

Heller and Public Carry Restrictions*

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Denning: I'll just briefly introduce the panelists, and then I will take the moderating privilege just to set the discussion up, including posing a few questions that I hope we could come back to once everybody has made their presentations. So on the right, far right, is Glenn Reynolds. He is a Brogan professor of law at the University of Tennessee and my former professor. Then we've got Jonathan Lowy, the vice president for litigation at the Brady Center to Prevent Gun Violence. George Mocsary, who is assistant professor of law at Southern Illinois University, which was where I had my first teaching gig, so it's nice to have a Saluki in the house. And then finally, Joseph Blocher, who is professor of law at Duke University.

So just by way of discussion, I think one of the most interesting shifts in firearm policy over the last three-plus decades has been this transition from either prohibitions on the carrying of concealed weapons, or, where it was allowed, from a may-issue regime—that is to say officials would have discretion whether or not to grant you a license to carry a concealed weapon—to a must-issue regime. And, as of now, the vast majority of states have adopted must-issue laws for concealed carry permits. I think it's over forty and maybe as many as forty-four or forty-five states. Somebody on the panel more knowledgeable can probably verify that.

* Panelists made edits to this transcript. Visit www.campbelllawreview.com to view the full video of *Campbell Law Review's* 2018 symposium: *Heller* After Ten Years.

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In addition, you have begun to get a movement for public carry. Now, in the old days, in the nineteenth century, culture read open and concealed carry 180 degrees differently than we do today. Many of the prohibitions, the rationales given for prohibitions on concealed carry, had to do with the fact that if you were going to go armed, you had an obligation to put everybody on notice. If you were strapped, you ought to have the sort of courage or be transparent about it, as opposed to people with concealed weapons who were sort of card sharks, and carpetbaggers, and other people of no repute.

Now that it's become the reverse so that open-carry—if you're wearing a gun on your hip, carrying a rifle in public, whatever, that that's viewed as very provocative and very aggressive. Whereas, if you're going to carry a gun, do the rest of us a favor and not flaunt it. And so I'd be interested to hear any thoughts that anybody had on that sort of cultural shift.

As to concealed carry, courts have been very reluctant to read *Heller* to require state and local governments to adopt a shall-issue regime.¹ In fact, it's still a relatively open question whether *Heller* extends beyond the four walls of the home. And this matters only in a few states; only in the few states that happen to have populations that are located close to a city, huge urban populations, which, to generalize, may favor more gun control. And then, in some cases, we'll have rural populations which are very much interested in being able to have a concealed carry permit and the like. So in these sort of outlier states, this is still an issue.

Interestingly, this is sort of a departure for the courts. The Supreme Court in particular, when it comes to fundamental rights, it sometimes has a habit of waiting until there are just a few outlier states that prohibit certain conduct, and then they'll just constitutionalize it. You saw this in *Lawrence* with sodomy statutes.² There were just a handful left. And, in fact, gay marriage as well. And I heard Sandy Levinson, a professor at Texas, give a talk in 1998, where he predicted that by 2010 or 2015 that there would only be a handful of states that had outlawed—that still banned same-sex marriage, and at that point the court would jump in and constitutionalize the issue, and just apply the rule to these outliers. And it's interesting that there is a slightly different dynamic going on here.

So before I turn it over to the panelists, I wanted to pose a few questions that I hope either get addressed in the remarks or we could come back to following the presentation. So, number one, is this history that I described, this historical prohibition of concealed carry, is it a problem for the current litigation or the current litigants? In other words, is it too easy for courts to

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

2. *Lawrence v. Texas*, 539 U.S. 558 (2003).

just say, “Look, there is a long tradition of banning concealed carry, and therefore the framers of the Fourteenth Amendment and the framers of Second Amendment understood this, and took it into account when they drafted those amendments”?

The second point is, given the success of the concealed carry movement in most states, is this something that could be safely left to the political process? In other words, is this an area where the judiciary needs to become involved? And to the extent the courts perceive it as not, is that driving some of the judicial reluctance to constitutionalize this issue as opposed to leaving it largely as a policy matter?

And finally—I’m throwing Joseph a softball here—can you make the argument that the retention of concealed carry bans or—may-issue regimes in states is simply an example of a kind of firearms localism that we ought to value? In other words, that if people in California, by and large, don’t want to give their officials discretion to issue licenses or not, and a majority of them are happy, is that a policy choice that we should respect, and not expect the courts to jump in and disrupt? So, with that, I will turn it over, and we will start with Glenn.

Reynolds: So I’m looking at this carry issue through a particular lens, and this is because I’m an academic, and I look at everything through the lens of whatever I’m working on at the moment. And what I’m just done with is something called *The Judiciary’s Class War*. The gist of that is that the judiciary is a branch of government made up entirely of well-off people with post-graduate degrees; that it has the class biases, the aesthetic preferences, and the general habits of living that go along with being a bunch of people who are upper-middle class or better, and have post-graduate degrees. Something that goes double for the Supreme Court, which is sort of the elite of the elite.

Dahlia Lithwick calls them “judicial thoroughbreds,” who have careers based in academia and appellate courts, and don’t have even the sort of real-world experience that your average capital defense lawyer or somebody has, which I think is a fair criticism.

So it’s not surprising, under those circumstances, that somebody who has spent a good chunk of their life with a button under their desk that will summon armed marshals at a moment’s notice [LAUGHTER] doesn’t see the right to carry a gun to protect yourself as that important. And when you add to it the sort of class divide in general regarding gun rights in the United States, and not only the class divide sort of between rich and poor, or rich and middle class, but also the class divide between sort of urban academic mandarins and fly-over people—it’s not surprising that the court is much less solicitous of these kind of rights than they are, for example, rights involving

words or sexuality, things that educated academic elites take much more seriously as part of their own lives.

So I think that accounts for a good deal of it. And I think that it is also interesting that it's happened anyway, as Brannon noted. I live in Knoxville, Knox County, Tennessee. The latest estimate I saw said that about 15% of the adults in Knox County have a carry permit. Then it's not legal in Tennessee to carry a gun in your car without a permit, so I don't know how many that is. But in some sense, it's really no change. I talked to a cop when they first adopted the law, and he said, "Well, my experience suggested about one out of three people has got a gun their car already, even though it's illegal." And the practice in the local police was if they seemed like a good guy, you just let them go, and if they seemed like a bad guy, you arrested them for having an illegal gun, and you were happy to have the leverage.

So it may not have actually changed behavior all that much. But as a political phenomenon, it's amazing because widespread carry rights seemed unimaginable just a couple of decades ago. And now they have spread almost everywhere to—I mean, I wouldn't say they've been politically uncontroversial, but it's been a lot lower-profile than you might have expected, certainly than you would have expected twenty years ago. And generally speaking, we haven't seen the rivers of blood in the streets that some people might have predicted at the time.

Constitutionally, it's hard for me to say. There is language in *Heller* that can certainly be read to suggest a right to carry, and go armed in case of confrontation, as Scalia says. But the Supreme Court certainly hasn't done very much to push that. And the lower courts have been largely unreceptive. They have been willing, I think, to go as far as to say an absolute prohibition on carrying is not going to be upheld. That's *Wrenn*.³ And beyond that, you're not getting a lot of help out of the lower courts on these kind of things. But you also don't need it for the most part because the democratic process has answered that. And that raises, to me, a second question.

Brannon talked about localism. Now, localism and constitutional right seems a little iffy to me. We can say, "Well, if the people of California don't want people to carry guns, maybe we should just let them have that." We don't say, "If the people of California don't want gay marriage, maybe we should just let them ban gay marriage." We don't say, "If the people of Kansas want to ban abortion, maybe should just let them ban abortion. If the people Connecticut want to ban birth control, maybe we just let them ban birth control." We don't have a tradition of localism where constitutional rights are concerned.

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

What we do have, outside the judicial sphere, is a tradition of having a national majority regulate the behavior of local majorities that are oppressing local minorities. And that's, for example, what the civil rights laws do. If, in fact, the Supreme Court does nothing on this, and there is a sentiment that these outliers that continue to have may-issue or prohibitions are a problem, Congress can pass laws essentially imposing carry on states, and it has constitutional power to do that through a number of mechanisms. And there may be pressure to do that.

And, of course, we have right now the national handgun Concealed Carry Reciprocity Act in front of Congress, which does not do quite that but something that's a step in that direction. Will that happen? I don't know. It depends on how much it matters as a national issue; it depends on how the next few elections go. I will say almost every panel in this program, and for that matter, almost any panel on almost any program on any constitutional issue right now, carries with it the caveat, "Well, it depends on how many judges Donald Trump gets to appoint. It depends on whether Donald Trump gets to appoint judges or whether Hillary Clinton had gotten to appoint judges." We have reached a situation in which personnel is policy in our judicial system to, I think, an unprecedented degree.

But if we have two terms of Trump, I think that you will see the courts, and the lower courts, in particular, shift their view on some of these issues. And if Donald Trump is—well, I was going to say if Donald Trump is replaced by Bernie Sanders, but Bernie is actually kind of—he's from Vermont. He's not so anti-gun. We'll see. Hillary could come back. It's not too late. If President Hillary comes in in 2020 and appoints some justices, we'll see things—and it should concern us, actually, that the outcome of a lot of these questions depends so much on potentially how many Puerto Ricans move to Florida over the next six months or whatever. I'll pass on after that.

Lowy: Thank you. I've got a different perspective than Glenn and actually, I think, all of the panelists because I'm a litigator, not an academic. And for the past twenty years I have represented victims of gun violence, people who have lost loved ones because of gun violence. And that brings me to three lenses that I'd like to suggest that all of you consider for this issue, for any Second Amendment issue, and probably for any constitutional issue. And those are people, rights, and the law.

And first let me talk about people because, of course, the Constitution is not about abstract principles. It's not about a product or an industry. It's ultimately about people. And let me tell you a story about two people that bears on the issue we're talking about.

The two people are Jeff and Kirsten. Jeff was a young man, 29 years old, who had severe mental problems. He was probably a paranoid schizophrenic. He had severe paranoid delusions and thought people were out to get him, thought people on the television were laughing at him, et cetera. Jeff also had a permit to carry a concealed weapon in public places. He was issued that by law enforcement in his state, and actually law enforcement in his state had no choice but to issue him a permit to carry a loaded concealed weapon. I had the opportunity to actually talk to the sheriff whose office issued him the permit. And I asked him something like, "If you had asked Jeff why he wanted a concealed carry permit and his answer was, 'because there are millions of silver-backed monkeys on the other team, and there are none on my team, and I need to defend myself against them,' what would you have done?" And he said, essentially, "I have no choice, because of the state law," and it's the state law, as was said, in most states. "I would have to issue him a permit."

Jeff actually also had been convicted of a felony, of shooting with his firearm, someone else's property, maybe at the person. And then after his probation he got that expunged. That also was of no legal relevance to the sheriff. And, in fact, I could give you much more facts about the danger that somebody posed if they went into the sheriff's office, and the sheriff knew that that person was a tremendous danger to the community, even unarmed, but a much greater danger armed with a lethal weapon. The sheriff would have no choice but to issue the permit. And of course, it's being argued by some that there shouldn't even be a permit required; Jeff and people like him should be able to carry because it's their constitutional right.

The other person in this story is Kirsten. Kirsten was a woman who was a mother, loved nature, loved photography. She was driving to visit one of her sons. She stopped at a scenic overlook. She wanted to see a lighthouse on the coast. And she saw a man there and said, "I want to see a lighthouse, but I can't see it through the fog. Is it there through the fog?" The man was Jeffrey. Jeffrey took out the gun that he was legally permitted to carry loaded, and he shot Kirsten five times. He then dragged her body into the woods and burned her body.

Now, I could tell you many more stories besides Jeffrey. There have been reports in the news over the years. In North Carolina it was reported, in fact, that 2,400 people convicted of crimes had been issued concealed carry permits. In Florida, 1,400 people convicted of felonies had been issued concealed carry permits. And there are many other stories like the story of Jeff and Kirsten.

And that brings me to the second lens, the second prism, which is rights. And it's important to understand what is the "right to carry" that's being talked about. I think it's a little misleading to call it a right to carry because

that suggests that the people who want this right would be happy carrying a gun as a fashion accessory. That isn't really why the right is being sought. The right is being sought so it can be carried and that then when the user, whether it be Jeffrey or somebody else, deems it appropriate, under his view, to defend himself that he can take out that firearm and shoot it, and perhaps kill someone if necessary, if he deems it appropriate. That's really the right that we're talking about.

Clearly, it is circumscribed by criminal law. In Jeffrey's case, it was murder. I'm not suggesting that there's a claim that the Second Amendment exempts people from murder or assault. But, of course, when we're talking about that sort of criminal prescriptions, that's too late for the victim. The fact is, once you entitle Jeffrey to carry his gun, he will do what he wants to do, what he deems he needs to do. And he may be prosecuted, but that's no solace to Kirsten and her family.

It's also important to think about Kirsten's rights, and people like her, and people like all of us. And I would suggest—I heard Professor Malcolm talk about the right of self-defense to, I think, be the most fundamental right. I disagree with that. I think the most fundamental right is the right to live. And I think that was a right that Kirsten had. I think it was a right that Trayvon Martin had when he was shot and killed by a concealed carry holder. And I think it's the right of all of us.

I don't think it's a rhetorical right. I think it has constitutional basis to it. I published an article with Kelly Sampson a year or so ago called "The Right Not to Be Shot," which makes the argument that all constitutional rights are circumscribed by public safety.⁴ And the Supreme Court has long interpreted the First Amendment, for example, not to permit fighting words because they might instigate a fistfight. Every right is limited by public safety. The court doesn't call it a right to live, but I think that's what it really is, a right to live that we all have. And any constitutional right, but certainly a right to possess and/or carry loaded, lethal firearms must be constrained to some extent by the most fundamental right to live. And I understand there can be fair disagreement with everyone on this panel about where you draw that line, even recognizing that there is a right to live, but you have to think about it and account for it in your analysis.

The third prism is the law. And *Heller*—I think it's pretty clear—does not embrace a right to carry. The court may well embrace a right to carry later, but *Heller* didn't do it. And every single circuit court that's looked at the issue has agreed that *Heller* did not embrace a right to carry. And, in

4. Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL'Y 187 (2016).

fact, Second Circuit, Fourth Circuit, Seventh Circuit, Ninth Circuit all haven't embraced a full, unregulated right to carry. Seventh Circuit struck down a ban on concealed carry, and that's sort of the strongest precedent in that direction. The others have upheld restrictions that would allow law enforcement to, for example, deny permits to someone who was afraid of silver-backed monkeys or gorillas.

And in closing, I want to quote from Judge J. Harvie Wilkinson in the Fourth Circuit. And this is from the assault weapon case.⁵ But I think what I'm reading is relevant to this discussion as well. And I think Wilkinson put all of these prisms together very poetically: "Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation." Providing for the safety of citizens within their borders has long been state government's most basic task. In establishing the right of law-abiding, responsible citizens to use arms in defense of hearth and home, *Heller* did not abrogate that core responsibility.

Thank you.

[APPLAUSE]

Mocsary: Thank you all very much for having me here. It's an honor to be at one of two symposia on the tenth anniversary of *Heller*. So, when you talk at this point in a symposium, and we've heard so many very smart people speak, you necessarily rehash some of what they're saying. A lot of the themes that I'm going to cover have been covered already. But I'm going to do it from a slightly different lens here.

Bans on public firearms carriage are attempts ostensibly to prevent already prohibited conduct. We already have laws against murder, assault, making threats, etc. And in most places, or many places at least, we have enhanced penalties for doing it with a gun. It's difficult to imagine that someone who is not deterred by the sanction for these crimes would be deterred by a possessory offense with a much lower chance of detection.

Gun owners are often demonized and even ridiculed for wanting to defend themselves when so-called trained professionals are out there to do that for us. But going about armed is more than an act of self-defense. It's an acceptance of a civic duty and a responsibility, which I would submit—

5. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017).

and I agree with Professor Reynolds—many elites in this country have abandoned, including our federal judges. And that responsibility is to be self-sufficient, and it's got a long history in American culture.

In fact, the D.C. Court of Appeals recently recognized that in *Conley v. United States* when it struck down a D.C. ordinance that made it a felony to be present in a motor vehicle knowing that it contained a firearm.⁶ It wrote that the U.S. has a “long tradition of widespread lawful gun ownership” and that individuals “may not see anything wrong in the presence of a gun.” We know that concealed carry holders are exceedingly law abiding. The permit revocation rate for commission of a crime ranges from 1 in 6,000 to 1 in 10,000. By the numbers, they're as low—as law-abiding—as police are. I suspect that means that they're more law-abiding because concealed carry holders don't benefit from the professional courtesy that other police officers benefit from as a matter of course when they encounter police.

And citizens are capable of accurately using their weapons to both ward off and to fight off, when needed, attackers, again, as effectively—and in this case, potentially far more effectively than—police are. They shoot the wrong person far less frequently than police do. And that's not because the police are not skilled or something like that; it's just that police arrive to a chaotic situation. They don't know what's there. If you're walking down the street at night and someone points a gun at you and says, “You're coming with me,” there is no question who your attacker is.

So to give you a roadmap, first, I'll share some thoughts on the concerns raised by may-issue carry laws where the avowed goals of the laws are to serve as bans for most of the law-abiding population, and an attempt by some, but not all, to over-criminalize a disfavored group of law-abiding persons. Then I'll talk about how courts are acquiescing in all this. And to echo a theme that Alan Gura raised in both of his talks, we're talking about the Second Amendment today. This applies to every right that matters to everyone in this room.

An individual law-abiding citizen is well-positioned to know what his or her specific danger is, or better positioned than a government bureaucrat. Yet the application fees for carry permits can be onerous. We heard about that in an earlier talk. The process can take exceedingly long. And in most may-issue jurisdictions, but, again, not all—Connecticut is an exception—only connected people get permits. The famous situation of Aerosmith is a nice one. The members of the rock band Aerosmith got their permits at One Police Plaza during the day. That night, the police officers got great tickets to the Aerosmith concert at Madison Square Garden. Apparently, some limousines even picked the officers up.

6. *Conley v. United States*, 79 A.3d 270 (2013).

The result is that many—and truckers are a very large group because they travel between jurisdictions, so if they go to one where they can't carry, they can't carry anywhere they go—are forced to choose between staying unprotected and being subject to severe criminal sanction. The effect of all of this is that carry bans tend to turn into criminals peaceable citizens whom the state has no reason to have on its radar. Massachusetts's Fox-Bartley Law, which provides a mandatory one-year sentence for unlicensed firearms carriage, provides a stark example.⁷ This is a situation, also, about a person. I certainly agree that people matter, as Mr. Lowy said.

In 1986, Sylvester Lindsey was sentenced to a mandatory one-year prison term for carrying a handgun that he used to defend himself from a knife-wielding attacker after that attacker, who was a convicted felon, had previously threatened him and attacked him with a knife. The jury found him guilty of unlawful carrying of a firearm but acquitted him of assault with intent to murder and assault and battery by a dangerous weapon.

The first thing that should bother you here is that the prosecutor even charged him with intent to murder. The Supreme Judicial Court of Massachusetts, which is the top court there, in a somewhat schizophrenic opinion, first held that the defense of necessity was not available to Mr. Lindsey because the previous attacks and threats were not immediate enough to warrant them.⁸ But then it noted that, "The threat of physical harm was not a general one," that Mr. Lindsey may have saved his life by using a gun to defend himself, and that he was an upstanding citizen, but that the courts had no choice but to imprison him for a year. So for Mr. Lindsey, the relatively new adage of preferring to be judged by twelve, rather than carried by six, played out in a very sad way.

Three years later, a Massachusetts trial court, unhindered by a mandatory sentence requirement, imposed a suspended sentence on a forty-four-year-old man for twice raping an eight-year-old girl. Nothing seems to have changed in Massachusetts in the last thirty years. Fox-Bartley is still on the books, and the state continues to release rapists and violent attackers: In 2015, suspended sentence for misdemeanor sexual assault and second-degree felony assault; 2013, suspended sentence for a child rapist; 2008, probation and monitoring for rape of a child with force, statutory rape of a child, and indecent assault and battery on a person fourteen or older. The same year, probation and monitoring for two counts of indecent sexual assault and battery.

I submit to you that a legal regime that's willing to imprison a disfavored Mr. Lindsey, who is disfavored because he dares to want to

7. MASS. GEN. LAWS ch. 269, § 10 (2015).

8. Commonwealth v. Lindsey, 489 N.E.2d 666 (Mass. 1986).

protect himself with a firearm, while allowing child rapists to be free, suggests that, at least for some—and I don't say that all, but at least for some—the motive for these laws is more what Bob Cottrol and I call a kind of cultural imperialism, than real hope that the measures they seek to impose will reduce crime. That's demonstrated by the ineffectualness of gun control in preventing crime, and by its focus on restricting the behavior of the law-abiding, in this case, hyper law-abiding, would-be concealed carry holders, rather than apprehending and punishing the guilty.

It's also brought into focus when the staunchest advocates for ever more gun control—and, again, only some of the staunchest advocates, like Senator Feinstein—get concealed carry permits, or who move about with armed security details, like Senators Schumer and Boxer. It reveals an attitude held by some—and one example of someone who is a gun-control advocate, who doesn't share this view, is Richard Aborn. He believes people who fight concealed carry laws are wrong. He said in a symposium in 2014 at the University of Connecticut (this is close to an exact quote)—“This is about illegal guns, not gun owners. This is where the homicides are occurring.”—that it's acceptable to force into existence one view of what our society should look like; where the elites' lives are worth protecting, but others are not, even at the expense of destroying innocent lives. To subject exercise of a right—and it is a right, to quote the Bill of Rights, and *Heller*—to pervasive and even plenary government discretion is to degrade it into a state-granted privilege for society's elites. In this country both classical liberals and progressives argued—correctly, I would say—that it's never okay to punish the innocent or the blameless. What we have in this area is collective guilt and collective punishment, and that belief is neither liberal nor progressive.

So what are the courts doing? We've heard a lot about it, and I agree with most of what Alan Gura says. I'll share my take on it, including what I believe is the worst case on the topic. There's been outright defiance of decades of fundamental-right jurisprudence at the far end, and many cases fall somewhere short of that. *Heller's* analysis strongly implies that the Second Amendment protects the bearing of arms outside the home:

- Significantly, it notes that the need for self-defense is “most acute” in the home, implying that it's acute and, as is self-evident, certainly exists elsewhere.
- It lists a number of longstanding, “presumptively lawful,” arms-bearing regulations. We've heard that phrase many times, including, “laws forbidding the carrying of firearms in sensitive places,” but it does that without sanctioning a general ban on public carriage, suggesting that some regulation of arms carriage outside the home is not presumptively lawful.

- It holds that the Second Amendment protects, an “individual right to possess and carry weapons in case of confrontation,” most of which are not limited to the home in a world where it’s all but impossible not to leave the home.
- It disaggregates the right to keep arms from the right to bear or carry arms, which “right to carry” is unlikely to refer to the home, while “keeping” naturally refers to the home.
- And to get to one of Professor Denning’s first questions here, about this cultural shift between open and concealed carry, the case relies on nineteenth-century state case law that held that the right to keep and bear arms—or that the right to bear arms, at least, mandated the legality of either concealed or open carry. So the answer there is that one or the other has to be legal. It doesn’t have to be both. It doesn’t have to be concealed carry; it could be open carry. But there certainly is a cultural shift, and we’ll get back to that to see how that question played out in Illinois. And that gets to the historical-prohibition-on-concealed-carry question as well. Sure, it’s okay, *if* open carry is allowed.

So, I’d like to discuss *Drake v. Filko*, which I think is the most defiant case.⁹ At issue was New Jersey’s very restrictive may-issue statute that resembled that of Massachusetts. It had a three-year mandatory sentence instead of one. The court first held that public carriage fell outside the scope of the Second Amendment’s protection because the justifiable need requirement was longstanding. Yet even if *Heller*’s presumption of legality is based on the longstanding nature of a regulation, something I believe to be a questionable assertion—and I understand that most people here disagree with me, though I learned today that not everyone does, which makes me feel great. [LAUGHTER] It’s a questionable assertion, I believe, because *Heller* didn’t say that longstandingness drove the presumption. I think what *Heller* was really saying is that ownership by dangerous people—self-evidently dangerous people—can be regulated.

But taken at face value, the *Drake* court made no serious effort to address the plaintiff’s argument rebutting the presumption. *Heller* didn’t make a categorical statement that longstanding regulations are okay, but only set forth a presumption that they are. *Drake* first dismissed the plaintiff’s argument that either open or concealed, shall-issue carry had to be allowed with a conclusory statement without addressing *Heller*. It then combined the New Jersey statute’s 1924 pedigree, the ban on concealed carry, with the assertion that felon-in-possession bans sanctioned by *Heller* were enacted in the same era to conclude that the law was longstanding. But, as the dissent

9. *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

points out, New Jersey allowed open-carry until 1966. So some kind of public carriage was certainly allowed until 1966. And, “felon-in-possession laws have historical pedigrees that originated with the founding generation.” That’s absolutely correct, and the majority made no effort to explain away these complications.

But the *Drake* majority also performed an alternative analysis under what it called “intermediate scrutiny,” but that arguably was even more deferential than rational basis review. Under the Third Circuit’s version of intermediate scrutiny, the state bears the burden of showing that a given regulation “does not burden more conduct than is reasonably necessary,” in attempting to achieve its stated end. Most significantly, the court relied entirely on “the predictive judgment of New Jersey’s legislators,” that limiting issuance of carry permits would enhance public safety. The predictive judgment was based on “no evidence at all,” to quote the dissent. And that’s really correct. There was no evidence at all, not a scintilla, not a shred, not one bit of evidence, empirical or otherwise, showing this.

And how does the majority explain this away? It attempted to absolve the state from its burden by stating that when New Jersey passed its statute, *Heller* had not yet declared the Second Amendment to be an individual right and that the legislature, therefore, could not have been expected to know that it should marshal evidence to support its law, its ban. But a governmental entity may present, and a court may consider, evidence outside the legislative record when evaluating a law’s constitutionality, as happened in another Third Circuit Second Amendment case which the *Drake* majority cited twenty-three times. That case is *U.S. v. Marzzarella*, where the Third Circuit—correctly, I believe—said that the ban on firearms with obliterated serial numbers was constitutional.¹⁰ And that case, which the *Drake* court cited twenty-three times, used tons of extra-legislative evidence and said more or less, directly, “We can use evidence outside the legislative record.” The court doesn’t explain why it was acceptable for New Jersey not to present evidence to support the continued justifiability of its prohibition.

Understand the import of this. This is the equivalent of an 1871 court saying that a ban on freed slaves’ voting that was passed before the Reconstruction amendments was valid because the legislature that passed it didn’t know at the time that it would eventually be constitutionally banned.

Most, but not all, challenges to public-carry bans and may-issue regimes failed, usually falling somewhere short of *Drake* in their defiance.

10. *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

Drake is an especially bad case. I'll talk about *Caetano v. Massachusetts* in a moment, where the Massachusetts Supreme Judicial Court was as defiant.¹¹

I want to touch on *Moore v. Madigan* a little bit.¹² And everything that was said about Posner's sort-of reluctant opinion, I think is correct. He okayed may-issue licensing. His opinion did. It was only through the political process that we got shall-issue in Illinois. A coalition of Democratic pro-gun legislators in Southern Illinois threatened to hold up any new legislation unless two conditions were met: that we would get shall-issue carry throughout the state and that there would be statewide preemption.

And getting back, again, to the historical prohibition and the cultural question, the Northern Illinois politicians—from both parties—this was really a north-south question, not so much a party question—just could not imagine seeing someone carrying a gun openly in Northern Illinois. If you cross the river into Kentucky, in Southern Illinois, it's not infrequent to see someone carrying openly. Most recently I saw a gentleman walking in the mall with his wife. He was wearing his handgun, and it just wasn't a thing. It just wasn't an issue. People there aren't afraid of guns.

In *Caetano v. Massachusetts*, the Supreme Court issued a GVR. That means it granted certiorari, vacated the Massachusetts high court's opinion, and remanded. In that case, Ms. Caetano was prosecuted for possessing a stun gun. She got it after her abusive boyfriend put her into the hospital and she became homeless. One day when she got off work, her abuser was waiting for her and screaming that he wasn't going to let her work there anymore because she should be at home caring for the kids they had together.

She took out the stun gun and said she would use it, and he got scared and left. Sometime later in some mix up about a shoplifting incident in which she wasn't involved, police asked for permission to search her bag. She granted it, and they saw the stun gun. They arrested her. The DA prosecuted her, knowing the background at this point. The trial court convicted her, and the Massachusetts Supreme Judicial Court upheld the conviction, rejecting her Second-Amendment argument that stun guns were protected.

Here is what it reasoned: first, it said that stun guns are not protected because they, "were not in common use at the time of the Second Amendment's enactment." But *Heller* squarely rejected as "bordering on the frivolous," the argument that, "only those arms in existence in the eighteenth century are protected by the Second Amendment."

Second, the Massachusetts court said that stun guns were dangerous and unusual, and therefore not protected. Dangerous because it's a weapon, and

11. *Commonwealth v. Caetano*, 26 N.E.3d 688 (2015), *vacated sub nom. Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

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

unusual because it's a modern invention. And that, again, fails *Heller's* frivolous argument. And guns are also considered dangerous in Massachusetts and *Heller* said that those can't be banned. Note that we're even outside the area of firearms now. There's something other than a desire to preserve life at issue at this point.

Third, the court said that stun guns weren't useful in the military. That fails *Heller's* rejection of the proposition that only military weapons are protected. And my big lesson from the case is that it's also false. Apparently, stun guns are used in modified form in the military, and, of course, police use them.

So the case is vacated. This is great. But a few things to note. The Supreme Court *did not* hold that the Massachusetts law was unconstitutional, even though some jurisdictions interpreted it that way. It only sent the case back for remand, presumably for the Massachusetts high court to apply a watered-down form of intermediate scrutiny, like you've heard about over the last couple of days.

On July 6th, 2016, Ms. Caetano was formally exonerated. The charges against her were dropped. She was formally found not guilty, and the record was sealed. Also a very good thing. Here is someone who may have saved her life, or at least protected herself from very serious injury, and is not being punished for it. But the Massachusetts law is still on the books and has never been struck down, so the police are free to arrest the next Ms. Caetano that they come across if for some reason they don't like her, as Professor Reynolds said.

Justice Thomas sums up the situation nicely in a dissent from a denial of cert in the Ninth Circuit's *Jackson v. San Francisco* case, which is this odd semi-forced carry case.¹³ *Heller* struck down D.C.'s law that required all firearms kept in the home—only long guns before the ruling—to be kept disassembled and bound by a trigger lock because it prevented owners from keeping the gun “operable for immediate self-defense.”

San Francisco required, and still does, that a handgun kept at home be disabled with a trigger lock unless it's being carried on someone's person. If you're carrying it in your home, then it doesn't have to be disabled with a trigger lock. You cannot put that gun down onto your kitchen counter, for example. You can't even put it way on top of the fridge where the kids can't reach it.

The Ninth Circuit upheld the law. The Supreme Court denied cert. And here is what Justice Thomas said: “Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it. []

13. *Jackson v. City of San Francisco*, 746 F.3d 953 (9th Cir. 2014).

Second Amendment rights are no less protected by our constitution than other rights enumerated in that document. . . .”¹⁴ As a practical matter, it’s protected far less than even unenumerated rights, as others have said. Back to the quote: “San Francisco’s law . . . prohibits [residents] from keeping those handguns ‘operable for the purpose of *immediate* self-defense’ when not carried on their person. The law thus burdens their right to self-defense at times when they are most vulnerable—when they are sleeping, bathing, changing clothes, or otherwise indisposed.”

I submit to you that worse than harm to the Second Amendment caused by the lower court’s defiance of the Supreme Court, and the Court’s delegitimizing refusal to review blatant affronts to its authority—and to some extent, I agree with Professor Reynolds. In some cases it won’t matter; in many cases, it won’t matter all that much because we have a mass of people in this country, numbered in the nine figures, that just will not give up its guns. You cannot take their guns from them. That wasn’t very clear to me growing up in New York City, even though I was a New York City person who supported gun rights. Living in Southern Illinois, I see that you cannot take Southern Illinoisans’ guns from them—more than harm to the right to bear arms, which many will decide has to be ultimately exercised clandestinely, is the harm, to quote Justice Stevens’s final line in his *Bush v. Gore* dissent, to “the Nation’s confidence in the judge as an impartial guardian of the rule of law.”¹⁵

Thank you very much.

[APPLAUSE]

Blocher: I find myself in a very unusual position for a law professor, which is that I don’t think I have much to say in addition—that would add value to what my co-panelists have said. Usually, a law professor can continue to opine on anything, but Jon and George have covered the public-carry issue, and Glenn has already set up the judiciary question, and so I find myself scratching out things I don’t want to repeat. Instead what I want to try to do, in my time, is to tie back this panel, since we’re getting towards the end of the day, with the first panel, which was designed to talk about what’s happening ten years out in the lower courts. Where are we ten years after *Heller*? I will try to say something to situate the public-carry cases in particular there.

Now, as you have already seen, when people talk about what the lower courts are doing, they do what they usually do when they talk about law and say, “Here is what this court did. String cite, *See, e.g.*, here’s three,” or

14. *Jackson v. City of San Francisco*, 135 S. Ct. 2799 (2015).

15. *Bush v. Gore*, 531 U.S. 98 (2000).

maybe cut some language from a court's opinion and try to parse it. And that makes perfect sense. That's what we do as lawyers, all the time. But, of course, as you all, I'm sure, have experienced, the other side then does the same thing. You say, "Oh, courts are doing X, *See, e.g.*, 1, 2, 3," and they come back and say, "No, no, no. Courts are doing not X, *See, e.g.*, 4, 5, 6." And there's no real way to resolve those kinds of disputes, I don't think, without some sense normatively of what the courts should be doing. And so those debates tend to reduce to, "Yeah, but yours are wrong, and mine are right."

You've got to have some normative vision of what the Second Amendment is about in order to get traction there. I do not purport to offer that. This is not going to be a presentation about the normative vision of the Second Amendment. Presumably, y'all have strong visions of it already if you're here. But I do think it can be helpful to get a sense of whether cases 1, 2, 3 or cases 4, 5, 6 are representative of broader trends. And ten years after *Heller*, we have the benefit, which we didn't have in 2008, of a really big, broad, and rich jurisprudence. If you were at dinner last night, you heard various figures thrown out of 1,000 or 1,200 Second Amendment cases in the last ten years, which is great. That's a lot to read. That's a lot to digest.

And some of the arguments you'll hear about the Second Amendment are the kind of statements that are subject to proof. If a person says something like, "Well, the lower courts are openly defying *Heller*," you can test that. You can actually look at the cases and see if they are favorably citing *Heller*. If you hear somebody say, "Well, history is driving all the analysis," you can test that. You can actually just look, read the cases, and see if they're citing historical sources or not. You can look at success rates, and you can break it out and see what kinds of cases are succeeding and what kinds of cases are not. And by now you have probably guessed that I am going to do what Glenn did, and talk a little bit about my own work on this issue because, as it happens, I'm just completing a project which involved reading and coding every single post-*Heller* case for the last ten years.

Not myself personally, I should say! My co-author Eric Ruben did most of the work, and we had a research team, but together we've read and coded, across ninety different variables, nearly every available post-*Heller* case. That's a lot. We found 1,000 up until February 2016, which is when we started this project. It's taken two years to complete. And that data set includes every reported and available federal trial case, federal appellate case, and state appellate case. We couldn't do the state trial cases because they're not available on Westlaw, or they're not available broadly enough that we thought the results would be representative.

What we've done is broken out from those cases each individual challenge raised, "individual challenge" meaning individual arguments.

Sometimes a case, like *Ezell* which you've heard mentioned, involves multiple Second Amendment challenges.¹⁶ Or *Heller II*, which involved five, or six, or eight Second Amendment challenges.¹⁷ We wanted to treat each of those things like a little case because sometimes you'll have partial wins or whatever. And for each of them, we asked this set of ninety questions.

And these ninety questions included things like, "Who were the judges?" which gives us a little traction to analyze things you've heard about—for example, whether judicial background or nominating party may track with sympathy for Second Amendment claims. We asked questions like, "Who are the parties? Are they pro se? Are they represented? What kind of law are they challenging? What was the procedural posture of the case? Is it coming up on summary judgment, a motion to dismiss? Where are we in the judicial process?"

And then we asked, "Well, how did the court get there? What's the reasoning the court employed?" Did they invoke the two-part test you've heard a lot about? Did they invoke intermediate scrutiny, which you've heard a lot about? Did they cite historical materials, which, of course, we've all heard and talked a lot about? And with the understanding that [LAUGHS] it's probably not the best way to wake everybody up after lunch, I do want to give a few numbers, because I think it might help situate where the Second Amendment doctrine is right now.

Now, the highest-level takeaway is one that I think is probably familiar to anybody who follows the issue, which is that the vast majority of Second Amendment challenges fail. We counted up 1,150 challenges, only 109 of which succeeded. That's an overall success rate of 9%, which is low. Now, our goal in this paper, as I say, is not normative. We're not trying to say whether this is a good or a bad thing; just reporting what we see.

I'll just observe for myself that that seems to me to be the kind of number that could be spun positively, whether you consider yourself a pro-gun-rights person or a pro-gun-regulation person. If you're a gun-regulation person, you say, "See, that means that the Second Amendment is no barrier to reasonable gun control." And that's good news. If you're on the gun-rights side, you point to that as, "That's exactly why," per Justice Thomas and some of the opinions that George was just quoting from, "the court needs to take another case; this demonstrates the sort of second-class rights status." I take no position on that. I'm just reporting to you what the numbers are.

But, of course, 1,150 cases gives us a lot, so we can drill down into and actually see a little—with a little more granularity, what's going on. So here

16. *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

17. *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011).

are a few more numbers. We found out that the success rate for Second Amendment claims is actually higher in federal courts of appeals than it is in federal trial courts or in state appellate courts. So in federal appellate courts, the success rate is 13.1%; federal trial courts, 7.8%; and state appellate courts, 9.3%.

There's lots of reasons that might be. It could be that weak cases don't get appealed, so that people lose at the federal trial court and then they don't go on; only the strong ones go up. You'd expect the success rate maybe to be a little bit higher. But it suggests, at the least, that federal courts of appeals are not rubberstamping these cases, and that as compared to other courts, they're actually more likely to rule in favor of Second Amendment claims. To which you might say, "Okay, I believe that. Except I bet that number is being inflated by the circuits that are thought to be conservative, and that the liberal circuits are the ones who are striking down all these laws."

And interestingly what we found is that the success rates are highest in the circuits typically thought to be liberal. So the success rate in the Second Circuit is 18%; in the Fourth Circuit, which is now regarded as liberal thanks to a raft of Obama appointees, 11%; in the Ninth Circuit, 13%; and in the D.C. Circuit, roughly 50%. Now, there's lots of reasons why that might be, but just compare it to the success rate in circuits thought to be conservative—the Sixth, the Eighth, the Tenth, where the success rate is 0%.

Now, why might that be? Well, I think one obvious explanation is that the states that have stringent gun laws tend to be concentrated in the Second, Fourth, Ninth, and D.C. Circuits. In fact, that pretty much covers the waterfront of the kinds of states that don't already have, for example, shall-issue laws, and instead include the ones that are trying to restrict permitting. It's a target-rich environment for people who want to raise a Second Amendment challenge.

Now, we can dig in a little deeper and see what the cases themselves are actually about, see maybe a little bit about what's driving the result. We found that the identity and the representation of the challengers mattered. This picks up a little bit from the last panel. Litigants in civil cases unsurprisingly succeed at a higher rate, about 15%, whereas those in criminal cases succeed at a rate of just 6%. And this was mentioned earlier. Some of you already may sort of be familiar with the—if you were here for the last panel, or the panel before, you heard about 922(g) and the federal prohibition on certain categories of gun owners. Those "who" bans, bans on particular classes of people, constitute half of the data set. Those are the laws that are most often being challenged, and they are overwhelmingly losers, particularly the challenges to the federal felon-in-possession law. So that inflates, in some respect, the loss count because those are the kinds of claims

that any criminal defendant will throw in, and they're, almost all of them, going to be losers.

Back to the civil cases. Within that category, pro se plaintiffs succeed only 2% of the time, whereas represented plaintiffs in civil cases succeed about 21% of the time. What seems to be driving the result of success rates there? We've heard a lot today about intermediate scrutiny being a rubberstamp. But what we've found is that when courts explicitly say they're doing intermediate scrutiny, the success rate is 9%; the same for the data set as a whole. We can't say what's actually going on in the judges' minds, but when they invoke intermediate scrutiny, they are no more likely to strike down the law than in cases where they don't.

You heard about the two-part test this morning. Invoking the two-part test actually increases the chances of a win. That is, if the court invokes the two-part test as opposed to some other kind of test. That increases the chance of a win by a 1.3 multiplier. And that's controlling for other variables, which, again, we found interesting.

Let me bring it back to public carry, and the topic of this panel. Challenges to public-carry regimes, as a class, have a higher success rate than overall Second Amendment challenges, roughly 22%. But I think it's important to break out different kinds of challenges to public-carry laws. Again, we want to try to get granular on this.

The kind of flat public-carry bans of the kind that are at issue in *Moore v. Madigan*, which George mentioned, are most likely to fall. And, in fact, I think as George mentioned, that was a unique law. I believe no other state had such a law. Very few cities have—that I'm aware of at least—have those kinds flat bans anymore. Most of the action is on these permitting requirements and licensing requirements. And there the success rate looks a lot more like the overall data set. If you're talking about a flat ban, it's sixteen times more likely to succeed. Those things get struck down. But the licensing and permitting requirements are much closer to the rest of the data set, in fact—about 9%.

I want to leave lots of time for questions, but I do want to say something about the localism point since Brannon was kind enough to throw that one out for us to talk about. I've written an article on this, and so my answer to Brannon's question to whether this is a good idea is "yes." But I do just want to answer two things that Glenn raised, some of which I agree with and some of which I don't.

Glenn is absolutely right; we don't treat constitutional rights as optional, that states get to just opt out. If that were the case, we would have had de jure segregated schools for so much longer than we did. Having national rules is often a good thing. And yet, we do actually tailor constitutional rights locally at the margins. So what I advocate in the article

and that I think is actually good for the Second Amendment—for evolving Second Amendment doctrine—is the same kind of tailoring we do with regard to other constitutional rights.

The easiest example, for me, is obscenity doctrine. Obscenity is carved out from protection by the First Amendment, but what constitutes obscenity is defined in part by local standards. What counts as obscenity in Montana may be different than what counts as an obscenity in Manhattan, to take an example that the Supreme Court has used. The same is true for property rights. The property rights protected by due process are defined by state law, and state law varies in important respects from state to state.

So that marginal change, I think, could be good. And it's not clear to me that that's actually going to be a prescription for weaker Second Amendment rights or weaker gun laws. I actually think—I could be wrong about this—that the degree to which we allow that local variation may actually have the overall effect of strengthening gun rights, because if we're not forcing those judges, who we might not trust to take a broad view of the Second Amendment, to impose on themselves the same kind of rules that they might apply somewhere else, they might actually be more willing to strike down gun laws in other places.

If you require a one-size-fits-all solution at the state level or at the federal level, it's going to be hard to convince a federal appellate judge that an AR-15-style weapon has to be carried around their building. But if you're going to tell them, "Look, we're going to have one rule here and one rule somewhere else," maybe they're willing to take that kind of balance. So I'll stop there, and we can have time for questions.

Denning: Great. Thanks. [APPLAUSE] Well, again, I'm going to assert moderator's privilege here and ask the panel some questions, and maybe continue the discussion. Jonathan, I'm curious, but what's your response to—obviously the stories that you shared with us are heartbreaking, and nobody wants to see that—but what about the larger point that George made that as a percentage of concealed carry permits, what you're talking about is, by most accounts, a very, very small percentage. Is it, for you, irrelevant as long as there are these people who are slipping through the system and who are legally empowered to commit mayhem, or at least have the tools to commit mayhem, that that's what we should be focused on and not just say, "Well, you know, just collateral damage, or a social cost that we're willing to afford"? Or—it's also possible—I don't want to put words in your mouth—that you would dispute the figures and argue, "Well, there is actually a lot higher number of bad guys than is being reported."

Lowy: Well, one, I think the more relevant figure is, at least in determining whether this is a good law or a bad law—which may not be the same question as whether it’s a constitutional right—but the more relevant issue is, Does this sort of law increase or decrease crime or violent crime? And John Donohue has done the best analysis on that, and he has found that when you have these right-to-carry laws, there is, I believe, about a 13 to 15% higher rate of violent crime. On the other side, you have John Lott who has been roundly discredited except for by his alter ego Mary Rosh, who continues to support him. But I think the social science supports giving law enforcement authority.

And then the constitutional question becomes, “Does the constitution deprive states from—if they choose—allowing law enforcement a role in determining who may or may not carry lethal firearms in public spaces?” As was said, a few decades ago that was not a controversial view. It was the view of most states, “Of course, law enforcement should have a role. Of course, law enforcement should be able to make a judgment that if this person is dangerous and has no good reason to carry lethal firearms in public, I should not let them do that.” Again, there was almost universal agreement that, of course, law enforcement should have that role. We now have the reverse, and that’s due to great credit to the NRA’s lobbying campaign with the state legislatures, which has proven very, very successful.

But I think that the constitutional question, again, is, should states have that authority? And particularly given John Donohue’s social science showing that that’s a good policy to restrict public carry, I think, clearly there is no constitutional right to carry.

Mocsary: On one point I think, remarkably, we agree, which is, “Let’s give the police the authority to weed out those that they can clearly tell are dangerous because they come in drooling and speaking about silver-backed monkeys.” And, in fact, in Connecticut, which has a may-issue system, that happens. Connecticut has a may-issue system, but law enforcement will issue to anyone who has taken the safety course, does not have a record, and where they don’t have a reason to believe that this person is somehow dangerous for some other reason.

And all of us on the gun-rights side have no objection to that system in Connecticut. The problem is that a may-issue system degenerates into the connected people, special people, so that means retired police, their spouses, politicians, Aerosmith, Don Imus, Howard Stern, Donald Trump; people with connections, and with money, and whose lives, for whatever reason, somebody thinks are more worth protecting. They get permits while the rest of us don’t. And that’s not okay. That is a decidedly un-American way to do things. And it’s not a right at that point; it’s a privilege. So if we had a

Connecticut-style system, I don't think anyone would mind. I don't think anyone would mind if every state had a Connecticut-style system in effect.

And that gets to this whole question, or touches on the question, of the political process, and localism. Rights are about minorities. Madison's statement, "Tyranny of the minority," and all that. Rights fundamentally are about minorities. Most Second Amendment advocates—gun-rights advocates—live in places where it's easy for someone to get a concealed carry permit. Ninety percent of our conversations are about the minorities in the eight states where you have to be someone special to carry, to get a gun. And we always talk about the rights of the minority. We never talk about our own rights. We always talk about, you know, "Look what is happening to the people in New York City," for example. Or California.

On the point of John Donohue's study, the studies come out fairly often. There's another one, a fairly good one, that just came out that said that moving from a no-issue jurisdiction to one that issues permits reduces crime. There was a statistically significant reduction in crime moving from no-issue to may-issue. And the result going to shall-issue was not statistically significant. I've written about—when I'm not doing guns, I'm doing corporations and securities law. And I've written about statistical significance in that area. And statistical significance is fairly overrated.

The point is that studies come out fairly often. There are all sorts of studies that look at this from all sorts of directions. They're not nearly convincing enough to say that enacting a shall-issue system leads to more crime. And the reason is, social science is very hard when you don't have an alternate reality to which you can compare the one you're in. If you're doing drug testing, for example, which is what I've written on in the securities-regulation context—in a clinical trial you can very clearly create an alternate reality where one group gets the drug, the other doesn't; it's double-blind, etc. You can't do that with the whole world. There is no alternate reality to which to compare ours. And so social scientists are necessarily guessing at all of this. And that's why we get studies going in all directions all the time.

Denning: I'm going to come back to that point for a second. And this may be a nice point in the day in which to raise that broader question of, "What do you do with competing studies? How do you convince people?" And there's an argument that Dan Kahan and others have made that you're not going to make much headway because these go to the heart of people's sort of worldview and self-identity. But, Glenn, you want to jump in here?

Reynolds: I don't tell stories as well as litigators do, but I do have a story about may-issue. It's about when I was a little kid, and my grandfather

had a little badge in his wallet that made him a special deputy of the Jefferson County Sheriff's Department. The effect of that badge was to allow him to carry a gun. He was given that badge, along with a whole lot of other people, because he was white and he voted for the Democratic machine, which at the time was run by one Bull Connor. And that's how shall-issue has historically worked.

In Tennessee, when we moved from may-issue to shall-issue, we did so because the state sheriffs had the reputation of giving gun permits to their cronies, and that seemed to be how it worked out. Actually, it was a similar special-deputy system, I think. And any kind of system where you give discretion, you'd like to believe that the sheriff or the chief of police will be this philosopher king carefully evaluating the applicants to decide whether they are a danger to society or not.

But, in fact, people who are in police departments are extremely poor even at weeding out the sociopaths and overly violent people who actually work for them. Their track record at that is pretty terrible. So I think they're very poorly suited to weed out violent people from the population at large. And, indeed, if you want to find a bad actor in your story, it is perhaps the expungement of the previous felony of shooting at people, which is not a very good mark for the criminal justice system.

Denning: You could say that you want Heck Tate, the virtuous sheriff from *To Kill a Mockingbird*, and what you might get is Joe Arpaio making those calls. Let me come back to this point. I'd be interested to get you all's take on it. So Dan Kahan is a law professor at Yale, and he and a psychologist, Don Braman, have done this multiyear project in which they assess individuals' what they call, "cultural cognition." Dan and Don wrote a paper several years ago, and they followed up with it basically saying that if you tend to be more communitarian, if you tend to be more egalitarian, then those are sort of personality markers that they can sort of map out—as opposed to being authoritarian and hierarchical.

So authoritarian, hierarchical folks tend to favor gun rights; communitarian, egalitarians tend to favor controls on privately owned firearms. And because that is so deeply embedded in the sort of cultural DNA, that it almost becomes impervious to reason. "Take a look at this study by John Donohue, and it proves this." And people who are deeply and personally invested in gun rights would look at that and say that it's garbage. Ditto, John Lott. And particularly if the study tends to prove something at odds with our belief.

We've had a perfectly civil discussion here all day. I think everybody has been respectful of each other's views, and certainly, there have been no fisticuffs or anything. But I bet we haven't changed anybody's mind. If

you're deeply invested in one position or the other, you probably haven't—probably hasn't moved the needle very much, maybe at the margins.

Lowy: One obvious relevance of the Donohue study or other studies is it provides the evidence for, for example, the New Jersey concealed carry law where—I don't recall every word of the Third Circuit opinion, but if it said that there was no evidence to support New Jersey's may-issue law—I don't know what was in the record of the case—but I think that's clearly wrong. John Donohue's study—and there have been studies like it for decades—provides ample support for a legislature to enact a law like New Jersey's. And, of course, people can disagree. People in North Carolina can choose to cite John Lott's study and have a very different law. That's the legislative process.

Denning: Okay, so let a thousand flowers bloom and then people—if there's no consensus, you adopt the evidence that would at least lend support to the position that you've taken so that it's not irrational—it couldn't be characterized as irrational.

Blocher: I can weigh in on this because—I have to say I find these questions very hard. And I think those of us who have been writing on the issue for a long time—and there are folks on this panel who have been on it for longer than I have—presumably feel the same way. It's like we're not just rehashing the same thing; that's not fun. It's not interesting. You actually have to struggle with those issues that seem hard. I find myself uncertain about a lot of things, and certainly in no position to judge the Donohue study, let's say, or others. I'm not an econometrics person, my study notwithstanding.

So then I think the question comes down, as it often does in law, particularly in constitutional law cases, “Well, what do you do in situations where you're uncertain?” And that usually ends up being a question of, “Who gets to answer this; who gets to decide in situations of uncertainty?” And just to sort of extrapolate a little bit, I think what's been put on the table by the comments here is, we have at least, that I can think of as I'm sitting here, four options for who gets to resolve that question.

One, you just let the legislature do it. The legislature is in the best position; they're politically accountable; they can have experts come in. You know, we have a presumption in favor of the political branches, and they get to do what they want presumably. Another option is to have licensing authorities, sheriffs, whoever it is. The person has to present themselves, and that authority will make a determination and hand out licenses or not. That's two options, both of which have the serious problem that there is a

constitutional right here, at least in proximity to this issue, whether or not you think it's directly implicated, which means your third option would be courts. Which, again, if you like the results when these laws get struck down, you think that's a good thing. If you don't, you think it's judicial activism, and the roles flip as they do all the time on these kinds of issues. That's at least three options.

The other option is the individuals get to decide for themselves. And George mentioned something along these lines, I think, which is not wrong, which is that people are generally in the best position to determine for themselves—at least they're in a privileged position to determine for themselves what threats they face or what kind of threats they feel like they're facing. So you might say, "Okay, well, just the individual gets to decide." And actually in the *Woollard* case, which is one of the ones mentioned for our panel here, the district court there essentially adopted that, I think, and used some version of the line, "The Second Amendment is its own license."¹⁸ You don't have to actually go ask anybody. You've got a Second Amendment right. You get to decide for yourself.

And I think that approach, like the other three options, is problematic as well. It's tough because the self-defense right, whether it's the most basic one or not—and it may be—is not a right that is subject to an individual's determinations without any other sort of legal oversight. You don't just get to decide you're in danger and attack somebody; there actually are rules about it. So it would be strange if the Second Amendment right, interpreted as it has been to sort of effectuate self-defense interests, were so untethered from that interest that you got to decide for yourself, at any point, when you need to have a gun.

I personally find it very hard to work through the four of those things. I actually think that's a real challenge. But I'm just trying to reflect back on what I think my co-panelists have already put on the table.

Mocsary: I think that's exactly right. One thought that occurred to me in talking about empirics, is how easy it is to mislead and lie—dare I say lie—with empirics—and lie might be a strong word. Two studies come to mind. One was about suicides and guns in the home. And the conclusion was that if there's a gun in the home, there's much more likely to be a suicide in the home. So I looked at the study very—because I do have some economics and some econometrics background—very carefully. And it does not say that the gun causes the suicide in the home. It did not say that the gun in the home is then the cause of the increased number of suicides. It was

18. *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 466 (D. Md. 2012).

very careful not to say that. So what does one do with that? One can interpret that to mean that somehow a gun just in proximity of someone leads that person to commit suicide, but that's not a convincing causal story.

Another one said that easy availability of firearms leads to more gun homicides. Also a very logical statement. That study was very, very careful, again—and I checked it—was very careful not to say that the availability of guns in these areas led to more homicides overall. That's a very different question. And I think that latter question is the one that actually matters.

And I've seen some—I've seen studies on the other side, from the gun-rights side that make similar sort of statements and are very careful in what they say. And perhaps I blocked out the details because, you know, I like them so much—[LAUGHTER] the whole point that Brannon made. But they're there. With empirics it's very, very easy, if you know what you're doing—and many people know what they're doing—to send one message that is not false but that doesn't tell the whole story, and in that process misleads. And that's more of a general warning about any kind of statistic about anything.

Lowy: I don't know what study you're referring to, but my guess is that the study concluded that the presence of a gun in the home is associated with a higher risk of suicide, which is a clear, accurate term reflecting—which I think is true. And if the criticism is that the social scientist didn't take the next leap and say that they were—that the gun necessarily caused suicide. That was just someone being careful. But I think it's a little strong to call that—if I'm right—to call it a lie; that if somebody concludes from that study that the presence of a gun in the home leads to increased risk of suicide. That's basically supported by social science.

Mocsary: It was one of these “associated with,” but it's very easy to measure—homicides are one of the things where we have the most records on the causes. It's very easy to measure and to determine whether somebody was shot. There's a bullet hole, and there's a bullet. There's no reason that study author couldn't have included in that study that fact that this increased number of suicides in such-and-such an area has increased by so many more shooting deaths. There was nothing about shooting deaths in there, just an association. “There's a gun in the home; there are more likely to be suicides,” with no breakdown of the type of suicide. That's a very easy fact to determine, and it wasn't there. It was decidedly absent, and that is suspicious. So to call it a lie is—you're right, it's strong, but it is certainly misleading.

Reynolds: One analogy for this, that is, another case where statistics have never solved a single argument or changed probably very many minds, is the ongoing dispute about whether access to pornography promotes rape or not, which has gone on for at least as long as Nixon's Attorney General John Mitchell and maybe before.

My own feeling is it must not, because with the explosion of pornography in the last twenty years, everybody would be raped every day if it had any connection. But it's gone back and forth with study on one side, study on the other side. I think it's never changed a single mind. And constitutionally, it's kind of irrelevant because you've got a First Amendment right to publish pornography. Let the consequences fall where they may.

One reason why this debate doesn't move very much is that it's fundamentally about something less involving social policy, and crime, and numbers, as about aesthetics; that there are, for example, people in Northern Illinois who see somebody walking with a gun on their hip and they are absolutely as repelled as some other people might be if they see two men kissing in the mall. And their reaction to it is similarly visceral and—I wrote an article called “Guns and Gay Sex”—everything else that follows is sort of a rationalization for your views on these.¹⁹ That is fundamentally aesthetic or maybe an aesthetic view of how society should be ordered at writ large. You can argue, but ultimately—you never argued anybody into liking onions on their cheeseburger if they didn't like onions on their cheeseburger.

Lowy: —except you do have to get back to the reality and the social science. I mean, there have been no studies that I'm aware of that gay sex leads to 13 to 15% increase in violent crime. We can debate those studies, but there actually is a body of social science which show that these permissive laws increase people dying, so—

Reynolds: Actually, in my own state, the State of Tennessee, it wasn't a gay marriage case; it was a sodomy case. We did try to make precisely that argument, that gay sex was associated with higher risk of AIDS and things like that. The court basically had none of it and said it didn't apply because there was a constitutional right. But, it's not as if that argument hasn't been made. It may be bad science, but most social science is bad science.

Lowy: Well, I would disagree with that.

19. Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and “Reasonable Regulation”*, 75 TENN. L. REV. 137 (2007).

Denning: Well, I think we're going to leave it there. [LAUGHTER]
But thank you all for your attention. Thank the panelists for a really great discussion.

[APPLAUSE]