>].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Key Federal Regulation Acts*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/key-federal-regulation-acts> [<https://perma.cc/9VYT-ZHKV>] (last visited Dec. 17, 2020).

<sup>19</sup> *Id.*

<sup>20</sup> *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); Eugene Volokh, *Supreme Court Cases on the Right to Keep and Bear Arms*, UCLA, <https://www2.law.ucla.edu/volokh/beararms/sct.htm> [<https://perma.cc/VW4F-YPVH>] (last visited Dec. 17, 2020) (citation omitted).

<sup>21</sup> *Cruikshank*, 92 U.S. at 553; *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

to restrict the powers of the national government.”<sup>22</sup> These early cases still do not make clear whether there is an individual right to own guns, but they at least propose that if such a right exists, it does not come from the Constitution. This is important to the theoretical debate about what exactly the Second Amendment protects.

Further, in 1939, the Supreme Court decided its first case directly related to gun regulation in *United States v. Miller*. In this case, the Court asserted that there is no individual right to own a sawed-off shotgun, as it is not necessary for the preservation of a well regulated militia.<sup>23</sup> As the first Supreme Court decision directly related to gun control regulation, it is significant that the Court did not read an individual right to own a shotgun into the Second Amendment. Even more telling, the Court’s decision rested heavily on the need to preserve a well-regulated militia, which implies that the Second Amendment is not an individual right.

After *Miller*, American sentiment generally shifted toward the protection of individual gun rights. In 1986, Congress passed the Firearm Owners Protection Act, which loosened many previous restrictions, for example, by repealing record keeping requirements for ammunition sales.<sup>24</sup> Though the Act loosened some restrictions, it also tightened some restrictions of the GCA, for example, by amending the GCA to prohibit the transfer and possession of machine guns, though it exempted private agencies and machine guns already in possession at the time of the ban.<sup>25</sup> Later, the focus of regulations generally shifted away from regulating *types* of guns to instead regulating *who* could own guns. For example, the Brady Handgun Violence Prevention Act of 1993 (“Brady Law”) established a waiting period for individuals looking to purchase handguns in order to conduct a background check.<sup>26</sup> While the interim period imposed by the Brady Law was only in effect until 1998 and applied only to handguns, the law contains permanent provisions that apply to all firearms.<sup>27</sup>

### C. *UNITED STATES V. LOPEZ* AND ITS AFTERMATH

The next major gun control case, *United States v. Lopez*, came in 1995, with the Supreme Court deciding that Congress did not have power under the Commerce Clause to pass the Gun-Free School Zones Act, an act that made it illegal to carry a firearm within one thousand feet of a school.<sup>28</sup> Justice Rehnquist identified the Gun-Free School Zones Act as a criminal statute outside of federal control.<sup>29</sup> However, he glaringly omitted any justification for why guns do not significantly affect interstate commerce,

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<sup>22</sup> *Id.*

<sup>23</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939).

<sup>24</sup> *See generally* Firearm Owners’ Protection Act, 18 U.S.C. § 921 (1986).

<sup>25</sup> *National Firearms Act*, *supra* note 15.

<sup>26</sup> *Brady Law*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (July 15, 2021), <https://www.atf.gov/rules-and-regulations/brady-law> [<https://perma.cc/U597-Y6GB>].

<sup>27</sup> *Id.*

<sup>28</sup> *United States v. Lopez*, 514 U.S. 549, 551, 567–68 (1995), *superseded by statute*, Violent Crime Control and Law Enforcement Act of 1994, § 922(q), Pub. L. No. 103-322, § 320904, 108 Stat. 1796, *as recognized in* *United States v. Tucker*, 90 F.3d 1135 (6th Cir. 1996).

<sup>29</sup> *Id.* at 559–61.

which would allow them to be regulated under the Commerce Clause.<sup>30</sup> This made the *Lopez* decision unstable and vulnerable to change.<sup>31</sup> In fact, the reasoning in *Lopez* has already been superseded by statute in the Sixth Circuit by a case regarding controlled substances sold within one thousand feet of a school.<sup>32</sup>

Following *Lopez*, there were further efforts to protect individual gun ownership. For example, in 2005, the Protection of Lawful Commerce in Arms Act reinforced the idea that there is an individual right to own guns, even when individuals are “not members of a militia or engaged in military service or training.”<sup>33</sup> Later Supreme Court decisions followed these changing sentiments of the American public toward an individual right to own guns. As evident in the history of the Second Amendment, this individual right was developed with changes in public sentiment and did not exist at the writing of the Second Amendment.

#### D. SOCIAL MOVEMENTS SURROUNDING THE SECOND AMENDMENT

Before discussing a more recent Supreme Court decision surrounding gun control, an evaluation of social movements in general is warranted. Social movements can play a role in constitutional law, as they allow citizens to “voice concern, criticism, or outright resistance to government policy,” and they can change constitutional tradition.<sup>34</sup> Social movements have led the Court to make constitutional change without the democratically-provided means of creating these changes, such as amendments.<sup>35</sup> There are countless examples of this, such as the labor movement, the civil rights movement, and the women’s movement.<sup>36</sup> Many shifts in constitutional meaning come from judicial interpretation, therefore social movements can play a significant role in shifting judicially prescribed meaning of the Constitution,<sup>37</sup> and this form of popular constitutionalism can give the people a level of control over the “interpretation and enforcement” of the constitutional law that guides their lives.<sup>38</sup> The debate surrounding the Second Amendment is no stranger to social movements.

##### 1. Social Movements Advocating Broad Gun Rights

One side of the gun control debate is backed by social movements which advocate broad gun rights. The most recognizable actor in this movement is the National Rifle Association (“NRA”), which was founded in 1871 to “promote and encourage rifle shooting on a scientific basis.”<sup>39</sup> In 1903, the

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<sup>30</sup> See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 203 (1995); see also *Lopez*, 514 U.S. at 603, 609 (Souter, J., dissenting).

<sup>31</sup> Lessig, *supra* note 30, at 214.

<sup>32</sup> See generally Tucker, 90 F.3d 1135.

<sup>33</sup> Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 (2005).

<sup>34</sup> Reva Siegel, *The Jurisgenerative Role of Social Movements in United States Constitutional Law* 1, 2 (2004).

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 5.

<sup>38</sup> Larry Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 959 (2004).

<sup>39</sup> *A Brief History of the NRA*, NAT’L RIFLE ASS’N, <https://home.nra.org/about-the-nra> [https://perma.cc/FN78-NJJK] (last visited Dec. 17, 2020).

NRA began promoting youth shooting programs and established rifle clubs at major colleges, universities, and military academies across the United States.<sup>40</sup> Later, in 1934, the NRA formed a Legislative Affairs Division to stay updated with legislative changes “[i]n response to repeated attacks on the Second Amendment rights.”<sup>41</sup> It mailed analysis and legislative information about the Second Amendment to NRA members so that they could take action in defense of their rights.

In 1975, upon “recognizing the critical need for political defense of the Second Amendment,” the NRA created the Institute for Legislative Action to begin lobbying for broad Second Amendment protection.<sup>42</sup> Throughout the years, the NRA has released several publications with a focus on self-defense and recreational gun use.<sup>43</sup> The NRA has been recognized as “America’s foremost defender of Second Amendment rights,”<sup>44</sup> running campaign advertisements, directly lobbying for broad gun rights, influencing the public on gun issues, and even assisting parties with litigation on gun control.<sup>45</sup>

Although support for broad gun rights has traditionally been viewed as a politically conservative value, the issue of individual gun rights in America is much more complex than the political left versus the political right. Many other factors, including race, pervade the discussion. While the typical conservative stance has been to uphold individual gun rights, more progressive concerns about racial justice have increased individual gun ownership recently in groups that traditionally have not been a large demographic of gun owners.<sup>46</sup> With racial tensions increasing, Black gun ownership is at an all-time high after the murder of George Floyd in May 2020, with incidents of violence against people of color leading some Black Americans to become first-time gun owners.<sup>47</sup> This is not an entirely new phenomenon, with historical figures such as Harriet Tubman and the Black Panthers carrying guns, yet even within the Black community, gun ownership carries complex feelings, with some believing that while needed for protection, owning a gun also puts them in more danger if approached by police.<sup>48</sup>

Some activist groups, such as BLM757, support both the Black Lives Matter movement and the Second Amendment, believing that Black Americans need protection in the fight for racial justice.<sup>49</sup> Other Black Americans, such as NRA-certified pistol instructor Justin McFarlin, will not carry their guns even with a license because they are afraid of being killed

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See generally* Sam Musa, *The Impact of the NRA on the American Policy*, 4 J. POL. SCI. PUB. AFF. 222 (2016).

<sup>46</sup> *See* Leigh Paterson, *Black Gun Ownership Rises Amid Pandemic, Protests for Racial Justice*, NAT’L PUB. RADIO (Sept. 6, 2020, 7:59 AM), <https://www.npr.org/2020/09/06/910194857/black-gun-ownership-rises-amid-pandemic-protests-for-racial-justice> [<https://perma.cc/3LCG-7588>].

<sup>47</sup> *Id.*

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

<sup>49</sup> *See* Christianna Silva, *Some Black Americans Buying Guns: “I’d Rather Go to Trial than Go to the Cemetery”*, NAT’L PUB. RADIO (Sept. 27, 2020, 7:00 AM), <https://www.npr.org/2020/09/27/911649891/some-black-americans-buying-guns-i-d-rather-go-to-trial-than-go-to-the-cemetery> [<https://perma.cc/4TST-J5E5>].

were they to carry a gun in public as a result of historical police behaviors against Black Americans.<sup>50</sup>

Other communities feel that excessive criminalization of guns will disproportionately affect communities of color. Critics of anti-racism protests have used “[s]ensationalized stereotypes about Black Americans and guns . . . to justify a security crackdown in urban areas, many with large Black communities.”<sup>51</sup> Many proposed plans for public safety include steps like “raising penalties for gang members who use guns in crimes,” clearly targeting urban areas with large minority populations.<sup>52</sup> Kat Traylor, a Democratic political consultant in Colorado, says, “[W]orst intentions are assumed just because we’re Black and we’re gun owners.”<sup>53</sup> Complex factors such as these challenge the perception that support of gun ownership is a conservative stance.

## 2. Social Movements Advocating Limited Gun Rights

On the other side of the debate are social movements advocating limited individual rights under the Second Amendment, most of which are aimed at preventing gun violence and maintaining public safety. The oldest organization formed to prevent gun violence is the Coalition to Stop Gun Violence (“CSGV”), formed in 1974 to “develop[] and advocate[] for evidence-based solutions to reduce gun injury and death.”<sup>54</sup> Working with the Educational Fund to Stop Gun Violence, the CSGV works to translate research on gun violence into policy.<sup>55</sup> In addition, the Brady Campaign to Prevent Gun Violence (“Brady Campaign”) grew from the 1993 passage of the Brady Law to promote gun safety.<sup>56</sup> The Brady Campaign aims to ensure gun safety and prevent tragedies such as mass shootings and urban gun violence by advocating laws that demand stricter gun responsibility and assisting with education and litigation surrounding gun control.<sup>57</sup> It also promotes a comprehensive plan to address gun sales, research, and laws.<sup>58</sup>

In 2016, Guns Down America (“GDA”) was formed to “weaken[] the gun industry and its lobby” and build “political and cultural support for policies that will keep us safe from gun violence.”<sup>59</sup> The organization focuses

<sup>50</sup> Justin McFarlin, *I’m a Licensed Gun Owner but I Haven’t Carried in Years. Why? I’m Black and I’m Scared.*, USA TODAY (Sept. 9, 2020, 2:16 PM), <https://www.usatoday.com/story/opinion/policing/2020/09/09/guns-white-privilege-dangerous-for-black-veteran-like-me-column/5738354002> [<https://perma.cc/4MM3-ALFR>].

<sup>51</sup> Maya King, *“It’s My Constitutional Freaking Right”: Black Americans Arm Themselves in Response to Pandemic, Protests*, POLITICO (July 26, 2020, 7:00 AM), <https://politi.co/39sPcnf> [<https://perma.cc/3HSL-7QXY>].

<sup>52</sup> Steve Karnowski, *Minnesota House GOP Proposes Crackdown on Urban Crime*, U.S. NEWS (Feb. 17, 2020, 6:34 PM), <https://www.usnews.com/news/best-states/minnesota/articles/2020-02-17/minnesota-house-gop-proposes-crackdown-on-urban-crime>.

<sup>53</sup> Paterson, *supra* note 46.

<sup>54</sup> THE COALITION TO STOP GUN VIOLENCE, <https://www.csgv.org> [<https://perma.cc/LFQ7-P2QZ>] (last visited Dec. 17, 2020).

<sup>55</sup> *Id.*

<sup>56</sup> See *About Brady*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <https://www.bradyunited.org/about> [<https://perma.cc/9EGP-XKES>] (last visited Mar. 20, 2021).

<sup>57</sup> *Id.*

<sup>58</sup> *The Brady Plan*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <https://www.bradyunited.org/the-brady-plan> [<https://perma.cc/9EK5-ECWC>] (last visited Dec. 17, 2020).

<sup>59</sup> *Our Focus*, GUNS DOWN AM., <https://gunsdownamerica.org/focus> [<https://perma.cc/6XUK-LF5S>] (last visited Oct. 4, 2021).

on corporate campaigns, for example pushing Walmart to end gun sales and convincing insurers to sever their relationships with the NRA.<sup>60</sup>

In response to the February 14, 2018, school shooting in Parkland, Florida, a group of students created March for Our Lives, an organization with a mission of ending gun violence.<sup>61</sup> They organized the “largest single day protest against gun violence in history” and regularly work to register young voters, leading to forty-six NRA-backed candidates losing their elections in the November 2018 midterm elections.<sup>62</sup> This organization has labeled the American gun crisis a “national public health emergency” and published a plan to address the national gun violence epidemic.<sup>63</sup>

Smaller grassroots movements have also popped up at the local level, such as the Strides for Peace organization in Chicago and the Louder than Guns campaign in Los Angeles.<sup>64</sup> There are countless other organizations working to end gun violence as well, such as Giffords, which works on gun policy in America,<sup>65</sup> and Everytown for Gun Safety, which researches the impact of gun violence and facilitates advocacy.<sup>66</sup> Although the NRA remains powerful, these advocacy groups call into question its authority, and rights and values other than individual gun ownership have now moved to the forefront of the gun rights discussion.

Legislation also reflects the changing social views on guns in America. After the NRA successfully lobbied for a moratorium on research into firearm injury prevention in 1996,<sup>67</sup> Congress reached an agreement in 2019 for \$25 million in funding on the issue.<sup>68</sup> In February 2020, Senate Bill 3254, the Gun Violence and Community Safety Act of 2020, was proposed, which included factors such as a community violence prevention program.<sup>69</sup>

Since the 1970s, social movements have mobilized around both sides of the gun control debate, and both sides have advocated legislation and litigation to address the Second Amendment. However, when the Court addressed individual gun rights in 2008, it took into account only one side of the debate.

<sup>60</sup> *Id.*

<sup>61</sup> *Mission & Story*, MARCH FOR OUR LIVES, <https://marchforourlives.com/mission-story> [<https://perma.cc/KRN4-XYRP>] (last visited Dec. 17, 2020).

<sup>62</sup> *Id.*

<sup>63</sup> *It Ends with Us*, MARCH FOR OUR LIVES (Aug. 2021), <https://marchforourlives.com/wp-content/uploads/2021/08/It-Ends-With-Us-March-For-Our-Lives.pdf> [<https://perma.cc/F3H6-YKB3>].

<sup>64</sup> See STRIDES FOR PEACE, <https://www.stridesforpeace.org> [<https://perma.cc/7XFF-XYJ8>] (last visited Dec. 17, 2020); LOUDER THAN GUNS, <https://www.louderthanguns.org> [<https://perma.cc/XUM5-FUUW>] (last visited Dec. 17, 2020).

<sup>65</sup> See GIFFORDS L. CTR., <https://giffords.org> [<https://perma.cc/EF4H-H3XS>] (last visited Dec. 17, 2020).

<sup>66</sup> *Our Work*, EVERYTOWN FOR GUN SAFETY, <https://everytown.org/work> [<https://perma.cc/6DPM-68NE>] (last visited Dec. 17, 2020).

<sup>67</sup> Arthur L. Kellerman & Frederick P. Rivara, *Silencing the Science on Gun Research*, 309 JAMA 549, 549 (2013).

<sup>68</sup> Nidhi Subbaraman, *United States to Fund Gun-Violence Research After 20-Year Freeze*, NATURE (Dec. 17, 2019), <https://www.nature.com/articles/d41586-019-03882-w> [<https://perma.cc/RR4W-ECSR>]; Erin Schumacker, *Congress Agrees on Historic Deal to Fund \$25 Million in Gun Violence Research*, ABC NEWS (Dec. 16, 2019), <https://abcn.ws/36Dw7ML> [<https://perma.cc/3K8A-85VD>].

<sup>69</sup> Gun Violence Prevention and Community Safety Act of 2020, H.R. 5717, 116th Cong. (2020).

III. ORIGINALISM AND *HELLER*

Now that this Note has provided a brief history of the Second Amendment, it is helpful to take a look at another seminal Supreme Court decision on gun control: *District of Columbia v. Heller*. Looking at *Heller*, and then diving deeper into the originalist theory its authors claim to uphold, reveals that it is not truly a product of originalism. As a result, *Heller* is an incomplete decision.

A. *DISTRICT OF COLUMBIA V. HELLER*

In 2008, *District of Columbia v. Heller* became the first case to provide legal grounds for individual gun rights in America. Prior to the *Heller* decision, the Second Amendment was not interpreted as providing an individual right to gun ownership. In *Heller*, a police officer who was authorized to carry a hand gun while on duty applied to register a handgun in order to keep it in his home, but the District of Columbia refused.<sup>70</sup> The officer sued, alleging that the prohibition on handgun registration violated the Second Amendment, as he was unable to have a firearm in his home without a license.<sup>71</sup> He also challenged the District's trigger-lock requirement for firearms in the home as violative of the Constitution since it prohibited functional use of firearms in the home.<sup>72</sup>

Writing for the Court, Justice Scalia adopted a broad interpretation of the word "arms" as "any thing that a man wears for his defence [sic], or takes into his hands, or useth in wrath to cast at or strike another."<sup>73</sup> He read a purpose of individualized self-defense into the right to bear arms,<sup>74</sup> in defiance of the fact that the historical objective of the amendment was the prevention of tyranny and that the phrase was always thought to connote militia service.<sup>75</sup> In deciding that the ban on handguns in the home and the trigger-lock provisions of the D.C. law violated the Second Amendment, the Court, for the first time, read into the Second Amendment an "individual right to bear arms for defensive purposes."<sup>76</sup> Notably, although *Heller* establishes an individual right to own firearms, it also recognizes that the government has "broad powers to regulate guns," such as by "forbidding the carrying of firearms in sensitive places."<sup>77</sup>

While Justice Scalia claimed to be making an originalist argument, a dissent by Justice Stevens rightly pointed out that there was little basis for reading a purpose of self-defense into the Second Amendment.<sup>78</sup> Instead, Justice Scalia premised his opinion on a claim of rejecting modern norms to preserve a historical understanding of the Second Amendment, although he

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<sup>70</sup> *District of Columbia v. Heller*, 554 U.S. 570, 575 (2008).

<sup>71</sup> *Id.* at 576.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 581 (citation omitted).

<sup>74</sup> *Id.* at 585.

<sup>75</sup> *See id.* at 588.

<sup>76</sup> *See id.* at 602, 635.

<sup>77</sup> *Id.* at 626–27; Heath Druzin & Leigh Paterson, *Guns Are an Increasing Danger at Already Tense Protests*, BOISE STATE PUB. RADIO (July 30, 2020), <https://gunsandamerica.org/story/20/07/30/guns-anti-police-violence-protests-aurora-colorado> [<https://perma.cc/566N-2TEF>].

<sup>78</sup> *See Heller*, 554 U.S. at 637 (Stevens, J., dissenting).

“had no trouble making . . . thoroughly modern accommodations” in order to break precedent and read an individual right to own guns for the purpose of self-defense.<sup>79</sup> Justice Scalia ignored legal history, making his decision more a product of popular constitutionalism than originalism, taking into account only the viewpoint of those advocating for broader gun rights.<sup>80</sup>

## B. ORIGINALIST THEORIES OF INTERPRETATION

Looking deeper at originalism in its different forms reveals that the constitutional theory Justice Scalia claimed to uphold in *Heller* is only loosely based on strict originalism and leaves space to consider popular movements surrounding gun control. Constitutional theorist Michael Dorf sets forth six different types of originalism: (1) original intent originalism, (2) original meaning originalism, (3) skyscraper originalism, (4) framework originalism, (5) expected application originalism, and (6) semantic meaning originalism.<sup>81</sup> An analysis of each of these types of originalism will reveal that different forms of originalism lead to different interpretations of the Second Amendment, and the type of originalism Justice Scalia employed in *Heller* stretches originalism beyond any useful preservation of the values of originalism.

### 1. Original Intent Originalism

Original intent originalism embraces the “original expected application rather than original semantic meaning” of the words in the Constitution.<sup>82</sup> In other words, under this theory, the Court should apply the Constitution the way the Framers wanted it to be applied.

Applying original intent leads to an exclusively states’ rights view of the Second Amendment.<sup>83</sup> The amendment was the Founders’ response to concerns about the federal government and was written in order to protect state power to organize a military without federal intervention to disarm state forces.<sup>84</sup> Under the original intent interpretation, there is no individual right to own a gun, nor was there ever intended to be, and the entire amendment is “little more than a holdover” from a bygone era.<sup>85</sup> The Framers originally intended the Second Amendment to protect state militias from interference by the federal government,<sup>86</sup> but the Selective Draft Laws of the early 1900s repealed these state protections, invalidating the original purpose of the Second Amendment of protecting states from federal interference in militias.<sup>87</sup>

Thus, under original intent originalism, there is no argument for an individual right to own guns, and original meaning originalism cannot be

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<sup>79</sup> Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 *YALE L.J.* 1486, 1530 (2014).

<sup>80</sup> *Id.*

<sup>81</sup> See generally Michael C. Dorf, *The Undead Constitution*, 125 *HARV. L. REV.* 2011 (2012).

<sup>82</sup> *Id.* at 2021.

<sup>83</sup> See Kates, *supra* note 9, at 211.

<sup>84</sup> *Id.* at 212.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 *MICH. L. REV.* 588, 647 (2000).

used to defend such a right. *Heller* could not have been decided the way that it was under this form of originalism.

## 2. Original Meaning Originalism

Original meaning originalism embraces the semantic meaning of words in the Constitution as understood at the time of the framing. This is a “conventional” form of originalism which stands for the principle that words in the Constitution should be interpreted “in accordance with the meanings those words had when they became law.”<sup>88</sup>

Many proponents of an individual right to own guns use original meaning originalism to argue that the eighteenth century definition of the word “militia” was “the whole body of able-bodied male citizens declared by law as being subject to call to military service.”<sup>89</sup> Thus, under original meaning originalism, the Framers must have intended to adopt this definition.<sup>90</sup> Further, individual rights proponents point to the “right of the people” language to advance their interpretation.<sup>91</sup> However, reading this phrase alone ignores the whole of the text of the Second Amendment, which clearly expresses security and militia purposes.<sup>92</sup>

At the time the Second Amendment was adopted, to “bear arms” meant to serve as a soldier; thus, there is a military connotation to this phrase as well.<sup>93</sup> This creates an interpretation that contradicts that of original intent originalism; how could the Framers have meant one thing but intended a different outcome? Another problem with this definition is that under the original meaning of “militia,” there may not be an individual right to gun ownership in today’s society. First, the original meaning of “militia” included only able-bodied men, which leaves out a lot of members of society who do not meet that definition. Second, conscription has not been employed since 1973,<sup>94</sup> so arguably no one in today’s society fits the original definition of “militia.” Because this is the case, it is difficult to argue that the definition from the time of framing should be used. The meaning of militia did not include the ordinary citizens of today’s American society until Justice Scalia decided so in *Heller*; therefore the decision does not employ a true original meaning interpretation.

## 3. Skyscraper Originalism

Someone who subscribes to skyscraper originalism “thinks that the original meaning contains the blueprint for the entire constitutional edifice.”<sup>95</sup> A skyscraper originalist could reject original intent, for example, by interpreting the equal protection clause to allow women to be denied the opportunity to practice law, as doing so would not deny equal protection

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<sup>88</sup> Dorf, *supra* note 81, at 2015.

<sup>89</sup> Kates, *supra* note 9, at 214 (citation omitted).

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 213.

<sup>92</sup> Yassky, *supra* note 87, at 616.

<sup>93</sup> *Id.* at 619.

<sup>94</sup> Andrew Glass, *U.S. Military Draft Ends, Jan. 27, 1973*, POLITICO (Jan. 27, 2012, 4:40 PM), <https://www.politico.com/story/2012/01/us-military-draft-ends-jan-27-1973-072085> [<https://perma.cc/CP6A-D5UK>].

<sup>95</sup> Dorf, *supra* note 81, at 2020.

under a “separate but equal” conception of equality.<sup>96</sup> Under this interpretation, the law may bend to fit into a blueprint, such as in *Heller*, in which Scalia reinterpreted the term “militia” to include ordinary citizens. This leads to illogical results and cannot be a stable defense of the Second Amendment.

#### 4. Framework Originalism

Alternatively, framework originalists do not see the Constitution as a blueprint, but as a protection of constitutional principles, leaving room for “construction” in spaces left open by the Constitution.<sup>97</sup> This is a less formal type of originalism.<sup>98</sup>

Under framework originalism, there is also room for manipulation of plain meaning of the language of the Constitution and for popular interpretations of the Second Amendment to uphold individual gun rights for purposes other than those obvious upon reading the text of the amendment. For example, some scholars propose that the individual right to own guns is necessary in America for three purposes: (1) crime prevention (self-defense), (2) national defense, and (3) preservation of individual liberty.<sup>99</sup> This view may seem valid from an individual rights perspective, but it stretches the language of the amendment, instead filling in gaps and expanding the Second Amendment beyond its original framework.

Interpreting the Constitution through framework originalism allows for interpretations that are inconsistent with original meaning. While this may be valid, it should not be under an originalist framework, as it more closely mirrors progressive or living constitutionalism. For example, looking at the Constitution as merely a framework opens up the possibility for *Heller* to determine that the “core” of the Second Amendment is self-defense, when all prior history and interpretations of the Second Amendment determined the core to be militia service for tyranny prevention.<sup>100</sup> This leads to divergent approaches to interpreting the Second Amendment,<sup>101</sup> as well as further complications in the newly acquired meaning of self-defense and what it encompasses in regards to the Second Amendment.<sup>102</sup> The problem with this interpretation is that it can be used to easily misapply originalist purposes and definitions in the name of originalism, instead of acknowledging that other factors should be taken into account in a non-originalist approach. The framework model leaves room to impose new definitions that are not part of the amendment. This looks more like a progressive approach, which would accept that different factors affect how the Constitution should be interpreted instead of reading rules into the Constitution that were not originally there.

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<sup>96</sup> *Id.* at 2019–20.

<sup>97</sup> *Id.* at 2020.

<sup>98</sup> *See id.*

<sup>99</sup> Kates, *supra* note 9, at 268.

<sup>100</sup> Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CAL. L. REV. 63, 64 (2020).

<sup>101</sup> *Id.* at 66.

<sup>102</sup> *See id.* at 70.

### 5. Expected Application Originalism

This form of originalism is expectations-based and allows for an open-ended interpretation of original meaning which has been criticized because it allows originalists to “justify results that comport with their values, even as they claim to be guided only by the supposedly more determinative expected applications of the framing generation.”<sup>103</sup> Some constitutional scholars have stated that applying expected application originalism is a strategic move, and one that Justice Scalia made in the *Heller* decision.<sup>104</sup> While Justice Scalia’s decision referred superficially to the original meaning of the Second Amendment, he did not truly follow the original meaning of the amendment but, rather, used living constitutionalism to enforce a meaning of the Second Amendment brought about in nineteenth century America.<sup>105</sup> The Court’s decision in *Heller* followed changing sentiments under the guise of originalism. A strict view of originalism would have upheld earlier cases, narrowly interpreting individual rights to own guns. This expectations-based originalism is not true originalism and, instead, more closely mirrors a living constitutionalism approach, stretching originalism beyond any meaningful use of the theory.

### 6. Semantic Meaning Originalism

Finally, semantic meaning originalism allows for the interpretation of words and phrases in the Constitution “in accordance with their contemporary meaning, even when contemporary meaning differs from original meaning.”<sup>106</sup> When considering this form of originalism, it is important to note that the Framers’ interpretation of the word “militia” is distinguishable from today’s definition of the word.<sup>107</sup> Unlike in the eighteenth century, the time of the relevant initial definition of “militia,” most citizens in present-day America are not involved in any sort of military organization.<sup>108</sup> Under this interpretation, then, there is no modern form of the militia; there is the military, and there are self-proclaimed citizen militias who are separate from any form of government.<sup>109</sup> But it is a farce to claim that modern semantic meaning encompassing any self-proclaimed militia is within the originalist definition of “militia” under the Second Amendment. In fact, the Framers “might well be startled to see and hear how later generations read, and misread, their goals and tactics” surrounding the Second Amendment.<sup>110</sup>

Even under modern semantic meaning, it is unlikely that use of the word militia in the Second Amendment truly does include ordinary citizens. The semantic definition of “arms” also includes much more than the military connotation of the word in the past. Because modern semantic meaning is so

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<sup>103</sup> Dorf, *supra* note 81, at 2014.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (citation omitted).

<sup>106</sup> *Id.* at 2013 (citations omitted).

<sup>107</sup> See generally WALDMAN, *supra* note 10.

<sup>108</sup> Yassky, *supra* note 87, at 626.

<sup>109</sup> *Id.*

<sup>110</sup> WALDMAN, *supra* note 11, at 6.

different from what the Framers could have anticipated, modern semantic meaning originalism does not meaningfully preserve originalist values.

### C. IS ORIGINALISM AN APPROPRIATE THEORY FOR INTERPRETING THE SECOND AMENDMENT?

There are many problems with an originalist interpretation of the Second Amendment. All versions of originalism can lead to unthinkable results surrounding gun rights, and none can be reconciled with the practice of giving credence to precedent decided on non-originalist grounds.<sup>111</sup> Under true originalism, the Court would have followed early Supreme Court precedent stating that there is no individual right to own guns under the Second Amendment, and *Heller* would not have been decided to include ordinary citizens in the definition of “militia.” This certainly would have been more consistent with the Framers’ original intent.

Further, original meaning is problematic because some ideals we hold today are incompatible with eighteenth century definitions of certain terms. For example, the decision in *Brown v. Board*<sup>112</sup> was inconsistent with the original semantic meaning of “equal protection,” and instead resembled an expected application approach.<sup>113</sup> For the original meaning theory to work, originalists must always use original semantic meaning, which would lead to illogical results.<sup>114</sup> Original intent is similarly dangerous because it is impossible for the Framers to have imagined the future society in which the Constitution would need to be applied.<sup>115</sup>

Expected application originalism creates rigidity by interpreting the words of the Constitution as rules instead of standards and principles.<sup>116</sup> For example, under expected application, a punishment that was not determined to be cruel and unusual in the past could not be cruel and unusual today if it does not fall under the old “rule” for what is defined as cruel.<sup>117</sup> This rigidifies the meaning of “cruel,” even though the word is a constitutional standard rather than a rule with a strict definition.<sup>118</sup> A consistent application of this type of originalism would also lead to a number of unthinkable results, such as racial segregation and discrimination being considered constitutional.<sup>119</sup>

Further, skyscraper originalism does not allow room for modern rights such as gender equality, protection of interracial marriage, and so on.<sup>120</sup> And framework originalism is not really originalist or constraining because it follows more of a living constitutionalism approach.<sup>121</sup>

Even new, or semantic, originalism is not appropriate because social movements “rarely pay attention to original semantic meaning” when

<sup>111</sup> Dorf, *supra* note 81, at 2019.

<sup>112</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>113</sup> Dorf, *supra* note 81, at 2021.

<sup>114</sup> *Id.* at 2043.

<sup>115</sup> See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976).

<sup>116</sup> Dorf, *supra* note 81, at 2019.

<sup>117</sup> *Id.* at 2023.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 2027.

<sup>120</sup> *Id.* at 2028.

<sup>121</sup> *Id.*

generating constitutional meaning “except perhaps by accident.”<sup>122</sup> It pretends to use original meaning but really distorts originalism to reach desired results.<sup>123</sup>

Beyond the inconsistent results that originalism can create, there are no convincing reasons to hold on to originalism in the Second Amendment debate. Originalism does not do a better job of constraining judges than any other constitutional theory because there are ways to manipulate originalism to reach desired results.<sup>124</sup> For example, political ideology has been a reliable predictor of how Supreme Court Justices have come down on various cases, regardless of mode of constitutional interpretation.<sup>125</sup> In *Heller*, Justice Scalia used a distorted version of originalism to read individual gun rights into the Second Amendment, despite numerous Supreme Court precedents asserting that there is no individual right to own guns under the Constitution.<sup>126</sup> Originalism cannot be a good defense for individual gun rights because strict originalism cannot be credited for expanding gun rights to begin with. *Heller* uses originalist rhetoric to uphold an individual right to gun ownership, but it reads into the word “militia” an individual ownership, or “unorganized militia.”<sup>127</sup> This definition can be traced through a shift in political sentiment in favor of individual gun rights.<sup>128</sup> If this is the case, then originalism cannot truly be a defense of individual gun rights, and the Court has moved too far away from any originalist conception of the Second Amendment. Ironically, if the Court had followed an originalist interpretation, perhaps it would never have come to the understanding of individual gun ownership that is so pervasive in America today.

In addition, one of the main defenses of originalism is that it does not license judges to “make up constitutional law as they [go] along.”<sup>129</sup> This is an argument that Justice Scalia endorsed,<sup>130</sup> and yet it cannot be used as a defense of an originalist interpretation of the Second Amendment. In fact, Justice Scalia’s decision in *Heller* is at odds with his own identification of the originalist goal to “establish the meaning of the Constitution . . . in 1789.”<sup>131</sup> If this were Justice Scalia’s objective in *Heller*, he could not have read an individual right into the Second Amendment, nor could he have interpreted “militia” to include ordinary citizens. Justice Scalia lauded originalism as the “lesser evil” of constitutional theories precisely “to prevent the law from reflecting current changes in original values,”<sup>132</sup> yet his decision in *Heller* stretched originalism to fit with changing societal views valuing individual rights to gun ownership. Justice Scalia approached originalism in an inconsistent manner, failing to distinguish between original

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<sup>122</sup> *Id.* at 2017.

<sup>123</sup> *See id.* at 2022.

<sup>124</sup> *See id.* at 2025.

<sup>125</sup> *Id.* at 2026.

<sup>126</sup> *See, e.g.,* *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Miller*, 307 U.S. 174 (1939).

<sup>127</sup> Dorf, *supra* note 81, at 2042.

<sup>128</sup> *Id.*

<sup>129</sup> William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2213 (2017).

<sup>130</sup> *Id.*

<sup>131</sup> *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

<sup>132</sup> *Id.* at 862.

meaning and original expected applications,<sup>133</sup> and in *Heller* he went beyond any strict form of originalism to incorporate changing public sentiment.

Based on this, it is clear that the *Heller* decision did not derive from strict originalism, and no constitutional decision regarding gun rights has been made based on any conception of strict originalism since.<sup>134</sup> At best, the individual right to own guns is protected by an expected application defense, but even this defense really looks more like progressive constitutionalism, stretching originalism too far to meaningfully preserve any originalist values. If judges are going to consider societal values in deciding the Second Amendment, then they should not disguise this reasoning as originalist. Instead, it should be recognized as living constitutionalism, and judges should take an approach to interpreting the Second Amendment that analyzes *all* relevant factors, not just points of view belonging to people who want unconstrained individual gun rights. In other words, *Heller* is an incomplete decision because it takes into account public sentiment, but only on the side of those who advocate broad gun rights. In order to be a complete and valid decision, it should have also addressed concerns in favor of limiting individual gun rights.

Stated simply, individual gun rights have not come from a valid originalist interpretation of the Constitution or the Framers' intent; instead, they have arisen because "the widespread acceptance of some form of gun ownership is part of the way Americans think,"<sup>135</sup> and because the Court only took this view into account. Originalism leads to inconsistent interpretations of the Second Amendment, and *Heller* employs a form of originalism that looks more like living constitutionalism than originalism. It is time to recognize that the Second Amendment has been interpreted through a living constitutionalism approach, and take into account all of the relevant factors surrounding the individual right to own guns, not just factors of an archaic originalist interpretation.

#### IV. A PROGRESSIVE APPROACH TO THE SECOND AMENDMENT

Because originalism is not a good defense of the Second Amendment, it is more appropriate to take a progressive, living constitutionalist approach to interpreting the Second Amendment to decide whether and to what extent the individual right to own guns exists. First, an overview of progressive constitutionalism is necessary.

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<sup>133</sup> Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 165 (2016).

<sup>134</sup> In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that an outright prohibition on handguns violates the Second Amendment, but that laws restricting guns can still be constitutionally permissible. *Post-Heller Litigation Summary*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary> [https://perma.cc/4TNP-3BDV] (last updated Aug. 25, 2020). No other Supreme Court cases since have substantially affected Second Amendment interpretation. *Id.* However, the Court did agree to take on a major gun rights case in 2021. See Amy Howe, *Court to Take Up Major Gun-Rights Case*, SCOTUSBLOG (Apr. 26, 2021), <https://www.scotusblog.com/2021/04/court-to-take-up-major-gun-rights-case> [https://perma.cc/CX8C-U7MR].

<sup>135</sup> WALDMAN, *supra* note 11, at 174.

## A. PROGRESSIVE THEORIES OF CONSTITUTIONAL INTERPRETATION

Progressive constitutionalism asserts that the Constitution derives legitimacy not from being a stale and unchanging document, but from “a historical process of continual popular commitment to see in the Constitution the possibility of redeeming the document’s own promises of a more just society.”<sup>136</sup> It acknowledges that social and political movements can lead to legitimate constitutional change. Instead of the Constitution being law today because it was adopted by Americans in the past, it is law today “because it continues to be accepted today.”<sup>137</sup> It survives because of sociological, or external, legitimacy.<sup>138</sup>

Under this theory, social movements “necessarily influence judges and Justices who are drawn from the larger society and appointed through a political process.”<sup>139</sup> Political and social movements in America have drawn on constitutional principles to justify and support change, but these movements do not use any originalist rhetoric, except perhaps contemporary semantic meaning.<sup>140</sup> This explains why the Court found a right to individual gun ownership in *Heller* following a shift in public sentiment in favor of that right, and it also explains why *Heller* is incomplete. The Court took into account social movements advocating broad gun rights but not social movements on the other side of the debate.

Constitutional theorist Erwin Chemerinsky suggests that, because our modern world is so different than the time during which the Constitution was drafted, it is “silly to think that we can be governed by the specific views of those who knew nothing about the issues we face today.”<sup>141</sup> Therefore, instead of using a rigid originalist view, the Court should interpret the Constitution in order to “achieve its underlying values.”<sup>142</sup> This requires us first to establish what values we want to uphold as a society. We can start with the Preamble, which among other things, promotes “establish[ing] justice, insur[ing] domestic Tranquility . . . [and] promot[ing] . . . general Welfare.”<sup>143</sup> Chemerinsky proposes that all provisions of the Constitution should be seen as “embodying and implementing” one or more of five values: (1) democratic governance, (2) effective governance, (3) justice, (4) liberty, and (5) equality.<sup>144</sup> Viewing the Second Amendment through the lens of these values, as well as incorporating the goal of promoting general welfare, it is clear that a modern view of the Second Amendment requires taking the modern world into account.

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<sup>136</sup> Dorf, *supra* note 81, at 2012 (citation omitted).

<sup>137</sup> *Id.* at 2016.

<sup>138</sup> *Id.* (citations omitted).

<sup>139</sup> *Id.* at 2018.

<sup>140</sup> *Id.* at 2043.

<sup>141</sup> ERWIN CHERMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 50 (2018).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 57 (quoting U.S. CONST. pmbl.).

<sup>144</sup> *Id.* at 58.

## B. PROGRESSIVE INTERPRETATION OF THE SECOND AMENDMENT

Progressive constitutionalism allows for an interpretation of the Second Amendment that takes into account all relevant factors. And with the pervasiveness of guns throughout different parts of American society, this is a necessary approach. For example, America has now become a hyperpolarized society, and this polarization can greatly affect American politics,<sup>145</sup> and potentially even judicial interpretation. Social movements are no small part of the world of constitutionalism. With an increase in polarization comes a decrease in cooperative politics for mutual benefit, leading the democratic process to fall into gridlock.<sup>146</sup> As our democratic avenues fail, the judiciary becomes even more vital to constitutional interpretation.

Thus, the Court must deal with hyperpolarization and how it plays into rights, deciding what rights to uphold, and to what extent. It must decide how rights supported by one group, for example under the Second Amendment, can take away or threaten rights of others, such as the right to assemble or vote (discussed further below). Living constitutionalism acknowledges that the Constitution, as enforced by courts today, “bears little resemblance . . . to the understanding of the text when it was ratified.”<sup>147</sup> This allows courts to legitimately take into account factors of progressive constitutionalism, like equity and social welfare.<sup>148</sup>

Finally, even if the Court accepts an originalist view of the Second Amendment’s purpose as tyranny prevention—or, alternatively, a *Heller*-era purpose of self-defense—it still must define the meaning and scope of this purpose for today’s society,<sup>149</sup> including taking into account moral considerations and balancing the purpose of the Second Amendment against the dangers of gun violence.<sup>150</sup>

## C. IS PROGRESSIVE CONSTITUTIONALISM AN APPROPRIATE THEORY FOR INTERPRETING THE SECOND AMENDMENT?

As discussed, a theory of progressive constitutionalism views the Constitution as a living document, with the understanding that “the living Constitution, not the dead one, validates what is best in our constitutional tradition.”<sup>151</sup> Because originalism is not a good defense of the Second Amendment, the Court needs to look to other interpretations that are more appropriate for modern society.

Constitutional theorist David A. Strauss argues that a notion of living constitutionalism is necessary because the Constitution does not give us

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<sup>145</sup> Stephen M. Maurer, *The Healing Constitution: Updating the Framers’ Design for a Hyperpolarized Society*, 29 KAN. J.L. & PUB. POL’Y 173, 174 (2020); see also Kevin Jones, Note, *Reframing the Second Amendment Debate: Drawing Cultural Theory from the Holster*, 77 UMKC L. REV. 487 (2008).

<sup>146</sup> Maurer, *supra* note 145, at 180.

<sup>147</sup> Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 Cornell L. Rev. 1395, 1397 (2020).

<sup>148</sup> *Id.* at 1398–99.

<sup>149</sup> Skylar Pettit, Note, *Tyranny Prevention: A “Core” Purpose of the Second Amendment*, 44 S. ILL. U. L.J. 455, 456 (2020); see *District of Columbia v. Heller*, 554 U.S. 570, 585 (2008).

<sup>150</sup> See generally Pettit, *supra* note 149.

<sup>151</sup> Dorf, *supra* note 81, at 2012 (citations omitted).

“unequivocal instructions.”<sup>152</sup> Just reading the words of the Constitution is not enough because people can argue about what the words mean and what rights they include.<sup>153</sup> This is certainly the case for the Second Amendment. As previously discussed, it is unclear what “militia” means, who is included in that definition, and even what “arms” means throughout changing American history. This necessitates progressive constitutionalism. A theory of progressive, living constitutionalism does not have the same history, translation, and dead-hand problems as originalism has,<sup>154</sup> and instead takes into account “the way in which American constitutional law actually develops.”<sup>155</sup>

Further, progressive living constitutionalism allows interpreters to acknowledge that the Framers used general language in the Constitution in order to allow later generations to “apply[] that language to the unceasingly changing environment in which they would live.”<sup>156</sup> The Framers could not have foreseen every situation, so courts must take modern society into account when interpreting the Constitution.<sup>157</sup> This is especially true with the Second Amendment. The Framers could not have imagined the technological development of arms in America, nor could they have foreseen the use of guns in situations such as racial justice or election protests. They probably could not even have foreseen shifting sentiments regarding the individual rights discussed above. Really, then, a progressive approach has already been used to expand individual rights under the Second Amendment. If originalism had been used, it could only have applied to the situations the Framers could have foreseen, only using their interpretation of the amendment, and, ironically, an individual right to own guns probably never would have developed under a strict originalist interpretation of the Second Amendment.

Therefore, even if there is an individual right to own guns, it was obtained and maintained through living constitutionalism mislabeled as originalism. It is necessary to acknowledge this and take a progressive approach to interpreting individual rights under the Second Amendment moving forward. Because American society continues to change, the fact that the Court has established an individual gun ownership right does not mean that the right is unlimited, nor does the Court claim it is.<sup>158</sup> This has also been the case for other rights under the Constitution; for example, the First Amendment generally protects speech unless it is libel or contains fighting words.<sup>159</sup> Similarly, there can and should be limits on the Second Amendment, especially when gun ownership allows the rights of others to be infringed. This requires a broader view of the Second Amendment to consider all aspects of society that are affected by guns, which will in turn

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<sup>152</sup> DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 8 (2010).

<sup>153</sup> *Id.*

<sup>154</sup> *See generally id.*

<sup>155</sup> *Id.* at 31.

<sup>156</sup> Rehnquist, *supra* note 115, at 694.

<sup>157</sup> *Id.*

<sup>158</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

<sup>159</sup> *See generally* KATHLEEN ANN RUANE, *FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT* (2014).

allow for “judicially manageable ways for courts to update the Amendment.”<sup>160</sup>

## V. THE SECOND AMENDMENT IN MODERN AMERICAN SOCIETY

Now that a progressive approach to interpreting the Constitution has been explained, it can be applied specifically to the Second Amendment in the modern world. The pervasiveness of guns in all aspects of society reveals a clear need for progressive limitations on the individual right to own guns under the Second Amendment. And now, with the Supreme Court agreeing to take up a major gun rights case in 2021 regarding the right to carry a gun outside the home,<sup>161</sup> it is more important than ever to evaluate how Americans view the Second Amendment as a society.

In 2019, the last year for which the Centers for Disease Control and Prevention (“CDC”) has published statistics, there were 39,707 firearm-related deaths in America, and the CDC reported that even more people suffer from nonfatal firearm-related injuries than die.<sup>162</sup> This data supports a public health approach—considering factors affecting welfare—to regulating the individual right to own guns.<sup>163</sup> As of December 2020, there have also been 231 school shootings in America since the 1999 Columbine shooting,<sup>164</sup> and there have been at least 15 shootings at places of worship since 2012.<sup>165</sup> Further, there are age and race implications in firearm-related violence.<sup>166</sup> Homicide rates involving firearms are highest in the 15 to 34 age range, and among Black, American Indian or Alaskan Native, and Hispanic populations.<sup>167</sup> Firearm-related injuries are one of the top five leading causes of death for people under the age of sixty-five in America.<sup>168</sup> This type of violence, enabled by broad individual gun rights, has led to many social movements, as discussed above, addressing the need for progressive change in the interpretation of the Second Amendment.

### A. GUNS AND PROTESTS

The use of guns in protests is another vital factor in the gun control debate, as broad individual gun rights may endanger the First Amendment right to peacefully assemble. A progressive interpretation of the Second Amendment requires that the Court take into account how guns have been used in various situations throughout American history. Part of this analysis

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<sup>160</sup> David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 598 (1991).

<sup>161</sup> See Howe, *supra* note 134.

<sup>162</sup> *Firearm Violence Prevention*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/firearms/fastfact.html#:~:text=In%202018%2C%20there%20were%2039%2C740,firearm%2Drelated%20injuries%20than%20die> [https://perma.cc/U9Y4-TEBJ] (last visited Dec. 17, 2020).

<sup>163</sup> See, e.g., Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, U. PA. L. REV. 1193, 1194 (2000).

<sup>164</sup> Vigderman & Turner, *supra* note 3.

<sup>165</sup> See *A List of Some US House of Worship Shootings Since Columbine*, *supra* note 4.

<sup>166</sup> See *Firearm Violence Prevention*, *supra* note 162.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

requires looking at how guns have been used at protests and when this use has been viewed as a valid exercise of rights by the American public.

A survey of recent protests shows that the public does not view individual gun rights equally when in the hands of all Americans. For example, in late April 2020, spurred on by COVID-19 pandemic lockdowns in Michigan, a few hundred predominantly white protestors gathered around the State Capitol building, armed with assault rifles and handguns.<sup>169</sup> In response to this, police “stood by while white men demanded access to House Chambers and screamed in their faces.”<sup>170</sup> This scene starkly contrasted a 1999 protest by predominantly Black and Latinx activists who gathered outside the same building to protest the city’s takeover of public schools.<sup>171</sup> During this protest, the participants, who were all unarmed, were forced to go through metal detectors to approach the State Capitol building.<sup>172</sup> White protesters in 2020, in contrast, were allowed to walk right up with weapons in hand.<sup>173</sup>

In 1967, California quickly passed a law banning open carry after Black Panthers peacefully protested at the State Capitol.<sup>174</sup> In 2015, unarmed Black men were arrested in Missouri “on suspicion of firearm possession” after protesting the murder of Michael Brown, while at the same time white men walked armed through the same city, claiming to have police permission to do so.<sup>175</sup> And in 2017, white neo-Nazis used open carry to intimidate Black Americans at a rally in Charlottesville, Virginia.<sup>176</sup> There is no doubt that white privilege pervades application of the Second Amendment.<sup>177</sup>

In addition, when a white Mississippi couple was charged for unlawful use of a weapon when they “wave[d] weapons in a threatening manner at those participating in non-violent protest” to defund police following the murder of George Floyd by white policemen, the State Attorney General quickly moved to dismiss the charges, calling them a “political prosecution” that would chill the right to self-defense.<sup>178</sup> The couple were then featured speakers at the Republican National Convention for the 2020 election.<sup>179</sup>

These examples reveal an uncomfortable truth about the role of guns at protests: white protestors can create a “potential sniper’s nest” to have their voices heard, while the possibility of a marginalized protestor having any weapon at all is seen as a threat to public safety.<sup>180</sup> The Second Amendment is a tool for white Americans, who can “shoot up a school, hunt down a Black man jogging, or brandish weapons of war in the halls of government,” all

<sup>169</sup> Gabrielle Gurley, *White Men with Guns*, AM. PROSPECT (May 15, 2020), <https://prospect.org/justice/white-men-with-guns> [https://perma.cc/C42W-KD8J].

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> McFarlin, *supra* note 50; see also ADAM WINKLER, *By Any Means Necessary, in GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 225, 244–45 (2013).

<sup>175</sup> McFarlin, *supra* note 50.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *US Couple Who Pointed Guns at BLM Protestors “to Speak at Republican Convention”*, BBC NEWS (Aug. 18, 2020), <https://www.bbc.com/news/world-us-canada-53819020> [https://perma.cc/3V4B-BY6X].

<sup>179</sup> McFarlin, *supra* note 50.

<sup>180</sup> See Gurley, *supra* note 169.

seemingly without a serious question as to whether the individual right to own a gun should be limited.<sup>181</sup>

Other white supremacist groups, such as the Proud Boys, have attended protests around the country, using armed vigilante justice to “increase[] tensions and escalate[] the violence” at otherwise peaceful protests.<sup>182</sup> White supremacist groups have incited violence at unity rallies in Michigan, as well as other protests “related to police shootings and racial inequalities.”<sup>183</sup> Armed counter-protestors, some a part of “militia movements,” have attended anti-racism rallies in at least thirty-three states.<sup>184</sup> In Kenosha, Wisconsin, one of these militia members shot three Black Lives Matter protestors.<sup>185</sup> This use of weapons at protests has prompted some state lawmakers to consider purchasing bulletproof vests for protection.<sup>186</sup> When these actions are the response to gun violence, along with statements that it is “unfortunate . . . violence began and ended before public safety could get on scene,”<sup>187</sup> it is clear that the problem lies not only in how we respond to gun rights, but also with the broad scope of these rights to begin with. At what point does the individual right under the Second Amendment become so broad as to infringe upon other rights of Americans, such as the right to peacefully assemble under the First Amendment?<sup>188</sup>

Further, the need for judicial intervention becomes even more apparent when other branches of government fail to protect the public. This issue has escalated during the racial justice protests of 2020, and even during the 2020 presidential election. When asked to condemn white supremacy and militia groups increasing violence, former President Donald Trump refused and merely told these white supremacist groups, specifically the Proud Boys, to “stand back and stand by,” further fueling violence by these armed groups who claim to provide “security to protect Trump supporters from violent leftists.”<sup>189</sup> This allows guns to be used not just for any potentially valid purposes of self-defense, but to continue to espouse misogyny, Islamophobia, anti-Semitism, anti-immigration sentiment, transphobia, and white supremacy, promoted by groups like the Proud Boys who use the Second Amendment to uphold a “Western, white, English-speaking way of life.”<sup>190</sup>

<sup>181</sup> See *id.*; see generally *Armed and Dangerous: How the Gun Lobby Enshrines Guns as Tools of the Extreme Right*, EVERYTOWN FOR GUN SAFETY (Sept. 30, 2020), <https://everytownresearch.org/report/extreme-right> [<https://perma.cc/3EM4-SKM9>].

<sup>182</sup> See Knef, *supra* note 5.

<sup>183</sup> See *id.* For a list of armed protestors in 2020 generally, see *Armed Protestors Inspire Fear, Chill Free Speech*, GIFFORDS L. CTR. (Dec. 12, 2020), <https://giffords.org/lawcenter/report/armed-protestors-inspire-fear-chill-free-speech> [<https://perma.cc/3FEH-HCPM>].

<sup>184</sup> COALITION TO STOP GUN VIOLENCE & GUNS DOWN AMERICA, GUNS DOWN AT THE POLLS: HOW STATES CAN AND SHOULD LIMIT FIREARMS AT POLLING PLACES 6 (2020).

<sup>185</sup> *Id.*

<sup>186</sup> See Knef, *supra* note 5.

<sup>187</sup> *Id.*

<sup>188</sup> U.S. CONST. amend. I.

<sup>189</sup> James Rainey & Melissa Gomez, *Trump Tells Proud Boys Hate Group to “Stand By”*, L.A. TIMES (Sept. 29, 2020), <https://www.latimes.com/world-nation/story/2020-09-29/asked-to-condemn-white-supremacists-trump-tells-proud-boys-hate-group-to-stand-by>.

<sup>190</sup> Neil MacFarquhar, Alan Feuer, Mike Baker, & Sheera Frenkel, *Far-Right Group that Trades in Political Violence Gets a Boost*, N.Y. TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/us/proud-boys-trump.html>; Ben Collins & Brandy Zadrozny, *Proud Boys Celebrate After Trump’s Debate Callout*, NBC NEWS (Sept. 29, 2020), <https://www.nbcnews.com/tech/tech-news/proud-boys-celebrate-after-trump-s-debate-call-out-n1241512> [<https://perma.cc/W5SQ-5859>].

A broad interpretation of individual gun rights affects more than just physical safety; it also affects other constitutional rights, including the right to protest. It even affects the very right to vote. Surely, the Court cannot uphold the Second Amendment at the cost of all other constitutional values. If First Amendment rights of speech and assembly, along with public health and safety, are incompatible with a broad interpretation of individual rights under the Second Amendment, then we cannot uphold individual gun rights over other rights.<sup>191</sup>

## B. GUNS AND THE 2020 ELECTION

Additionally, individual rights under the Second Amendment have gotten so out of hand that the problem goes to the core of our democratic government. If the individual right to own guns threatens even the right to vote, then there is no convincing justification for upholding it.

Very few states have laws to prevent firearms at polling places, despite a history of “armed intimidation at polling places.”<sup>192</sup> In fact, only six states have such laws: California, Arizona, Florida, Georgia, Louisiana, and Texas.<sup>193</sup> Under current federal law, having a gun at a polling place is not considered “coercion or intimidation.”<sup>194</sup> However, 58% of adults in America report that they or someone they care for “has been impacted by gun violence,” suggesting that, whether intended or not, “the mere presence of guns at or around polling places threatens voters’ emotional and physical well-being.”<sup>195</sup> Further, even the suggestion of intimidation or need for armed “poll watchers” is inconsistent with the American ideal of free and open elections.<sup>196</sup> This is concerning, especially given the use of guns for intimidation in past elections.<sup>197</sup>

There have also been specific statements showing that guns have been used for voter intimidation. For example, during the 2018 midterm election, NRA spokesperson Dana Loesh said that NRA supporters might need to bring guns to the polls to “fend off attacks from ‘anti-gun progressives.’”<sup>198</sup> Concern over how to “handle” guns in polling places should be a non-issue because there is no valid reason to need a gun in a polling place.

The use of guns during elections is incredibly alarming, especially given that former President Trump urged his supporters during the 2020 election to

<sup>191</sup> See GIFFORDS L. CTR., *supra* note 183.

<sup>192</sup> See generally COALITION TO STOP GUN VIOLENCE & GUNS DOWN AMERICA, *supra* note 184.

<sup>193</sup> Reid J. Epstein, *It’s Legal to Bring Guns into Polling Places in Five Battleground States, a New Study Says*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/elections/its-legal-to-bring-guns-to-polling-places-in-five-battleground-states-a-new-study-says.html>.

<sup>194</sup> Casey McDermott, *U.S. Attorney Urges Voters to Think Carefully Before Bringing Guns to N.H. Polling Places*, N.H. PUB. RADIO (Nov. 2, 2020), <https://www.nhpr.org/politics/2020-11-02/u-s-attorney-urges-voters-to-think-carefully-before-bringing-guns-to-n-h-polling-places> [<https://perma.cc/5E33-GRT4>].

<sup>195</sup> *Guns at Polling Places: Preventing Armed Voter Intimidation*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <https://www.bradyunited.org/program/democracy/voting-access-saves-lives/guns-at-polling-places> [<https://perma.cc/9XCD-V6C8>] (last visited Dec. 17, 2020) (citation omitted).

<sup>196</sup> *Guns in Polling Places Make a Mockery of the American Ideal of Free and Open Elections*, CHI. SUN TIMES (Oct. 27, 2020), <https://chicago.suntimes.com/2020/10/27/21537018/election-day-guns-intimidation-poll-watchers-donald-trump-editorial> [<https://perma.cc/P66T-WNT3>].

<sup>197</sup> See generally COALITION TO STOP GUN VIOLENCE & GUNS DOWN AMERICA, *supra* note 184.

<sup>198</sup> *Id.* at 5.

“go into the polls and watch very carefully,”<sup>199</sup> and given rhetoric from the former president’s son Donald Trump Jr. who stated, “We need every able-bodied man [and] woman to join Army for Trump’s election security operation.”<sup>200</sup> Rhetoric like this is considerably more harmful when there is an “increased presence of armed militia at protests and political rallies around the country.”<sup>201</sup> With rising political tensions, it is difficult to justify the stance that carrying a gun into a polling place is not intimidation, and when connected with Trump’s statements, there is an argument to be made that the presence of guns at election sites is meant for intimidation.<sup>202</sup>

Broad individual gun rights have become even more worrying due to Trump’s endorsement of far-right militia groups such as the Proud Boys during his campaign. Referring to Trump’s statement to the Proud Boys during the presidential debate to “stand back and stand by,” the leader of the Proud Boys said that following Joe Biden’s presidential victory, the “standby order has been rescinded” and the Proud Boys were ready to “roll[] out.”<sup>203</sup> Also, during the 2020 election, armed protestors gathered nightly outside of offices in Arizona, Nevada, and Michigan where votes were being counted, brandishing shotguns, handguns, and military-style semiautomatic rifles.<sup>204</sup> Armed protestors in Arizona shouted, “Arrest the poll workers!”<sup>205</sup> The armed protestors claimed to be “protecting” a “peaceful protest” of the election and making sure votes were counted fairly.<sup>206</sup> How guns could be used for this purpose, rather than intimidation, is unclear. Finally, on January 6, 2021, rioters opposing Joe Biden’s presidential victory stormed the United States Capitol armed with guns and “planning for ‘war’” in a clear attack on democracy.<sup>207</sup>

## VI. HOW SHOULD THE COURT APPROACH COMPETING SOCIAL MOVEMENTS?

It is now appropriate to return to the discussion of social movements surrounding the Second Amendment, as this is the medium through which citizens have advocated for themselves on the issues of modern gun usage discussed above. Ongoing struggles about how the Constitution should be interpreted, as seen in social movements and by observing the impact of the Constitution over time, help to sustain constitutional authority by ensuring it is compatible with a modern understanding of constitutional order.<sup>208</sup> When

<sup>199</sup> McDermott, *supra* note 194.

<sup>200</sup> Pam Fessler, *Trump’s Calls for Poll Watchers Raise Fears About Voter Intimidation*, NAT’L PUB. RADIO (Sept. 30, 2020), <https://www.npr.org/2020/09/30/918766323/trumps-calls-for-poll-watchers-raises-fears-about-voter-intimidation> [<https://perma.cc/2VGM-FLBW>].

<sup>201</sup> *Id.*

<sup>202</sup> *See id.*

<sup>203</sup> Nicholas Reimann, *Alleged Proud Boys Leader Declares “Standby Order Has Been Rescinded” While Some Trump Supporters Protest*, FORBES (Nov. 7, 2020), <https://www.forbes.com/sites/nicholas-reimann/2020/11/07/alleged-proud-boys-leader-declares-standby-order-has-been-rescinded-while-some-trump-supporters-protest/?sh=4b666368179a>.

<sup>204</sup> Sullivan & Geller, *supra* note 6.

<sup>205</sup> *Id.*

<sup>206</sup> *See id.*

<sup>207</sup> Brad Heath & Sarah N. Lynch, *Arrested Capitol Rioters Had Guns and Bombs, Everyday Careers and Olympic Medals*, REUTERS (Jan. 14, 2021), <https://reut.rs/3qilQzp> [<https://perma.cc/24X9-3D6S>].

<sup>208</sup> ROBERT POST & REVA B. SEIGEL, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020* 27 (Jack M. Balkin & Reva B. Seigel ed., 2009).

interpretations of the Constitution are detrimental to our shared societal values, then the Constitution cannot rationally be upheld as it compromises the modern structure of rights that we have collectively built over time. People “mobilize because they care about constitutional ideals,”<sup>209</sup> and without a judicial approach to the Constitution that takes into account modern society and values, the Constitution will lose all legitimacy.

It is clear that *Heller* takes into account at least social movements that advocate broad individual gun rights. However, it ignores the competing social movements that advocate limiting individual gun rights under the Second Amendment. Here, there is an issue of competing social movements, and the Court must decide how to approach them.

#### A. A BALANCING ACT

Balancing competing social movements is certainly not new to the Court. For example, in the context of abortion, competing social movements use rhetorical strategies to polarize the issue.<sup>210</sup> Activists who do not support the right to abortion frame their movement as advocating the right to life, stating that unborn fetuses are human beings.<sup>211</sup> On the other side, activists who support a right to abortion frame their movement as advocating reproductive rights and the right to choose, stating that fetuses are not living human beings.<sup>212</sup> The Court responded to these competing rights—the right to life and the right to choose—by creating a viability framework that addressed interests of both the mother and unborn fetus based on whose interests are more vital at different points in a pregnancy.<sup>213</sup> Similarly, social movements surrounding marriage equality for same-sex couples began as a countermovement to conservative religious social movements which led to the Defense of Marriage Act.<sup>214</sup> Changing understandings of marriage led the Supreme Court to recognize the right of same-sex couples to marry despite opposition by conservative groups.<sup>215</sup>

The gun debate similarly brings forth the issues of competing social movements and competing rights. While *Heller* did not establish a framework for courts to analyze Second Amendment claims, most constitutional rights must satisfy a scrutiny test.<sup>216</sup> Courts have typically applied what is called “strict scrutiny” to Second Amendment cases when a law burdens the core of the Second Amendment, which was established as self-defense in *Heller*.<sup>217</sup> Passing the test requires a compelling government interest, and a law must be narrowly tailored to meet this interest.<sup>218</sup>

<sup>209</sup> *Id.* at 31.

<sup>210</sup> See Dawn McCaffrey & Jennifer Keys, *Competitive Framing Processes in the Abortion Debate: Polarization-Vilification, Frame Saving, and Frame Debunking*, 41 SOCIO. Q. 41, 44 (2000).

<sup>211</sup> *Id.* at 47.

<sup>212</sup> *Id.* at 54.

<sup>213</sup> See generally *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>214</sup> Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 450 (2014).

<sup>215</sup> *Obergefell v. Hodges*, 576 U.S. 644, 644 (2015).

<sup>216</sup> COALITION TO STOP GUN VIOLENCE & GUNS DOWN AMERICA, *supra* note 184, at 23.

<sup>217</sup> CONGRESSIONAL RESEARCH SERVICE, *POST-HELLER SECOND AMENDMENT JURISPRUDENCE* 1 (2019).

<sup>218</sup> *Id.* at 15.

Competing social movements try to prescribe the government's main concerns.

However, a strict or even an intermediate scrutiny standard is not appropriate for the Second Amendment. Strict scrutiny is used when it is almost unimaginable that there would be legitimate regulatory reasons for restrictions, such as laws that discriminate on the basis of race.<sup>219</sup> This is not the case for laws restricting an individual right under the Second Amendment, as there are clear reasons why restrictions are needed, supported by data on gun violence. Under a progressive reasonableness standard, reasonable methods of regulating the right to bear arms could be deemed constitutional restraints on the individual right to own guns.<sup>220</sup> This allows the Court to look at more than the Second Amendment itself or its historical context; it allows the Court to take modern society into account, including factors of progressive constitutionalism, and balance the interests of competing social movements.

Those who advocate broad individual rights under the Second Amendment argue that the right to bear arms is an individual liberty. Those who advocate narrower rights counter that broad rights under the Second Amendment cause harm to other rights, such as the right to life, and infringe on other constitutional rights like the First Amendment right to protest peacefully. The Court has stated that “there should not be a presumption that one constitutional right is superior to another constitutional right.”<sup>221</sup> Accordingly, in order to avoid a hierarchy of rights, the Court should approach competing rights and competing social movements by considering and balancing the individual interests at stake.<sup>222</sup>

This is the framework the Court used in *Rowan v. United States Post Office Department* to resolve the competition between the rights to free speech and privacy.<sup>223</sup> In this case, the Court held that a person could remove themselves from an advertising mailing list they deemed to be “arousing or sexually provocative,” and that their right to privacy in this case did not impose too much of a burden on the sender’s freedom of speech and right to advertise under the First Amendment.<sup>224</sup> The Court employed a balancing act in this case, weighing the “individual costs and burdens placed on each party,”<sup>225</sup> and determining which side would “have to make the greatest sacrifice of its protected liberty.”<sup>226</sup> Ultimately the Court in *Rowan* found that there would be a bigger sacrifice to the right of privacy than to the right of free speech.<sup>227</sup>

A similar analysis should be applied to the Second Amendment. When deciding a case that proposes limiting individual rights under the Second Amendment, the Court should balance the right to own a gun with other

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<sup>219</sup> See *Strict Scrutiny*, LEGAL DICTIONARY (Mar. 15, 2016), <https://legaldictionary.net/strict-scrutiny> [<https://perma.cc/LK45-UQE8>].

<sup>220</sup> Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 716–17 (2007).

<sup>221</sup> Ken Hyle, *When Constitutional Rights Clash: Masterpiece Cakeshop’s Potential Legacy*, 9 CONLAWNOW 200, 202 (2018).

<sup>222</sup> *Id.* at 205.

<sup>223</sup> *Id.*

<sup>224</sup> See *Rowan v. USPO*, 397 U.S. 728, 733, 740 (1970).

<sup>225</sup> Hyle, *supra* note 221, at 205.

<sup>226</sup> *Id.* at 205–06.

<sup>227</sup> See *Rowan*, 397 U.S. at 740.

constitutional rights, such as the right to protest. The Court should also take into account non-constitutional rights, such as the right to life, which may directly be impacted by the exercise of broad rights under the Second Amendment. Under this framework, it is difficult to argue that the right to life or the right to protest peacefully would impose too heavy a burden on the right to own a gun.

#### B. A PROPOSAL FOR SOCIAL MOVEMENTS SURROUNDING THE SECOND AMENDMENT

Under this balancing framework, it is important to acknowledge that social movements are only one piece of the puzzle. A progressive approach to the Second Amendment acknowledges that social movements and concerns about the safety of different demographics can play a role in judicial interpretation. These movements outside of the Court can “expand[] the possibilities for constitutional development and . . . [mediate] tensions that occasionally arise between constitutional law and the culture in which it operates.”<sup>228</sup> Social movements, along with an analysis of how guns are used in various settings in our democratic institution, such as protests and elections, can keep the Constitution current.<sup>229</sup> However, social movements should not be the *only* consideration that courts take into account.

Progressive constitutionalism requires that the Court address all concerns, including a democratic and effective government, liberty, justice, equality, and welfare.<sup>230</sup> Therefore, when analyzing competing social movements, the Court should take into account how these social movements address the concerns of progressive constitutionalism, and how they work with an analysis of the other factors of progressive constitutionalism.

##### 1. Progressive Constitutionalism and Social Movements Advocating Broad Gun Rights

Social movements advocating broad gun rights focus most adamantly on the fact that gun ownership is a fundamental right under the Second Amendment. This falls into the liberty factor of progressive constitutionalism. While this is a strong argument, it is not the be-all and end-all of the gun debate, and individual rights cannot be upheld at the expense of the rights of others and of other valid constitutional values. Rights are not unlimited when an unlimited right would negatively impact the common good; rather, the Court has often limited rights under the Constitution. For example, First Amendment rights are limited when they impact the safety of others: obscenity, child pornography, and fighting words are not protected speech.<sup>231</sup> Rights of parental autonomy read into the Fourteenth Amendment are limited when it comes to mandatory school immunizations aimed to protect the health of others.<sup>232</sup> Even Fourth

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<sup>228</sup> Kramer, *supra* note 38, at 975.

<sup>229</sup> *See id.*

<sup>230</sup> CHEMERINSKY, *supra* note 141, at 57–58.

<sup>231</sup> Ruane, *supra* note 159, at 1.

<sup>232</sup> *See* Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773, 1784 (2008); Ronald Bayer, *The Continuing Tensions Between Individual Rights and Public Health: Talking Point on Public Health Versus Civil Liberties*, 8 EMBO REPS. 1099, 1101 (2007).

Amendment rights against warrantless searches are limited when exigent circumstances exist because people are in imminent danger.<sup>233</sup> Individual liberties have never been upheld when lives are at risk. This should be no different in the Second Amendment context.

Aside from liberty, social movements advocating broad gun rights do not adequately address how broad rights under the Second Amendment contribute to effective democratic governance, equality, justice, or welfare, or how these values would be harmed by limiting individual rights under the Second Amendment. The closest they come to defending welfare and justice can be found in self-defense justifications for the right to own a gun, but even this does not justify an unlimited individual right under the Second Amendment.

Social movements advocating broad rights under the Second Amendment may be considered from an individual rights perspective, but social movements advocating limited rights must be evaluated to view other progressive factors through the lens of the common good.

## 2. Progressive Constitutionalism and Social Movements Advocating for Limited Gun Rights

As can be seen in the discussion of how guns have been used in modern society, there are strong social and policy reasons for restricting the individual right to own guns under the Second Amendment. It is clear that individual gun ownership pervades each of the five factors Chemerinsky outlines. Social movements advocating limited gun rights under the Second Amendment address these issues more effectively than social movements advocating broad rights. Our democratic and effective government is affected by armed intimidation at polling places and an armed attack on the Capitol. Our liberty is threatened by the exercise of the Second Amendment right to gun ownership, and we are unable to safely access our other rights, such as protesting and voting, if guns are not regulated. Justice cannot be achieved if the outcry of social movements to end gun violence is ignored in favor of broad individual rights to own a gun. Similarly, equality is endangered when certain demographics are able to practice their rights under the Second Amendment without issue, and others are arrested merely on suspicion of possession of weapons. Equality is endangered when minority populations face the brunt of the negative impact of gun rights. Finally, our welfare is at risk with unchecked individual rights to gun ownership, and people will continue to be harmed by gun violence if the Second Amendment remains unchecked. These are the very reasons why social movements call for judicial and constitutional change.

Social movements advocating for limited individual gun rights are perceptive of factors of progressive constitutionalism, and get at the root of issues that affect these facets of American democracy. While rights certainly are an important part of American society and warrant protection from the Constitution, these rights cannot be upheld at the cost of other important

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<sup>233</sup> *Fourth Amendment*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/fourth\\_amendment](https://www.law.cornell.edu/wex/fourth_amendment) [<https://perma.cc/5TGK-2X5X>] (last visited Mar. 20, 2021).

values of our government and society, especially when lives are put at risk by a broad interpretation of rights.

## VII. CONCLUSION

Today, people use guns in a way that the Framers never could have foreseen. We have moved so far beyond an originalist view of the Second Amendment that any originalist theory of self-defense is inadequate and incomplete. Differing originalist interpretations of the Second Amendment lead to inconsistent results, and the only conceptions that allow for an individual right under the Second Amendment come from stretching originalism beyond recognition to something that looks more like living constitutionalism, taking into account changing societal values in favor of individual gun rights. Therefore, originalism is not a good defense of the Second Amendment. Since the Court in *Heller* used a poorly-disguised version of living constitutionalism to find individual gun rights in the first place, it is an incomplete decision that does not take into account all necessary factors. It is time to acknowledge this and take into account the entire picture, addressing all factors that play into the gun control debate.

This requires a progressive interpretation of the Second Amendment, including considering factors such as social movements, the impact of gun violence on welfare and other rights—such as the right to assemble and the right to vote—and policy reasons for restricting individual rights. Guns have seeped into nearly every aspect of American life, and the courts cannot ignore the impact that rights under the Second Amendment have had on American society and other rights under the Constitution. Guns have been used to enact violence, instill fear, and intimidate. Considering all factors under a progressive interpretation, there are strong justifications for restricting the individual right to gun ownership under the Second Amendment. At the very least, the Court should employ an approach to the Second Amendment that takes into account competing social movements and all values of modern American government and society.