TAKE BACK THE COURT

# The Supreme Court Plays Key Role in Enabling Gun Violence


March 2021

TAKE BACK THE COURT

# Dear Reader,

Thanks so much for reading our study on the Supreme Court and gun safety. As you'll see in the following pages, our argument is that the Supreme Court's conservative majority plays an important role in enabling gun violence by making gun safety advocates walk on thin ice, substantially burdening efforts to end the violence with the threat of fatal litigation. Armed with extreme and, to be frank, ridiculous readings of the 2nd Amendment, the Court's conservative majority has a chilling effect on advocacy that's desperately needed to end the violence.

We completed our research and writing in the fall of 2020 before Justice Amy Coney Barrett was nominated and confirmed. Although we do not address her jurisprudence in this study, her record on the Second Amendment, while sparse, is cause for serious concern. In *Kanter v. Barr*, then-Judge Barrett dissented from her fellow Seventh Circuit judges on whether a convicted felon should have the right to own a firearm. In her 37-page dissent, Judge Barrett argued that Mr. Kanter's Second Amendment right to bear arms should outweigh the government's public safety interest in preventing felons from owning firearms. Even though Mr. Kanter was convicted for a nonviolent offense, the government produced studies showing a connection between past nonviolent offenses and future violent crime--evidence that Judge Barrett disregarded. Taking an originalist approach, Barrett wrote:

> *Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons. Nor have the parties introduced any evidence that founding-era legislatures imposed virtue-based restrictions on the right; such restrictions applied to civic rights like voting and jury service, not to individual rights like the right to possess a gun.*

Tellingly, though firearms are drastically more dangerous today than in the late eighteenth century, Barrett would have courts look to that period in history in determining whether Congress can restrict felons today from owning a gun. Even more concerningly, Barrett calls the Second Amendment an "individual right," which contrasts sharply with the view that the Second Amendment is a collective right meant to support founding-era militias. Gun rights activists have cheered her nomination, and for good reason--she would almost certainly vote to strike down more common-sense gun policies.

Thank you again for reading our study.

**Aaron Belkin**
*Director, Take Back the Court*

**The Court should address [the expansion of the Second Amendment] soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court.**

**Justice Brett Kavanaugh**
April 27 2020

# Executive Summary

- Ending gun violence is one of today's most difficult and important policy challenges.
- Nationally, more than 39,000 Americans died from gun violence in 2019, and each year guns injure approximately 100,000 people. There are more public mass shootings in the United States than in any other country in the world.
- Gun safety advocates have amassed an impressive string of victories at the local and state levels, but they have not persuaded the federal government to enact broad measures that would prevent larger numbers of fatalities, such as national bans on handguns or assault rifles.
- While public opinion partially explains the federal government's failure to enact comprehensive reforms, the U.S. Supreme Court plays an important role as well, in that its conservative majority makes gun safety advocates walk on thin ice, substantially burdening efforts to end gun violence with the threat of fatal litigation.
- Advocates are constrained by the possibility that even if they mobilize public support for comprehensive reforms such as banning handguns and assault rifles, the Supreme Court could sharply curtail or strike down such measures, and could expand the Second Amendment, leaving us worse off than before:
  - All members of the Court's conservative majority have, in prior rulings, taken stands that are inconsistent with efforts to end gun violence.
  - The majority repeatedly issues partisan rulings that cater to the interests of GOP donors, even when doing so requires distorting facts and relying on unsound legal reasoning.
  - Opposing efforts to end gun violence is the top priority of one the GOP's largest donors, the National Rifle Association.
  - The Court's conservative justices have two key opportunities at their disposal—an expansion of the Second Amendment as well as a partisan interpretation of the Commerce Clause—to cater to the GOP's agenda. While both options rely on unpersuasive reasoning, five justices may be willing to pursue them.
- None of this is intended to suggest that the Supreme Court would oppose every gun safety reform, or to downplay the importance of gun safety victories that advocates have achieved.
- Rather, our argument is that the Court plays an important role in enabling gun violence by burdening efforts to end it with the credible threat of fatal litigation, and thus has a chilling effect on comprehensive reforms policymakers might otherwise undertake.
- The Supreme Court's conservative majority can be expected to continue to jeopardize efforts to end gun violence for as long as it remains in power.

# I. Introduction

Ending gun violence is one of today's most difficult and important policy challenges.[1] America has a staggering number of guns—nearly half of all civilian-owned guns worldwide are owned by Americans[2]—and it has a correspondingly high rate of gun deaths.[3] Nationally, more than 39,000 Americans died from gun violence in 2019, and each year guns injure approximately 100,000 people.[4] There are more public mass shootings in the United States than in any other country in the world.[5]

For the last few decades, the National Rifle Association (NRA) has been a dominant force in gun politics and has worked tirelessly to block efforts to end gun violence. The group has outspent gun reform groups by a nearly ten-to-one ratio.[6] It has notched hundreds of legislative victories at the state level, including Castle Doctrine laws, laws forbidding restrictions on firearms, and even laws exempting gun ranges from noise complaints.[7] The organization spent nearly half a billion dollars in 2016 alone.[8]

However, there are signs that the politics of gun safety are changing. An ever increasing majority of Americans support stricter gun reform laws.[9] At the same time, the NRA is in financial trouble[10] and faces difficulties converting the money that it spends into legislative wins.[11] States are increasingly passing gun reform legislation as well,[12] and lawsuits against gun manufacturers are starting to make progress.[13] If Democrats win the presidency and Congress in 2020, they may have an opportunity to address gun violence by enacting important reforms at the federal level.

Despite grounds for optimism, the U.S. Supreme Court's conservative majority threatens efforts to end gun violence. After decades of lobbying by the NRA, the Court asserted that the Second Amendment protects an individual's right to own a handgun in their home. In *District of Columbia v. Heller*, a 2008 ruling that relied on a distorted textualist reading to inaugurate a monumental shift in the reach of the Second Amendment, the Court asserted a broad individual right to keep and bear arms. In 2010, the Court extended *Heller*'s holding to apply to state and local government action in *McDonald v. Chicago*.

While the Supreme Court does not address the constitutionality of gun reform frequently, its conservative majority plays an important role in enabling gun violence by making gun safety advocates walk on thin ice, substantially burdening efforts to end violence with the threat of fatal litigation. As a result, while gun safety advocates have compiled an impressive string of victories at the local and state level, they have been constrained by the possibility that even if they mobilize public support for comprehensive reforms such as banning handguns and assault rifles, an emboldened Supreme Court could sharply curtail or strike down such measures, and could expand the Second Amendment even further. This likelihood that broad gun legislation would be met by a Supreme Court decision that expands the Second Amendment and thus leaves gun safety advocates in a worse position than they are today has a chilling effect on efforts to reduce gun violence.

All members of the Court's conservative majority have, in prior rulings, taken stands that are inconsistent with efforts to end gun violence. As well, the majority repeatedly issues partisan rulings, even when doing so requires distorting facts and relying on unsound legal reasoning. In the case of gun reform, the Republican Party stridently opposes efforts to end gun violence, and the Court's conservative justices have two key opportunities at their disposal—an expansion of the Second Amendment as well as a partisan interpretation of the Commerce Clause—to cater to the GOP's agenda. While both options rely on unpersuasive reasoning, five justices may be willing to pursue them.

None of this is intended to suggest that the Supreme Court would oppose every gun safety reform. Rather, our argument is that the Court plays an important role in enabling gun violence by burdening efforts to end it with the credible threat of fatal litigation, and thus has a chilling effect on gun safety advocates who must pursue narrower policy changes as a result. Regardless of public opinion or research that shows that gun safety reforms save lives, the Supreme Court is likely to continue to jeopardize efforts to end gun violence for as long as the conservative majority remains in power.

# II. All Conservative Justices Have Taken Stands that are Inconsistent With Efforts to End Gun Violence

Justices Samuel Alito, John Roberts, and Clarence Thomas were among the five conservative justices who sided with the gun lobby in their two key victories – *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010) – and remain on the court today. Because Chief Justice Roberts has increasingly been called the new center of the Supreme Court's ideological spectrum, and Justices Gorsuch and Kavanaugh were not on the court for the *Heller* and *McDonald* decisions, gun reform advocates may look to these three justices as the key potential swing votes.

Unfortunately, an examination of the record suggests that without exception, the members of the Court's conservative majority have expressed skepticism about efforts to end gun violence. While Justices Roberts, Alito, Thomas, Kavanaugh, and Gorsuch may be open to some narrow gun reform measures, all have opposed efforts to end gun violence in the past, and there is strong reason to believe that all would be skeptical of comprehensive reforms such as banning handguns or assault rifles.

The record does not suggest that all five justices necessarily would oppose every effort to mitigate gun violence. That said, there are grounds for concern given each justice's apparent commitment to arguably expansive readings of the second amendment and past opposition to gun reform measures. As a result, advocates must walk on thin ice, anticipating that even the most reasonable gun safety laws may be burdened with the threat of fatal litigation.

## Justices Alito and Thomas Are Noted Opponents of Efforts to End Gun Violence

Justices Samuel Alito and Clarence Thomas are the Supreme Court's staunchest conservatives and have long favored an arguably absurdly expansive view of the Second Amendment. Both Justices joined the majority opinion in *District of Columbia v. Heller*, which inaugurated a monumental shift in the reach of the Second Amendment.[14] Alito wrote the majority opinion in *McDonald v. Chicago*, a follow-up case extending *Heller*'s holding to apply to state and local government action.[15] Thomas joined that majority opinion as well. While Justice Alito's record suggests an openness to supporting some gun safety laws that restrict access to guns by felons, domestic abusers, and the dangerously mentally ill, both Alito and Thomas could vote to broaden the Second Amendment's bounds if given the opportunity to do so, and their extremism helps force advocates to walk on thin ice.

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## Chief Justice Roberts Has Opposed Efforts to End Gun Violence

Despite the fact that Chief Justice John Roberts has been called the Supreme Court's new center after Justice Kennedy's retirement, he remains far to the right of what could be called moderate. Media coverage has underscored Justice Roberts's ostensible concern for his own legacy as Chief Justice and for the Court's overall legitimacy,[16] yet research shows that his individual voting record is as conservative as the most extreme of his current and former colleagues, including Justices Kavanaugh, Alito, Thomas, and Scalia.[17]

While it is unclear exactly how Justice Roberts might vote on guns today, his record indicates that he may oppose efforts to end gun violence. In 2008, Justice Roberts joined Justice Scalia's majority opinion in *District of Columbia v. Heller*, which relied on a distorted textualist reading of the Second Amendment as applied to federal gun restrictions in order to assert a broad individual right to keep and bear arms.[18] According to Richard Posner, "[Scalia's majority opinion in *Heller*] is

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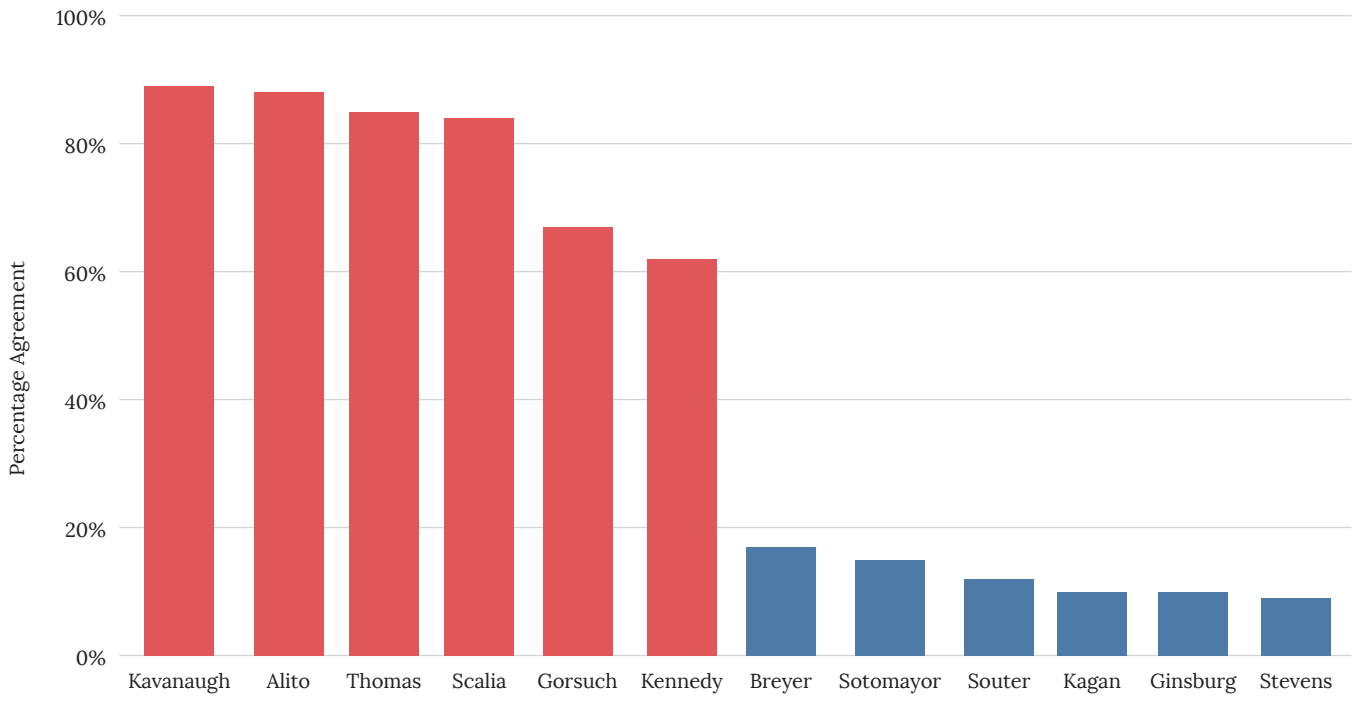
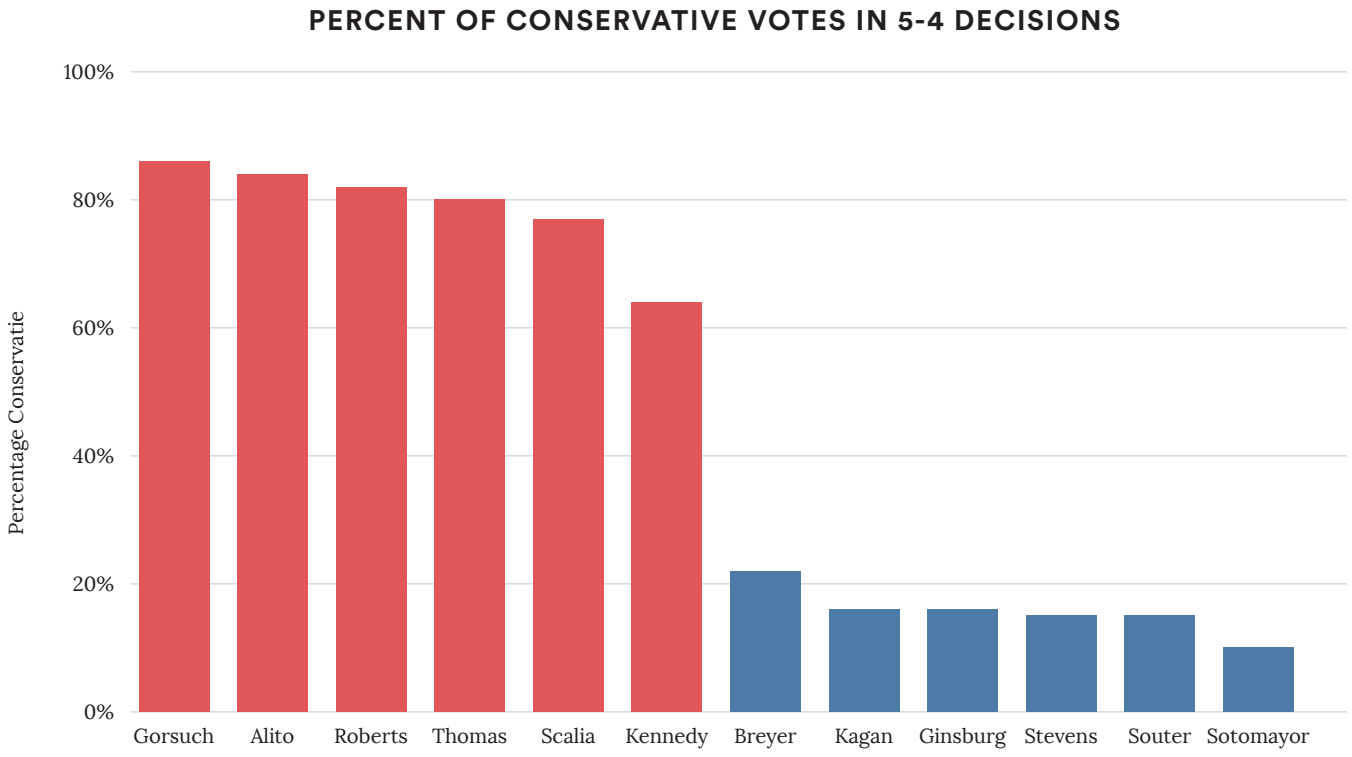
**AGREEMENTS WITH ROBERTS IN 5-4 DECISIONS, 2005–2018**






questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology."[19] Law professor Adam Winkler adds that "… a sincere originalist inquiry [by Scalia] would have led to precisely the opposite result; from the context of the Framing, the Second Amendment was primarily concerned with preserving the militia."[20]

In 2010, Justice Roberts again joined the Court's majority opinion in *McDonald v. Chicago*, which expanded the *Heller* decision to state and local government action through the Fourteenth Amendment.[21] These decisions are considered immense victories—at least symbolically—for the pro-gun lobby, and indicate that Justice Roberts supports the individual rights interpretation of the Second Amendment.[22]

Following *Heller* and *McDonald*, though, the Court did not take on any new gun cases until recently, "in part because Roberts and Kennedy would not join the other conservative justices to take on a new case."[23] Thus, Justice Roberts did "not join[] the chorus of the justices to his right calling for the court to pick up where Heller left off. That doesn't mean he's not with them. It means we don't know."[24]

In March 2019, adding to the uncertainty on his stance, Justice Roberts "rejected a bid by gun rights activists to put on hold a ban by President Donald Trump's administration on 'bump stock' gun attachments that enable semi-automatic weapons to be fired rapidly."[25] The Court's decision in its most recent Second Amendment case, *New York State Rifle & Pistol Association Inc. v. City of New York* (hereinafter "*New York State Rifle*"),[26] did not provide much clarity either: the Court decided the case *per curiam* (i.e., without revealing individual votes) and on procedural grounds. But, with at least ten more Second Amendment cases in the pipeline for the Court's consideration,[27] Justice Roberts will soon be forced to choose a side—and his record on guns, while sparse, suggests helps explain why placing faith in Justice Roberts as a center swing vote could be dangerous, and why gun safety advocates must walk on thin ice.

## Justice Kavanaugh Appears to Be A Strident Opponent of Efforts to End Gun Violence

Justice Brett Kavanaugh should be expected to be hostile to many forms of gun reform while on the Court, which is why the NRA pledged to spend $1 million on advertising in support of his confirmation.[28] During his confirmation hearing, Kavanaugh refused to shake the hand of Fred Guttenberg, the father of a mass shooting victim.[29] Although this act received considerable media attention, a more relevant measure of Kavanaugh's beliefs on guns may come from a dissent that he wrote nearly a decade ago.[30] In 2011, while serving on the D.C. Circuit Court, he authored a dissent in *Heller v. District of Columbia*, known as *Heller II*. In the wake of the Supreme Court's 2008 *Heller* decision, which struck down a law in Washington, D.C. that prohibited ownership of handguns, the city passed another law attempting to conform with the Supreme Court's mandate. The new law required the registration of all firearms and prohibited both semi-automatic rifles and magazines with a capacity of more than ten rounds of ammunition.

The 2008 *Heller* decision acknowledged that "the right secured by the Second Amendment is not unlimited,"[31] and noted that certain types of weapons, like short-barreled shotguns, would not be protected, but the Supreme Court did not clarify the depth or breadth of the Second Amendment's protection any further. After a district court initially ruled in favor of the city's new law, a three-judge panel on the appeals court heard the plaintiff's raised the questions *Heller* left unanswered: a city could not prohibit citizens from owning handguns, but could it require them to register those guns? Does the Second Amendment protect the ownership of other types of weapons, like AR-15s? Most importantly, how are courts supposed to evaluate these questions?

Every circuit court that had addressed similar issues previously—including the First, Third, Fourth, Seventh, Ninth, and Tenth Circuits—agreed on the use of heightened scrutiny as the method of evaluating these issues.[32] Of the three judges on the D.C. Circuit Court panel, all of whom were appointed by Republican presidents, two agreed with the other circuits and, under a heightened scrutiny analysis, ruled in favor of the city. The third judge was then-Judge Kavanaugh.

The majority endorsed a two-step process to evaluate gun reform legislation: "We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny."[33] For the first step, the court looked to the Supreme Court: "*Heller* tells us 'longstanding' regulations are 'presumptively lawful.'"[34]

Kavanaugh took a different route. He wrote that the Supreme Court's decisions "leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition," as opposed to the majority's two-step scrutiny test. The Supreme Court never said this, which Kavanaugh ultimately acknowledged.[35] Yet, Kavanaugh devised a different method of evaluating gun

Natalie Chaney/Unsplash

reform, one that is more hostile to new laws. Kavanaugh extracted one small part of the majority's reasoning—the question of whether a regulation is longstanding—and transformed it into the entire test. In his view, "*Heller* established that the scope of the Second Amendment right—and thus the constitutionality of gun bans and regulations—is determined by reference to text, history, and tradition."[36]

Scholarly research confirms that gun regulations were common in early American history.[37] The danger of Kavanaugh's approach, however, is that his demand for a very close historical analogue for every contemporary gun regulation is an impossible standard for contemporary laws involving modern hardware, such as assault weapons, and modern dangers, such as domestic violence killings, that were not illegal when the nation was founded. Kavanaugh argued that the ban on semi-automatic rifles was unconstitutional because such weapons have not traditionally been banned. He went so far as to cite the number of AR-15s sold in order to bolster his argument, and he held new regulations to a stringent standard. By his reasoning, laws requiring owners to register their guns were non-traditional and therefore unconstitutional, even though he acknowledged that laws requiring gun owners to obtain a license and laws requiring gun sellers to register guns were longstanding and permitted.

Koshu Kunii/ Unsplash

Justice Kavanaugh's dissent appears to reveal much about his thinking on guns. While Kavanaugh stated in his dissent in *Heller II* that "history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller*,"[38] he believes that his interpretation, which is arguably unique and extreme, is the correct interpretation not just of the Constitution, but of Supreme Court jurisprudence, to which he is ostensibly bound. The Court has not determined which test is the appropriate one, and he well could win this fight at the highest level, dooming any new gun legislation, no matter how popular or important. Even if he does not, then-Judge Kavanaugh went out of his way in *Heller II* to clarify that under the majority's standard, he would still find D.C.'s laws unconstitutional. As well, much of his dissent is predicated on the faulty logic that because D.C.'s unconstitutional ban on handgun possession included semi-automatic handguns, and semi-automatic handguns fire as quickly as semi-automatic rifles, semi-automatic rifles must be protected by the Constitution.[39]

Kavanaugh's concurring opinion in the Court's recent *New York State Rifle* decision reveals his eagerness to bring his reasoning in *Heller II* to the Supreme Court. In his short opinion, Kavanaugh agrees with the reasoning set forth in the dissent authored by Justice Alito that concludes the gun ordinance at issue is unconstitutional.[40] He goes on to say, "some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court."[41] Justices don't often make such urgent statements about the Court's future jurisprudence, but when it comes to the Second Amendment, Kavanaugh and his conservative colleagues do not hesitate. As Christopher Kang, chief counsel for Demand Justice, aptly said, "Brett Kavanaugh just officially put everyone on notice that no gun safety measures are safe now that he is on the Supreme Court."[42]

## Justice Gorsuch Has Opposed Efforts to End Gun Violence

In 2017, Neil Gorsuch replaced Antonin Scalia, one of the Court's staunchest gun rights advocates. Unlike Scalia, less is known about Gorsuch's opinion of the Second Amendment, and he presided over few Second Amendment cases during his service as a judge. While Gorsuch's thin paper trail on the Second Amendment has led commentators to dub him "a Second Amendment mystery,"[43] this understanding is too generous, as evidence suggests that Gorsuch is skeptical if not hostile to efforts to end gun violence.

In the lead-up to his confirmation hearing, the NRA launched a $1 million television advertising campaign lauding Gorsuch as a stalwart supporter of gun rights.[44] The NRA pointed to Gorsuch's judicial philosophy of originalism as the source of its confidence.[45] David Hardy, a prominent conservative lawyer who was one of the earliest to argue that the Second Amendment guarantees an individual right to keep and bear arms, shared the NRA's confidence: "He's said to be an originalist, and if you're an originalist, the Second Amendment wins every time."[46] Originalism is the judicial philosophy upon which Antonin Scalia based his majority opinion in *D.C. v. Heller.* In *Heller,* Scalia relied on historical sources to divine a conclusion about how the Second Amendment was originally understood at the time of its ratification. If Gorsuch thinks about the Constitution in the same way, the NRA and Hardy argue, he will likely fall in line with Scalia and join the other conservative Justices in striking down gun reform legislation.

The few encounters that Gorsuch has had with the Second Amendment suggest that the NRA and Hardy are almost certainly right. When Gorsuch was a judge on the Tenth Circuit Court of Appeals, he filed a concurring opinion in a case appealing a conviction for firearm possession.[47] While he agreed that he was bound by precedent to uphold the conviction, he worried that the court's loose interpretation of the statute at issue unfairly encroached on the Second Amendment, which "protects an individual's right to own firearms and may not be infringed lightly."[48]

When the Tenth Circuit denied a rehearing of the case, Gorsuch reiterated his concern that the court's interpretation of the statutes at issue triggered Second Amendment concerns: "Together §§ 922(g) and 924(a)(2) operate to criminalize the possession of any kind of gun. But gun possession is often lawful and sometimes even protected as a matter of constitutional right."[49] While Gorsuch's opinions in this case did not directly rest on an interpretation of the Second Amendment, they revealed a desire to protect the Second Amendment from attack by even tangentially related statutes.

After his confirmation to the Supreme Court, Gorsuch has weighed in on the gun debate twice: in *Peruta v. California*, a case considering carrying firearms in public for self-defense,[50] and *New York State Rifle.* When the Supreme Court was asked to consider *Peruta v. California*, it declined. Justices do not typically file dissents in procedural decisions like this, but Justices Thomas and Gorsuch decided to do so in this case. In their dissent, they stated that the lower court's approach to upholding a gun reform law in California was

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>
> Justice Brett Kavanaugh
> April 27, 2020

"indefensible" and complained that the Court declined to review the case because it treats the Second Amendment as a "disfavored right."[51] They went on to suggest that, if the Court did accept the case, they would have voted to strike down the law and expand the Second Amendment to guarantee a right to public carry. Justice Thomas wrote, "I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen."[52] Gorsuch and Thomas cited an *amicus curiae* brief filed in the case by the NRA.[53] Gorsuch's dissent in this decision evinces a clear intention to stand side-by-side with Clarence Thomas in upholding and expanding the Second Amendment.

That intention was almost realized in *New York State Rifle*. While the Court ended up deciding the case on procedural grounds, Gorsuch signed onto a dissent penned by Justice Alito that argues that the Court should have reached the merits of the Second Amendment issue.[54] And without needing to do so, Alito goes ahead and analyzes the merits: he says that it is "not a close question" that the firearm restriction at issue was unconstitutional. "History provides no support for a restriction of this type," Alito concluded. With more Second Amendment cases in the pipeline that don't have the same procedural issues that prevailed in *New York State Rifle*, this line of reasoning could very well succeed in the near future.

In sum, the prevailing understanding of Gorsuch as a "Second Amendment mystery" fails to capture the more recent signals he has sent to gun rights advocates, as well as the powerful signal sent by the NRA's investment of $1 million in his confirmation. Similar to the rulings of his conservative colleagues on the bench, Justice Gorsuch's record helps explain why gun safety advocates must walk on thin ice, as they understand efforts to end gun violence are substantially burdened with the threat of fatal litigation.

> The Supreme Court's conservative majority makes advocates walk on thin ice, substantially burdening efforts to end gun violence with the threat of fatal litigation.

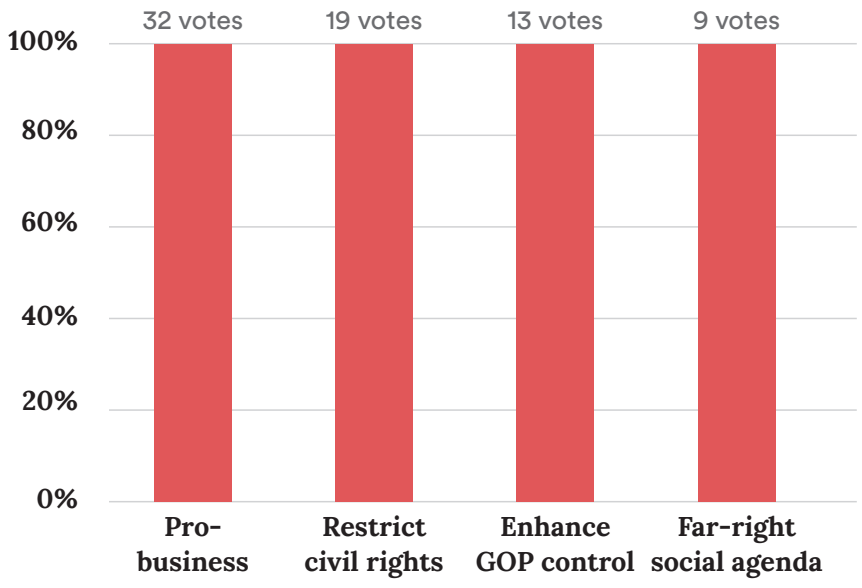
# III. The Court's Conservative Majority Prioritizes Partisanship Over Fact and Doctrine

Our argument is that the Supreme Court has played an important role in enabling gun violence by making gun safety advocates walk on thin ice, substantially burdening efforts to end gun violence with the threat of fatal litigation. The credibility of the threat, in turn, reflects the conservative majority's repeated and indeed nearly universal prioritization of partisanship over fact and doctrine. As discussed below, the conservative majority has repeatedly issued partisan rulings, even when doing so has required distorting facts and relying on unsound reasoning and implausible doctrine.

Since 2005, when John Roberts became Chief Justice, the Court has issued partisan split-decision rulings in 73 civil cases in which GOP donors have had a clear interest, and the Court voted in the direction preferred by GOP donors 73 times, for a record of 73-0 (100 percent).[55] Thirty two of these cases protected corporations, 19 restricted civil rights, and nine advanced a far-right social agenda. In 39 (53 percent) of the 73 rulings, the Court's majority arguably circumvented, disregarded, or violated conservative judicial doctrines such as Originalism, Textualism, and Federalism to reach partisan decisions.[56] This suggests that, far from simply calling balls and strikes, the conservative majority prioritizes the GOP's partisan agenda.

Nor is there a shortage of partisan rulings in which the Court's majority has twisted fact and common sense in order to cater to the GOP's political agenda. In *Rucho v. Common Cause*, the conservative majority accepted the argument that drawing political districts to maximize partisan gain was constitutionally permissible, despite

**PERCENT OF SPLIT-DECISION VOTES BENEFITING GOP DONORS (2005-2018)**



its damaging effects on equal representation and the right to vote.[57] In *Trump v. Hawaii*, the majority accepted the Trump administration's assertion that intolerance was not a pretextual motive for the travel ban, despite abundant evidence to the contrary.[58] In *Shelby County v. Holder,* the majority advanced the false assertion that voters of color are no longer subject to systematic efforts to suppress their votes.[59] In *Trump v. Karnoski*, the majority accepted the administration's assertion that the military's transgender ban must be reinstated to avoid the risk that inclusive policy posed to military readiness despite contrary testimony from Service Chiefs.[60] And in *Republican National Committee v. Democratic National Committee*, the majority forced Wisconsin voters to choose between voting and violating shelter-in-place guidelines on the basis of its conclusion that voting during the coronavirus crisis is not "'substantially different' from 'an ordinary election.'"[61]

While only a small minority of the 73 split-decision civil cases mentioned above involved gun safety, the NRA is a major GOP donor that has a clear interest in the outcomes of gun safety cases.[62] And, gun safety can be categorized in terms of two of the policy areas in which the Roberts court has amassed a 73-0 record ruling in the direction favored by GOP donors: protecting corporations and far-right social issues. The Roberts court's 73-0 record in such cases, combined with the majority's history of distorting fact to reach partisan rulings, lend credence to our argument that gun safety advocates must walk on thin ice because the threat of fatal litigation substantially burdens efforts to end gun violence.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# IV. Two Options for Blocking Efforts to End Gun Violence

Gun safety advocates must walk on thin ice because the Supreme Court's conservative majority burdens gun safety measures with the threat of fatal litigation, regardless of the reforms' constitutionality. The majority has two implausible but powerful constitutional weapons that it can invoke to invalidate almost any meaningful gun reform legislation enacted by Congress, states or cities: the Second Amendment and the Commerce Clause.

## Second Amendment

For most of American history, the Second Amendment was not understood to establish an individual right to gun ownership, but rather to grant a collective right tied to the context of a "well-regulated militia."[63] It was not until the NRA began a national campaign of aggressively pushing the idea of an individual right to own firearms in the 1970s that the new interpretation began to gain traction.[64] The group spent hundreds of millions of dollars, not only on lobbying but also on research and scholarships.[65]

It worked. In 2008, Justice Scalia authored the decision in *District of Columbia v. Heller*, which for the first time asserted an individual right to own a firearm. The decision was a relatively limited one—the Court struck down a law in Washington, D.C. that prohibited the ownership of handguns even in one's home. But, *Heller* asserted a much broader right: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."[66]

The Court did recognize certain limitations on the Second Amendment. "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[67] Additionally, the Court recognized that the Second Amendment does not protect against prohibitions of carrying "dangerous and unusual weapons."[68] However, the recognition of these limitations was added to convince Justice Kennedy to be the fifth vote—a concession which is no longer necessary.[69]

The Supreme Court has not yet clarified the breadth of the revamped Second Amendment, except to confirm that the Amendment binds the states as well. In the absence of subsequent Supreme Court jurisprudence, the circuit courts have reached their own conclusions. The main question that the courts have addressed is which test is appropriate to analyze new laws. In general, the circuits have applied a two-step test. First, they ask whether the law burdens conduct protected by the Second Amendment. Then, if the law does burden protected conduct, they assess whether the law meets the appropriate level of constitutional scrutiny.[70] Courts often apply strict scrutiny to laws that affect core protections of the Second Amendment and intermediate scrutiny to laws that affect conduct that is less strongly protected.[71]

The Supreme Court may decide to entrench this understanding of the Second Amendment, and the two-step framework would provide the Court sufficient latitude to expand its protections significantly. The Court might, for instance, agree with Judge Kavanaugh's view that semi-automatic rifles are due equal constitutional protection as handguns.[72] The Court might elevate the Ninth Circuit's ruling that ammunition is constitutionally protected[73] or a Third Circuit ruling that firearm magazines qualify as "arms" under the Second Amendment.[74] Moreover, it might settle the debate over carrying firearms in public, ruling with a variety

of circuits that the Second Amendment protects open carry.[75] The Court could act even more radically. As detailed above, Justice Kavanaugh has a unique view of the appropriate test, one which freezes the current state of gun safety law and marks any new types of legislation as unconstitutional. Then-Judge Kavanaugh lost at the circuit level, but he may be able to entrench his view at the nation's highest court.[76]

Other options for expanding the Second Amendment are available to the Supreme Court. For example, the Court may soon expand *McDonald* and *Heller* to block state and local reforms. As an initial matter, local action on gun reform is difficult to achieve in most states. At least forty-three states have passed laws preventing municipalities from enacting gun reform legislation that would exceed state law.[77] The NRA was a driving force behind the passage of many of these laws.[78] The effect of these NRA-backed laws is sometimes fatal to local initiatives. In October 2019, for example, a Pennsylvania state court judge struck down gun reform legislation passed by the City of Pittsburgh in the wake of the Tree of Life synagogue shooting.[79] The judge said that state law "pre-empts any local regulation pertaining to the regulation of firearms."[80]

Still, states themselves have sometimes enacted significant gun reform legislation and have allowed municipalities to pass local laws.[81] When such legislation is challenged, courts across the country have had trouble creating a coherent doctrine. As a result, a messy patchwork of Second Amendment jurisprudence is ripe for the Supreme Court to revisit—possibly to the detriment of gun safety.

The Supreme Court's modern attack on local gun reform efforts continued in 2010, when it ruled in *McDonald v. Chicago* that the Second Amendment protections it created in *D.C. v. Heller* also extend to state and local government actions.[82] At issue in *McDonald* was a set of Chicago-area ordinances restricting the registration and possession of handguns. At the time, it was unclear whether the Second Amendment applied to state and municipal laws like the ones at issue in *McDonald*. The Court ruled in *McDonald* that the Second Amendment did apply. However, it did not rule on whether those ordinances *actually violated* the Second Amendment.[83] Ultimately, Chicago and a neighboring suburb repealed the ordinances before the lower courts had a chance to weigh in on their constitutionality.[84]

Because the constitutional question in *McDonald* was never resolved, *McDonald's* and *Heller*'s reach remains unclear. The Supreme Court has not yet had the opportunity to revisit the Second Amendment's application to state and local gun reforms.[85] In the absence of Supreme Court guidance, lower federal and state courts have not interpreted *McDonald* and *Heller* in a consistent manner, resulting in distinct interpretations of the Second Amendment across jurisdictions.[86]

Some federal circuit courts have chosen to limit the scope of *McDonald* and *Heller.* In 2019, for example, the Seventh Circuit upheld Illinois's ban on issuing concealed carry licenses to certain out-of-state residents.[87] In doing so, it reiterated that the reach of *McDonald* and *Heller* was "not unlimited and, even more specifically, that a state's interest in promoting public safety is strong enough to sustain prohibitions on the possession of firearms by felons and the mentally ill."[88]

Likewise, the Second Circuit made a similar move to keep alive gun reform legislation enacted by New York and Connecticut in the wake of the Sandy Hook shooting in Newtown, Connecticut. In *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, the court acknowledged that "[n] either *Heller* nor *McDonald* . . . delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions."[89] The court recognized that semi-automatic weapons do not deserve the same level of Second Amendment scrutiny as do handguns, which are more popular and widespread.[90] With this in mind, the court held that the "core prohibitions by New York and Connecticut of assault weapons and large-capacity magazines do not violate the Second Amendment."[91]

At the same time, federal courts have relied on *Heller* and *McDonald* to strike down local and state reforms. The same circuit court that upheld Illinois's ban on licenses for certain out-of-state residents earlier struck down other Illinois laws prohibiting most state residents from carrying a gun, loaded or unloaded, in public.[92] The Seventh Circuit in that case reasoned that "[t]he Supreme Court has decided [in *McDonald* and *Heller*] that the

[Second] amendment confers a right to bear arms for self-defense, which is as important *outside the home as inside*."[93] The Seventh Circuit is not alone in offering distinct and arguably inconsistent interpretations of the Second Amendment.[94]About a decade after *McDonald* and *Heller*, it is clear that circuit courts have created a messy patchwork of Second Amendment jurisprudence that provides the Supreme Court's majority with an opportunity to clarify so as to impede gun reform efforts.[95]

The opportunity to clarify the circuit-court landscape came before the Supreme Court this year. In *New York State Rifle*, the Court considered the constitutionality of a 2001 New York City ordinance that prevented some city residents from taking their guns out of city limits.[96] Notably, the Court decided to hear the case even after the city and state eliminated the restriction.[97] Such judicial conduct—choosing to consider the constitutionality of a restriction that no longer exists—is unusual, and was interpreted by some as an indication that the Roberts Court may plan to extend its influence over state and local gun reform efforts.

In *New York State Rifle*, the New York state affiliate of the NRA asked the Supreme Court to extend *Heller*'s individual right beyond the home.[98] It argued that *Heller* and *McDonald* established the individual right to keep and bear arms as a fundamental constitutional right, and that any laws abridging that right deserve the Court's highest level of scrutiny—a level traditionally reserved for laws discriminating on the basis of race or religion, among other important categories.[99] It pointed out "just how radically divorced lower court Second Amendment doctrine has become from basic principles of constitutional analysis" and asked the Court to make clear how far it intended *Heller* and *McDonald* to go.[100] *New York State Rifle* presented the Court's majority an opportunity to do just that. Keeping in mind Thomas's and Gorsuch's dissent in *Peruta v. California* ("I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen"), the Court seemed poised in *New York State Rifle* to finally silence reform-minded states and cities by expanding *McDonald* and *Heller*, in effect invalidating local laws that restrict the possession of arms inside and outside the home.[101]

However, the Court ultimately reversed course and issued a decision declining to rule on the merits of the case because the restriction no longer existed.[102] While the Court declined to take such an extreme step in *New York State Rifle*, gun safety advocates will continue to walk on thin ice out of concern that future rulings could expand the Second Amendment by extending *Heller's* individual right beyond the home.[103] As Justice Kavanaugh noted in his concurring opinion, "The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court." Concern about expanding Second Amendment would not, in itself, prevent gun safety advocates from continuing to press for change, but it would continue to burden efforts to end gun violence with the highly credible threat of fatal litigation.

## The Court Can Invoke a Partisan Reading of the Commerce Clause to Limits Gun Safety Reforms

Congress is limited by the Constitution to a list of enumerated powers, as established in Article I, Section 1. Generally, Congress has passed gun reform legislation based on its authority under the Commerce Clause. The Commerce Clause states that "Congress shall have Power . . . To regulate Commerce with foreign Nationals, and among the several States, and with Indian Tribes."[104] There is a long history to the Supreme Court's jurisprudence regarding the Commerce Clause, but the most important modern case in establishing a framework for understanding the Commerce Clause is also the most important gun case involving the Commerce Clause: *United States v. Lopez.*

Congress passed the Gun-Free School Zones Act of 1990, which prohibited carrying handguns in areas near schools nationally. In 1995 the Supreme Court heard a challenge to that law in *United States v. Lopez*. The Court clarified the extent of Congress's power under the Commerce Clause, outlining three categories of activities over which Congress has authority. The Court ruled that Congress may "regulate the use of the channels

of interstate commerce[,]…regulate and protect the instrumentalities of interstate commerce,… [and] regulate those activities having a substantial relation to interstate commerce."[105] Because the act did not fall into either of the first two categories, the Court examined it under the third. It recognized its own history of cases "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[106] But it overturned the law because it was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[107]

The Supreme Court has developed that theme in corresponding cases. In *United States v. Morrison*, the Court struck down part of the Violence Against Women Act, which created civil liability for certain gender-based crimes. The Court specified that the activity in question must be "economic in nature" and that there must be a "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."[108] The Court did uphold a federal law criminalizing marijuana in *Gonzales v. Raich*, arguing that unlike in *Lopez* and *Morrison*, "the activities regulated by the CSA are quintessentially economic."[109]

The current state of law contains much ambiguity and an opportunity for conservatives to fulfill both a desire for gun reform and federalism. Lower courts have clarified that prohibitions on the manufacture and transfer of weapons, even within a state, do fall within the purview of congressional authority under the Commerce Clause.[110] The question of possession, however, is less clear, and provides the Court with a powerful tool against many types of gun legislation.[111]

The Supreme Court may invoke the Commerce Clause to restrict state and local laws that implicate interstate gun rights as well. In *New York State Rifle*, the petitioners argued that the New York City ordinance violates the Commerce Clause because it bars carrying a gun to shooting ranges outside of the city, effectively depriving New Yorkers the right to patronize out-of-state ranges.[112] Similar reasoning could apply to other state and local laws that could implicate out-of-state actors or actions. For example, the Illinois state law at issue in the Seventh Circuit case referenced above could arguably impede interstate commerce, assuming that gun owners from states with weaker licensing regimes wished to patronize shooting ranges or other establishments in Illinois.[113]

While conservatives on the Court have generally sought to constrain federal power by limiting the Commerce Clause, they have made exceptions to advance partisan goals such as banning marijuana, as noted above.[114] The possibility that they may make such an exception to strike down state and local gun safety laws is another factor that constrains efforts to end gun violence by forcing gun safety advocates to continue to walk on thin ice.

# V. Conclusion

The Supreme Court—coupled with extreme lower-court judicial appointees—plays a key role in enabling gun violence by jeopardizing efforts to put an end to it. The Court makes gun safety advocates walk on thin ice, substantially burdening reasonable and clearly constitutional gun safety laws with the threat of fatal litigation. As for the future, and given the dearth of existing Second Amendment caselaw, reasonable minds can differ on how extreme the Court will get in this space. At worst, the Roberts Court could well eviscerate the ability of federal, state, and private actors to regulate guns. Even in the best case, they could maintain the *Heller* status quo and give gun safety advocates room to find ways around *Heller*. In either case, the Court is going to continue make good faith actors do the work of walking on thin ice, substantially burdening reasonable gun safety laws with the threat of fatal litigation, and having a chilling effect that causes reformers to avoid the boldest gun safety measures for fear that the Court will use the opportunity to roll back even more modest reforms. Given the cost in human lives of endemic gun violence, this is not an area of regulation and law where we can tolerate such obstacles.

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