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**LITIGATION AS EDUCATION: THE ROLE OF PUBLIC HEALTH TO PREVENT
WEAPONIZING SECOND AMENDMENT RIGHTS**

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INTRODUCTION

Gun violence is a growing public health crisis in the United States. In 2017, nearly 40,000 people were fatally shot,¹ the highest recorded number since the Centers for Disease Control and Prevention (CDC) began tracking this data fifty years ago.² Though the data on firearm injuries is not as reliable, approximately 115,000 individuals are nonfatally wounded by firearms in a year.³ These tragic injuries and fatalities alone are enough to justify public concern, yet they still fail to capture the full scope of harm caused by gun violence. Frequently overlooked examples include individuals suffering from lead poisoning associated with bullet fragments that could not be extracted and children suffering from trauma and post-traumatic stress by exposure to shootings.⁴ Research now suggests the likelihood of knowing a gun violence victim within a social network is approximately 99.85%, regardless of race, ethnicity, or social class.⁵

Despite increasing gun violence in this country, and the consistent media coverage of high profile mass shootings, firearm regulations have been particularly difficult to pass.⁶ In other areas of public health, such as tobacco and lead paint, when the legislature is unable or unwilling to

1 *Web-Based Injury Statistics Query and Reporting System (WISQARS): Explore Fatal Injury Data Visualization Tool*, CDC, <https://wisqars-viz.cdc.gov:8006/explore-data/home> (select “2017” for the “From” and “To” fields, then select “Explore Data” button).

2 Sarah Mervosh, *Nearly 40,000 People Died From Guns in U.S. Last Year, Highest in 50 Years*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/gun-deaths.html>.

3 *See Facts and Figures*, U.C. DAVIS HEALTH, <https://health.ucdavis.edu/what-you-can-do/facts.html> (last visited Aug. 18, 2020). The CDC recently pulled the data for 2016 and later due to a concern that the data was unreliable. *See A More Complete Picture: The Contours of Gun Injury in the United States*, EVERYTOWN (Nov. 11, 2019), <https://everytownresearch.org/a-more-complete-picture-the-contours-of-gun-injury-in-the-united-states/>. Part of the concern was over the drastic increases in firearm injuries over those recent years. *See* Sean Campbell & Daniel Nass, *The CDC’s Gun Injury Data Is Becoming Even More Unreliable*, TRACE (Mar. 11, 2019), <https://www.thetrace.org/2019/03/cdc-nonfatal-gun-injuries-update/>. For example, the estimates for firearm injuries in 2017 range from 31,000 to 236,000. *Id.*

4 *See* Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 HASTINGS L.J. 1053, 1087–88 (2020) (describing a broader understanding of gun violence beyond fatalities).

5 Bindu Kalesan et al., *Gun Violence in Americans’ Social Network During Their Lifetime*, 93 PREVENTIVE MED. 53, 55 tbl.1 (2016).

6 *See Why It’s More Difficult to Change Gun Policy in the U.S. than in New Zealand*, NPR (Mar. 21, 2019), <https://www.npr.org/2019/03/21/705594544/why-its-more-difficult-to-change-gun-policy-in-the-u-s-than-in-new-zealand> (explaining some of the reasons it is difficult to pass national gun regulations, even after mass shootings).

make regulatory adjustments to protect the public, advocates have used the strategy of litigation as a regulatory tool.⁷ Courtroom victories and the pressure of lawsuits have generated change in industries that have been harmful to public health and safety.⁸ But such a strategy has been difficult when it comes to gun litigation. The Protection of Lawful Commerce in Arms Act (PLCAA) protects firearm manufacturers and sellers from civil liability actions,⁹ thereby preventing the need for the industry to improve safety standards or alter sales practices.

Liability litigation, however, is not the only avenue for generating change. Constitutional litigation focused on the scope of Second Amendment protections has the possibility to significantly alter the legal landscape for gun control in the coming years. Our understanding of what protections the Second Amendment affords is, relatively speaking, new and still largely undefined. The boundaries and privileges the right provides to individuals are still yet to be determined. While the fight over the militia clause has waned, the debate still focuses most often on historical interpretations and guidance from other areas of more established jurisprudence. The legal community and the judiciary rarely discuss the public health impact of an expansive interpretation of Second Amendment rights. What this leaves is a debate without all the relevant information.

This article argues that the public health and legal community, using literature studying firearms and the impact of laws on gun violence, can help to fill this void by viewing Second Amendment constitutional litigation as an opportunity to educate the judiciary. While research data will not be dispositive in most cases, it can help create a more thorough ruling that better understands the context in which these seemingly narrow legal decisions are made. There is strong evidence to suggest that the judiciary can be educated through social science and, thereby, influenced in their legal analysis.¹⁰ Justices are more likely to turn to social science in prominent cases of controversy,¹¹ of which Second Amendment cases would assuredly qualify. Moreover, the judiciary is more likely to take amicus briefs seriously when presented by expert, reliable sources.¹²

7 See Wendy E. Parmet & Richard A. Daynard, *The New Public Health Litigation*, 21 ANN. REV. PUB. HEALTH 437, 437 (2000) (describing the increase in using litigation as a public health tool, including areas of tobacco and lead paint).

8 *Id.* at 439 (discussing the success of tobacco litigation encouraging public health advocates to use a similar strategy in other areas).

9 See 15 U.S.C. § 7902 (2018).

10 See *infra* Part II.

11 William D. Blake, “Don’t Confuse Me with the Facts”: *The Use and Misuse of Social Science on the United States Supreme Court*, 79 MD. L. REV. 216, 252 (2019).

12 See Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine*

A consensus has emerged amidst the tragic events that have continuously unfolded in the United States over the last several years. As one mass shooting has led to another, a call to recognize gun violence as a public health problem has become the norm.¹³ Those in public health may have recognized this need for years, but large portions of the public, community leaders, politicians, and policymakers now join them. It is time for the judiciary to do the same.

Second Amendment rights, however they are ultimately defined, are not absolute. Thus, regardless of the fact that the Amendment protects the right to keep and bear arms, the courts must consider this right in conjunction with the state's interest in limiting those rights to protect the public. In some cases, the data may suggest a broader authority to limit Second Amendment rights. But in other areas, it may suggest less authority. In either case, a better understanding of the role the Second Amendment decisions will have on gun violence will make these decisions more objective, more constitutionally precise, and, hopefully, more acceptable to a fiercely

Balance of Access, Efficiency, and Adversarialism, 27 REV. LITIG. 669, 688 (2008).

13 See, e.g., David Hemenway & Matthew Miller, *Public Health Approach to the Prevention of Gun Violence*, 368 NEW ENG. J. MED. 2033 (2013); Mark E. Gichon & Michael Hayes, *Gun Violence Is a Public Health Epidemic*, CHI. TRIB. (Mar. 25, 2016), <https://www.chicagotribune.com/opinion/letters/ct-gun-violence-is-a-public-health-epidemic-20160325-story.html>; Richard Gonzales, *Gun Violence A Public Health Crisis*, *American Medical Association Says*, NPR (June 14, 2016), <https://www.npr.org/sections/thetwo-way/2016/06/14/482041613/gun-violence-a-public-health-crisis-says-ama>; Claire McCarthy, *Treat Gun Violence as a Public Health Issue*, N.Y. TIMES (Jan. 10, 2016), <https://www.nytimes.com/roomfordebate/2016/01/10/making-gun-use-safer/treat-gun-violence-as-a-public-health-issue>; Alexandra Sowa, *Treat Gun Violence Like the Public Health Epidemic It Is and Lift Research Ban*, BALT. SUN (Feb. 22, 2018), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0223-gun-research-20180222-story.html>; Kate Walsh, *Gun Violence Is a Public Health Crisis*, BOS. GLOBE (Jan. 22, 2016), <https://www.bostonglobe.com/opinion/2016/01/22/gun-violence-public-health-crisis/SIWyyNO0MWfqc32cF53AO/story.html>; Catherine Troisi & Stephen Williams, *Public Health Approach Can Stem Gun Violence*, HOUS. CHRON. (Feb. 2, 2016), <https://www.houstonchronicle.com/opinion/outlook/article/Troisi-Williams-Public-health-approach-can-stem-6802092.php>; Dan Diamond, *How to Reduce Gun Violence? Treat It as a Public Health Problem*, FORBES (Oct. 1, 2015), <https://www.forbes.com/sites/dandiamond/2015/10/01/gun-violence-is-a-public-health-problem-heres-why/#4ebce9364475>; Nancy Dodson, *Gun Violence Is a Public Health Menace, too; It's Escaped Our Attention During the Coronavirus Pandemic*, N.Y. DAILY NEWS (June 26, 2020), <https://www.nydailynews.com/opinion/ny-oped-gun-violence-public-health-menace-too-20200626-ptjlxh3mfjgjbkcb6budfusrc-story.html>; Maggie Fox, *Gun Control Is a Public Health Issue, Experts Say*, NBC NEWS (Jan. 5, 2016), <https://www.nbcnews.com/health/health-news/gun-control-public-health-issue-experts-say-n490846>; Sean Palfrey, *What a Public Health Approach to Gun Violence Would Look Like*, HUFFINGTON POST (June 17, 2016), https://www.huffpost.com/entry/gun-violence-public-health_b_7605102.

divided public.¹⁴ Thus, constitutional litigation is an opportunity for the public health community, in particular, to play a key role in demonstrating a path forward that properly balances the protections of the individual and the public, and that is grounded in evidence.

This Article begins in Part I by describing in more detail the difficulty in regulating firearms through litigation. A case involving an accidental shooting is examined to show how the PLCAA prevents liability of gun manufacturers even for overt disregard for increased safety measures, thus impeding victims or their families from bringing a successful cause of action. The potential for the judiciary to focus solely on the scope of Second Amendment protections and their reliance on historical analogues creates further barriers. Part II examines the informative function of litigation, which enables a mechanism for educating the judiciary on aspects of a case that may not have been apparent or for which they may not have the requisite expertise. Through amicus briefs, courts have been informed of the critical aspects of cases, including the lived experiences of underrepresented groups and how constitutional theory has a real-world impact outside of the courtroom. Finally, Part III will demonstrate how constitutional litigation opens the door for public health research to play a vital role in determining the circumstances and degree to which Second Amendment rights may be limited. Here, it becomes clear that the empirical nature of public health research may enable a truer understanding of gun violence and the impact deregulatory constitutional declarations may have on this growing epidemic.

14 See KIM PARKER ET AL., PEW RES. CTR., AMERICA'S COMPLEX RELATIONSHIP WITH GUNS 71 (2017), <https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2017/06/Guns-Report-FOR-WEBSITE-PDF-6-21.pdf> (finding 51% of surveyed responses said that it is more important to control gun ownership and 47% said protecting the right to own guns is more important).

I. LIMITATIONS IN LITIGATION

A. *Legislative Blockade*

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA) in response to an effort to regulate the firearms industry through litigation.¹⁵ Evidently stymied in their efforts to pass desired legislation, some gun control advocates turned instead to the courts to advance their cause.¹⁶ In addition to liability claims from interested groups, mayors of large cities and housing authorities brought lawsuits using innovative legal techniques to prevent consolidation and to maximize disadvantages for manufacturers.¹⁷ The claims in the causes of action varied from product liability to negligence to nuisance.¹⁸ While the suits may not have been successful in court, they put pressure on manufacturers, which had the potential to change the industry. But this change is specifically what Congress sought to prevent. According to Congressional findings, the Act was necessary due to “an abuse of the legal system”¹⁹ Congress’s aim was to prevent the “attempt to use the judicial branch to circumvent the Legislative branch,” thereby limiting the ability to regulate the firearms industry through litigation.²⁰

The PLCAA prevents industry change through litigation by prohibiting civil liability actions in federal or state court.²¹ The statute generally provides immunity for manufacturers and sellers of firearms in suits that arise from criminal or unlawful use of the products by a third party.²² This provides broad protection because shooting another individual

15 Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–03).

16 Parmet & Daynard, *supra* note 7, at 437.

17 David Kopel, *The Protection of Lawful Commerce in Arms Act: Facts & Policy*, WASH. POST: VOLOKH CONSPIRACY (May 24, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/24/the-protection-of-lawful-commerce-in-arms-acts-facts-and-policy/>.

18 *Id.*

19 See 15 U.S.C. § 7901(a)(6) (2018). Congress also states that protection of the firearms industry, for the industry itself and the customers they serve, was a key purpose for passing the statute: “To preserve a citizen’s access to a supply of firearms and ammunition” *Id.* § 7901(b)(2).

20 *Id.* § 7901(a)(8). Congress was focused on preventing judicial action against the firearm industry, aiming to prevent “possible sustaining of these actions by a maverick judicial officer” that would “expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States.” *Id.* § 7901(a)(7).

21 *Id.* § 7902(a).

22 *Id.* § 7901(b)(1).

nearly always includes an unlawful act. The statute does include some exceptions, but they are quite narrow.²³

For example, one exception was argued in a liability claim related to the Sandy Hook shooting. In *Soto v. Bushmaster*, the plaintiffs relied on an exception that relates specifically to the marketing of the product rather than the product itself.²⁴ This exception allows for claims to proceed when a manufacturer or seller knowingly violates a state or federal marketing law, and when that violation is the proximate cause of the harm.²⁵ The plaintiffs argued that the manufacturer of the semiautomatic firearm used to perpetrate the Sandy Hook shooting violated a Connecticut law prohibiting advertisements that promote or encourage violent, criminal behavior by marketing the weapon as a means to carry out military-style combat missions against someone's enemies.²⁶ Ultimately, the Connecticut Supreme Court ruled this claim was not blocked by PLCAA, rejecting the defendants' request for summary judgment.²⁷

Conversely, a 2009 case, *Adames v. Sheahan*, illustrates the extent to which protections are afforded to manufacturers by the PLCAA.²⁸ This case involved the tragic death of Josh Adames, who was shot by his friend Billy Swan, then thirteen years old.²⁹ Home alone, Billy found three guns that were inside a box he saw on the top shelf of a closet in his parents' room.³⁰

23 *See id.* § 7903(5).

24 *Soto v. Bushmaster*, 202 A.3d 262, 272, 274–75 (Conn. 2019).

25 15 U.S.C. § 7903(5)(A)(iii) (allowing claims where a “manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . .”). “The term ‘qualified product’ means a firearm . . . or ammunition, . . . or a component part of a firearm or ammunition . . .” *Id.* § 7903(4). The other exceptions include: (1) an action brought against a transferor convicted under the Gun Control Act, or a comparable State felony law, for conduct that directly harmed the plaintiff; (2) an action brought against a seller for negligent entrustment or negligence per se; (3) an action for breach of contract or warranty; (4) an action for death, injury, or property damage due directly to a design or manufacture defect when used as intended or in a foreseeable manner, as long as there was no volitional act that constituted a criminal offense; and (5) an action or proceeding commenced by the Attorney General to enforce the Gun Control Act. *Id.* § 7903(5)(a)(i)–(vi).

26 *Soto*, 202 A.3d 262, 272–74. These include advertisements that promote the weapon as “the uncompromising choice when you demand a rifle as mission adaptable as you are,” “the ultimate combat weapons system,” and use the slogan “Forces of opposition, bow down. You are single-handedly outnumbered.” *Id.* at 274, 276–78.

27 *Id.* at 324–25. The petition for certiorari was denied by the Supreme Court. *Remington Arms Co. v. Soto*, 140 S. Ct. 513 (2019).

28 *See Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009), *cert. denied*, 558 U.S. 1100 (2009).

29 *Id.* at 745.

30 *Id.*

Handling a Beretta 92FS handgun, Billy pressed the button that removed the magazine,³¹ believing incorrectly that the gun could not fire without the magazine. When Josh arrived at Billy's home, Billy showed Josh the Beretta as the boys began to play.³² Believing the gun was empty, Billy pointed the firearm at Josh and pulled the trigger, discharging the gun. The bullet struck Josh in the stomach, resulting in his tragic death.³³

Several available firearm features could have prevented Josh Adames's death. Experts for the plaintiffs testified that a magazine disconnect device, a mechanism first invented in 1910 and present in over 300 handgun models at the time, could have prevented the shooting.³⁴ Even without a magazine disconnect, experts testified that manufacturers could make the handgun safer with a loaded chamber indicator that was more easily visible.³⁵ This indicator would let the gun user know that a bullet was still in the chamber despite the absence of a magazine.³⁶ Wallace Collins, a firearms and ammunition design and safety expert, testified on behalf of the plaintiffs that these safety features were "readily available, inexpensive, and commercially feasible."³⁷ Therefore, as the challengers argued, specific choices by the manufacturer made the firearm more dangerous and more likely to cause the harm that occurred.

Johns Hopkins School of Public Health Professor Stephen Teret testified that in a survey of 1,200 respondents, nearly thirty-five percent either thought that a pistol could not fire after the magazine was removed or did not know whether it could.³⁸ Importantly, nearly thirty percent of those unaware that the pistol could fire without the magazine lived in a household where a firearm was present.³⁹ Thus, in Professor Teret's opinion, the lack of a magazine disconnect caused Josh's death.⁴⁰ Beretta's witnesses testified

31 *Id.*

32 *Id.* at 746.

33 *Id.* at 745–46.

34 *Id.* at 748–49. A magazine disconnect device or mechanism "prevents a semiautomatic pistol that has a detachable magazine from operating to strike the primer of ammunition in the firing chamber when a detachable magazine is not inserted in the semiautomatic pistol." *Design Safety Standards in California*, GIFFORDS L. CTR. (updated July 28, 2020), https://giffords.org/lawcenter/state-laws/design-safety-standards-in-california/#footnote_11_16042.

35 *Id.* at 749.

36 *Id.* at 748–50.

37 *Id.* at 749.

38 *Id.*

39 *Id.*

40 *Id.* Professor Teret echoed the other plaintiffs' experts in declaring the chamber-loaded warning on the Beretta to be ineffective in conveying that the handgun was still loaded without the magazine. *Id.*

that the cost of a magazine disconnect was approximately two percent of the firearms price and that the primary reason that they chose not to include one was that there was no market for that feature.⁴¹ Yet, in liability cases, this evidence matters little due to the immunity granted to manufacturers by the PLCAA.

Under the PLCAA, the Supreme Court of Illinois had little choice but to grant summary judgment for Beretta despite these testimonies. According to the court, there was a “criminal or unlawful misuse” of the firearm by a third party, regardless of whether Billy had the intent to shoot Josh.⁴² The primary concern for the court was that Billy pointed the firearm at his friend and pulled the trigger.⁴³ According to the court, this qualified as a volitional act that constituted a criminal offense, removing all possibility that one of the exceptions to the PLCAA applied.⁴⁴ Specifically, despite affordable solutions⁴⁵ readily available to Beretta, the exception to immunity for a “defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner,” did not apply here.⁴⁶

This case demonstrates the difficulty in winning a liability claim against gun manufacturers. The inherent dangerousness and ease with which the product can cause serious harm appears to be a primary justification for impeding liability claims. Here, despite being just a child, knowingly pointing the gun and pulling the trigger is enough to exculpate the manufacturer for the perilous product they have created. Because of the barrier created by the PLCAA, even the testimony demonstrating a lack of awareness of how firearms work and readily available safety features to reduce the risk of harm was rendered moot.⁴⁷ Under the PLCAA, it is apparent that not only are manufacturers not liable for the harm caused by their product, be it purposeful or otherwise, but they are under no obligation to maximize the safety of their product or to educate their consumers. This legislative

41 *Id.*

42 *Id.* at 761–62 (quoting 15 U.S.C. § 7903(5)(A) (2006)).

43 *Id.* at 763.

44 *Id.* at 762–63 (“Plaintiffs and the appellate court read volitional act to require a finding that Billy intended to shoot Josh or understood the ramifications of his conduct. We disagree. As Beretta argues, even if Billy did not intend to shoot Josh, Billy did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger. Although Billy did not intend the consequences of his act, his act nonetheless was a volitional act. Accordingly, pursuant to the PLCAA, the discharge of the Beretta in this case was caused by a volitional act that constituted a criminal offense, which the PLCAA provides ‘shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.’”).

45 *Id.* at 749.

46 *Id.* at 765 (emphasis added) (quoting 15 U.S.C. § 7903(5)(A)(v) (2006)).

47 *Id.* at 763.

limitation demonstrates that victims of gun violence need another avenue if they wish to have influence over the regulation of firearms.

While private actors were limited in their ability to sue for damages, cities attempted their own litigation strategies.⁴⁸ For example, New York City filed a claim against firearm suppliers for violating New York's criminal nuisance statute.⁴⁹ The city claimed manufacturers were knowingly distributing firearms to legitimate retailers that they knew would be diverted into illegal markets without making any efforts to prevent this diversion.⁵⁰ According to the city, firearm suppliers refuse to take reasonable steps available to them, such as monitoring sales, training dealers, or investigating which distributors have sales that disproportionately end up supplying the illegal secondary market.⁵¹ One of the city's claims for contribution to the illegal markets was manufacturers purposefully oversupplying firearms in markets where gun regulations were particularly lax.⁵² As a result, New York sought injunctive relief requiring suppliers to alter their marketing and distribution practices to effectively minimize these illegal markets.⁵³

Ultimately, the city's efforts were unsuccessful. The court determined that the PLCAA preempted the city's application of its criminal nuisance statute and that no exception was applied.⁵⁴ Applying the statutory canon of avoiding absurdity, the court stated that allowing this case to move forward would enable the "exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets."⁵⁵ Undeterred

48 *See, e.g.*, *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 172 (D.C. 2008) (rejecting the District's attempt to impose strict liability on assault weapons manufacturers).

49 *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 389–91 (2d Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009).

50 *Id.* at 391.

51 *Id.* The city asserted various mechanisms for facilitating the movement of legally distributed handguns into illegal markets: (1) gun shows; (2) private sales, which do not require background checks or record keeping required by federal firearm licensees; (3) straw purchases, where qualified individuals purchase firearms for those who are not qualified; (4) selling multiple firearms at once or in a short period of time; (5) intentional trafficking by corrupted federal firearm licensees; (6) thefts from licensees with poor security; and (7) "oversupply of markets where gun regulations are lax." *Id.*

52 *Id.*

53 *See id.* at 390–91.

54 *See id.* at 390, 399–400. Under the PLCAA, a lawsuit may proceed in "an action in which a manufacturer or seller . . . knowingly violated a State or federal statute applicable to the sale or marketing of [firearms], and the violation was a proximate cause of the harm . . ." 15 USC § 7903(5)(A)(iii) (2018).

55 *Beretta*, 524 F.3d at 403. Conversely, the dissent finds the majority's interpretation will in fact lead to "the sort of practical problems and absurd results we usually try to avoid."

by concerns of federalism, the court ultimately prevented New York from applying its laws to manufacturers the city believed contributed to substantial harm to its citizens.⁵⁶

B. *Judicial Engagement*

i. The Use, Misuse, and Absence of Data

While the PLCAA prevents regulating firearms through liability litigation, constitutional claims implicating the Second Amendment can have a profound impact on firearm regulations. A broad interpretation of Second Amendment protections has the potential to strike down existing regulations and prevent future policies aimed to curb gun violence. Meanwhile, a narrower reading of the Second Amendment may enable efforts to reduce gun violence but could also restrict the rights of those seeking to protect themselves from harm.

The Supreme Court has provided little guidance on how lower courts should decide these critical cases.⁵⁷ In *Heller*, the Court made clear that the Second Amendment provided an individual right to keep and bear arms, anchored by the right of self-defense.⁵⁸ Yet the majority opinion gave hardly any other information on what this meant for existing laws limiting firearm access.⁵⁹

Id. at 406 (Katzmann, J., dissenting) (citations omitted). In particular, the dissent questions the reasoning that while “a statute need not expressly regulate firearms to be ‘applicable’ to firearms, the majority comes to the conclusion that [criminal nuisance] is not a statute that ‘clearly can be said to regulate the firearms industry’ or ‘actually regulate[s] the firearm industry.’” *Id.* (second alteration in original) (footnote omitted) (citations omitted). Therefore, the dissent reads the holding to mean that a statute is not applicable unless and until it is in fact applied to the firearms industry. “Unlike, say, a fruit, which is edible long before someone has eaten it, or gasoline which is flammable even before someone has ignited it, the majority finds that a state law is not applicable until a state court actually applies it.” *Id.* (citation omitted).

56 *Id.* at 390–91 (majority opinion). The majority held that the only concern with respect to the Tenth Amendment was whether the federal government was commandeering the state’s authority to act autonomously. *Id.* at 396. The court ruled commandeering was not present because “it imposes no affirmative duty of any kind.” *Id.* at 397 (quoting *Connecticut v. Physicians Health. Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002) (internal quotation marks omitted)).

57 *See, e.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 88 (2d Cir. 2012) (“*Heller* provides no categorical answer to this case. And in many ways, it raises more questions . . .”).

58 *See* *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 591–92 (2008).

59 *Id.* at 719–23 (Stevens, J. dissenting) (arguing that the majority did not give any information on how its ruling would impact existing laws).

Gun violence and gun rights are fiercely debated in the public discourse, with passionate advocates on each side.⁶⁰ Most, though, acknowledge that gun violence is indeed a national problem.⁶¹ It is, therefore, not a question of should we address gun violence, but rather, *how* do we address gun violence—regulation or increased access to firearms for self-defense—that provokes emotionally charged responses. While the judiciary continues to determine the contours of the Second Amendment right, it is imperative that they do so deliberately and as objectively as possible. Objectivity in this area may be particularly important to encouraging public trust in the judiciary's ability to insulate itself from the politics of the issue.

The use of empirical evidence and the growing body of public health research may provide a useful avenue with which to achieve this goal. Data cannot necessarily answer a legal question, and in some circumstances, data may even be lacking or unavailable. But at other times, there may be data supporting the arguments on each side of a case, a situation that typically results in deference to the legislature. Emphasizing the relevance of public health research is not to suggest that it will answer any and all legal queries. Rather, it provides a more robust understanding of the legal question. Data can contextualize the legal analysis and provide more thorough reasoning for the court's ultimate conclusion. Using research that focuses on the relationship between gun laws and gun violence provides the judiciary with another important tool for accomplishing a complete analysis of the constitutionality of any firearm regulation. Yet too many cases tend to ignore the public health aspects of the issue.

Instead, cases often focus on the scope of the right, ignoring the harm that an expansive interpretation of Second Amendment protections may cause. There is some logic to this approach. *Heller* provided very little information outside of the fact that the District of Columbia could not ban individuals from possessing handguns in their homes. The Court's narrow ruling and reliance on historical analysis to find an individual right has led some jurists to turn to history for answers.⁶² But there are limitations to what history can provide in constitutional analysis, including state authority, to limit a right in response to a public health crisis.⁶³

To be sure, science and data tell us nothing of the scope of an amendment's protection. But under the police powers, the state is authorized

60 See KIM PARKER ET AL., *supra*, note 14.

61 See *id.* at 53 (showing that only 2% of respondents felt gun violence was not a problem at all in the United States).

62 See discussion *infra*, Part I.B.ii.

63 See *id.*; see also Michael R. Ulrich, *Revisionist History? Responding to Gun Violence Under Historical Limitations*, 45 AM. J.L. & MED. 188, 190 (2019).

to pass laws to protect public health, safety, and welfare.⁶⁴ Constitutional rights can and have been limited in the name of public health since the founding.⁶⁵ Thus, the public health impact is not only important but constitutionally relevant. A focus entirely on the right is simply an incomplete legal analysis. The scope of the right, the degree to which it is infringed, and the potential benefits to the public are all critical components of a constitutional evaluation.⁶⁶

Yet some prominent cases have been devoid of an empirical assessment while coming to conclusions that could have drastic impacts on gun control and exacerbate the gun violence epidemic. For example, questions have arisen regarding how to treat *Heller*'s declaration that:

[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

The Sixth Circuit has dismissed Second Amendment claims for those convicted of felonies, relying almost entirely on this language.⁶⁸ One such case involved an individual convicted of running an illegal gambling business.⁶⁹ The Sixth Circuit dispensed the constitutional claim with no analysis of whether this type of crime is associated with an increased likelihood of future violence by grounding its opinion on this quote from *Heller*, where the Supreme Court said prohibiting felons from possessing firearms was “presumptively lawful”⁷⁰ but provided no explanation or citations to explain

64 *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 27 (1905).

65 See Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 285–302 (1993) (describing public health regulations in the colonial period and founding era); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (declaring the inherent police power as “a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government,” including “[i]nspection laws, quarantine laws, [and] health laws of every description . . .”); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872) (acknowledging the historical acceptance of police power authority and “the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.”) (citation omitted).

66 Ulrich, *supra* note 4, at 1061.

67 *Heller I*, 554 U.S. at 626–27.

68 *United States v. Carey*, 602 F.3d 738, 739, 741 (6th Cir. 2010).

69 *Id.* at 739.

70 *Heller I*, 554 U.S. at 627 n.26.

this conclusion.⁷¹ Meanwhile, the Seventh Circuit in 2010 upheld the statute's application to an individual convicted of robbery, relying in part on a Note from 1982 that cited recidivism research published in 1979, thirty-one years prior to its opinion.⁷²

Laws limiting firearms access to the mentally ill received a slightly more deliberate analysis from the Sixth Circuit in *Tyler v. Hillsdale County Sheriff's Department*.⁷³ The question there was whether the mentally ill, a designation established in the federal statute by adjudications of incompetency and involuntary commitment, may be permanently prohibited from owning firearms.⁷⁴ Unlike the analysis for the permanent ban for felons, the Sixth Circuit did not take the *Heller* language to be “an analytical off-ramp to avoid constitutional analysis.”⁷⁵ However, the differing treatment of felons and the mentally ill do not appear to be based on one being more or less likely to commit future violence. Instead, the court looked to history, finding the prohibition of firearm possession by the mentally ill to lack “historical pedigree.”⁷⁶ Yet, as Judge Moore's dissent in *Tyler* notes, the ban on possession by all felons was enacted in 1961, 170 years after the Second Amendment was ratified and a mere seven years before the ban on the mentally ill.⁷⁷

The Sixth Circuit acknowledged that the purpose of the statute was to keep firearms out of the hands of “risky people.”⁷⁸ Yet, after examining the ban more closely, the majority opinion found that nearly all of the government's evidence lacked justification for a permanent prohibition for those who have been involuntarily committed at some point in their life.⁷⁹ The majority even cited a study finding that the rates of violent acts by those involuntarily committed and the general population in the observed

71 *Carey*, 602 F.3d at 741. The Sixth Circuit's determination in *Carey* also relies heavily on its own decision in *United States v. Frazier*. See 602 F.3d at 741–42. In *Frazier* the Sixth Circuit upheld the constitutionality of the felon ban, citing several cases that pre-dated *Heller* even though *Frazier* was decided after *Heller*. See *United States v. Frazier*, 314 F. App'x. 801, 807 (6th Cir. 2008).

72 *United States v. Williams*, 616 F.3d 685, 692–93 (7th Cir. 2010) (citing Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 515, 515 n.24 (1982)).

73 See generally *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016).

74 *Id.* at 681.

75 *Id.* at 686 (citations omitted).

76 *Id.* at 687. According to the court, the limits on the mentally ill are “of 20th Century vintage” (quoting *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010)), and lack “historical evidence” in support. *Id.*

77 See *id.* at 715–16 (Moore, J., dissenting).

78 *Id.* at 693 (majority opinion) (citations omitted).

79 See *id.* at 694–98.

community to be statistically indistinguishable.⁸⁰ Indeed, the evidence suggests people with mental illness are no more likely to be violent than those without mental illnesses.⁸¹ In fact, people with mental illnesses are more likely to be the victims of violence,⁸² which actually may suggest their right to self-defense should be more ardently protected.

Still, the majority decided to remand the case to give the government another chance to meet their burden of proof.⁸³ Multiple concurring opinions questioned the validity of offering the government another opportunity to justify the lifetime ban, and Judge McKeague characterized the government's evidence as "woefully short of demonstrating the required reasonable fit"⁸⁴ between the ban and their interests.⁸⁵ Here the problem is not necessarily that the court did not engage with research; rather, the Sixth Circuit did not come to the most logical conclusion in light of the fact that all of the government's research was deemed insufficient. Again, it is not that data will necessarily be controlling, but it should be persuasive. And a cursory discussion of empirical evidence that is not relied upon in reaching the court's conclusion hardly qualifies as a thorough analysis.

Courts have demonstrated a willingness to disregard data not only as it relates to limited Second Amendment rights of felons and the mentally ill but in finding an expansive view of Second Amendment rights as well. Broad protection of Second Amendment rights can have serious implications that may adversely affect the public. The right to carry firearms in public offers one such example. While dangers are present for the individual and those they live with when a firearm is present in the home, a decision to carry a gun

80 *Id.* at 696 (citing Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 400 (1998)).

81 *See, e.g.*, Jonathan M. Metzler & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 241–42 (2015) (demonstrating that only about 4% of violence is attributable to people with mental illnesses). Perhaps more importantly, this fact holds true when looking at harm from firearms. Studies "show that fewer than 5% of the 120,000 gun-related killings in the United States between 2001 and 2010 were perpetrated by people diagnosed with mental illness." *Id.* at 241.

82 *Id.* at 242 ("[P]eople diagnosed with schizophrenia have victimization rates 65% to 130% higher than those of the general public.").

83 *See Tyler*, 837 F.3d at 699 (McKeague, J., concurring).

84 *Id.* Judge McKeague also stated, "I agree with Judge Sutton that . . . it would be fruitless to give the government a second bite at the apple . . ." *Id.*

85 *Id.* at 699; *see also id.* at 700 (White, J., concurring) ("[T]he government has not met its burden . . ."); *id.* at 708 (Sutton, J., concurring) ("[T]he government has not presented any individualized evidence about Tyler's fitness to possess a gun but instead has relied on stereotypes about the mentally ill.").

in public has the potential to increase the risk for others. More importantly, it creates risk for individuals who have no control over the decision of others to carry their firearms and, in the case of concealed carry, may have no way of knowing if and when firearms are present in a public setting.

Yet, in *Wrenn v. District of Columbia*,⁸⁶ the D.C. Circuit struck down a limitation on carrying firearms in public with no reference, citation, or discussion of what impact this may have on gun violence and the public.⁸⁷ The case concerned a “good reason” restriction, which required individuals to demonstrate a need beyond general self-defense to carry a firearm in public.⁸⁸ The District was not trying to eliminate citizens’ right to carry firearms in public completely; rather, it attempted to limit concealed carrying rights to those who demonstrated a true need for it.⁸⁹ It seems unremarkable to see this as an attempt to strike a balance between the needs of individuals for self-defense and the risks to the public.⁹⁰ Consequently, a constitutional analysis would presumably examine the justification for these restrictions to determine whether they have a reasonable chance to mitigate risk or whether they go too far.

But the D.C. Circuit avoided such an analysis completely.⁹¹ Performing some logical gymnastics, the Circuit Court found the city’s regulation to be a complete ban for those residents who are denied a license to carry in public, thus falling in line with the complete ban of handguns by any resident that the Court categorically rejected in *Heller*.⁹² The majority in *Wrenn* focused entirely on the scope of the right, whereas the dissent highlighted the relevance of the District’s consideration of “vast amounts

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

87 *Id.* at 668.

88 *Id.* at 655–56.

89 *Id.*

90 Compare *Wrenn*, 864 F.3d at 667–68, with *Kachalsky v. County of Westchester*, 701 F.3d 81, 98 (2d Cir. 2012) (applying intermediate scrutiny and finding New York’s “proper cause” restriction a proper balance between Second Amendment rights and the State’s authority to protect the public), and *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (supporting the Second Circuit’s analysis in *Kachalsky* that New York took a moderate approach to fulfilling its objective to protect the public).

91 *Wrenn*, 864 F.3d at 666 (“[W]e strike down the District’s law here apart from any particular balancing test.”). The court did this despite recognizing that “our previous cases have always applied tiers of scrutiny to gun laws.” *Id.*

92 *Id.* at 665–66. The court ignores the fact that individuals would be able to reapply for public carry licenses in the future, which would contradict the categorization of the law as a permanent ban. Moreover, the court declares that *Heller* prohibits total bans yet, as discussed above, courts have rather easily accepted lifetime bans for anyone who has been convicted of a felony, including those that are nonviolent offenses. See *supra* notes 67–72 and accompanying text.

of data” that found an “empirical connection between a profusion of guns and increased violent crime.”⁹³ After declaring the right to carry a firearm in public a part of the core of Second Amendment protections, the *Wrenn* court held that it “would flout [the] lesson of *Heller I* if we proceeded as if some benefits could justify laws that necessarily destroy the ordinarily situated citizen’s right to *bear* common arms.”⁹⁴

The court here explicitly ignored the role of the government in protecting public health, safety, and welfare. It would be one thing to consider the evidence and determine that the law simply goes too far. Perhaps what qualifies as a “good reason” is too narrow, for example. But the court never weighed any evidence, let alone research considering to what extent public carry laws minimize or exacerbate gun violence. Regardless of the outcome, to be so cavalier about regulations aimed at minimizing the number of firearms in public is troubling. Gun violence is inarguably a problem and one that should be genuinely engaged with by the judiciary when considering firearm regulations.

It is worth noting two points about these cases. Although they are important, they are lower courts and obviously do not set a binding precedent throughout the country. Moreover, these cases do not represent the entirety of the Second Amendment landscape among the lower courts, including the use of empirical evidence. But with little Supreme Court case law to examine, these lower court cases are illustrative of how courts can ignore data and relatively easily dispense with state interests or even Second Amendment protections for certain groups.

It is, therefore, particularly important to understand how the Supreme Court Justices may grapple with empirical data or if they will at all. The litigation of the Supreme Court’s most recent Second Amendment case, *New York State Rifle & Pistol Association v. City of New York*,⁹⁵ is demonstrative of the uncertainty surrounding the Justices’ approach. New York City limited carrying handguns only to shooting ranges within the city limits.⁹⁶ The restriction was challenged as a violation of the Second Amendment, but the City won in the District and Appellate Courts.⁹⁷ After the Supreme Court granted certiorari to hear the case, however, New York reversed course and

93 *Wrenn*, 864 F.3d at 666, 671 (Henderson, J., dissenting). The majority holds that “we needn’t pause to apply tiers of scrutiny, as if strong enough showings of public benefits could save this destruction of so many commonly situated D.C. residents’ constitutional right to bear common arms for self-defense in any fashion at all.” *Id.* at 666.

94 *Id.* at 665 (emphasis in original).

95 *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020).

96 *Id.* at 1530 (Alito, J., dissenting).

97 *Id.* at 1527–28.

amended the law to appease the challengers and argued the case was moot.⁹⁸

New York did not fear that the Supreme Court would strike down the restriction; the fact that the law was amended evidences as much. But arguing that the case was moot might have been an attempt to forestall an adverse ruling broad enough to impact other firearm regulations critical to the fight against gun violence.⁹⁹ At every judicial level, Second Amendment rulings define the contours of the solutions available to policymakers. But the Supreme Court has the power to control all of those cases, and it appears that some members of the Court are more likely to look backward at the history of the Second Amendment, rather than forward, when making their decision. As illustrated below, such a backward-looking approach would be limiting.

ii. Historical Limitations

*McDonald v. City of Chicago*¹⁰⁰ is the only other Supreme Court case on the Second Amendment decided since *Heller*, but other sources provide insight into the approach certain justices might take.¹⁰¹ Importantly, many justices seem intent on using history as the primary tool for determining the constitutionality of gun laws. This approach, however, is misguided because it limits the influence and importance of social science and ignores the potential for public health issues to evolve over time, expanding government authority to act in times of crisis and restricting authority when the risk has been minimized or eliminated. As our understanding of public health problems and methods to address them improve over time, the analysis of state efforts to protect the public should evolve as well. But reliance on history may create a barrier to a modern, data-driven approach to gun violence.

Given Justice Thomas's numerous dissents from the Court's denials of certiorari for Second Amendment appeals, his opinion is perhaps the easiest on the Court to predict in these matters. Justice Thomas has declared the Second Amendment a "disfavored right" and castigated lower courts for their "general failure to afford the Second Amendment the respect due an enumerated right."¹⁰² More importantly, he rejects lower courts'

98 *See id.* at 1526 (plurality opinion).

99 Even Justice Alito questions the logic behind the government's change of heart: "Although the City had previously insisted that its ordinance served important public safety purposes, our grant of review apparently led to an epiphany of sorts, and the City quickly changed its ordinance." *Id.* at 1527–28 (Alito, J., dissenting).

100 *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010).

101 *See infra* notes 102–12 and accompanying text.

102 *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the Court's

use of a two-step inquiry that incorporates the tiers of scrutiny in Second Amendment cases, finding the test to be “entirely made up” and inconsistent with *Heller’s* rejection of an interest-balancing inquiry.¹⁰³ Instead, Justice Thomas appears to prefer that courts follow *Heller’s* suggestion that “courts could conduct historical analyses for restrictions” that may be analogous to the current laws that are challenged.¹⁰⁴ In another dissent, joined by Justice Gorsuch, Justice Thomas explicitly stated that historical digging into sources from England, the founding era, the antebellum period, and Reconstruction helped him determine that the Ninth Circuit Court of Appeals incorrectly upheld a firearm restriction.¹⁰⁵

Justice Alito took the historical approach in his dissent¹⁰⁶ from the Supreme Court’s most recent Second Amendment case, *New York State Rifle & Pistol Association v. City of New York*, a case the majority declared moot in light of recent amendments made to the city’s handgun licensing statute.¹⁰⁷ After explaining why the case was not moot, Justice Alito stated that the constitutional question was an easy one to answer using a historical analysis that showed a lack of analogous laws at the time the Second Amendment was adopted.¹⁰⁸

Justice Kavanaugh, a recent appointment to the Court, was equally explicit in favoring a historical approach to Second Amendment analysis while a lower court judge on the D.C. Circuit.¹⁰⁹ In the follow-up case to

denial of certiorari).

103 *Rogers v. Grewal*, 140 S. Ct. 1865, 1866–67 (2020) (Thomas, J., dissenting).

104 *Id.* at 1866. While Justice Thomas rejects the two-step inquiry that includes a tiers-of-scrutiny analysis, he believes that jurists who have “concluded that text, history, and tradition are dispositive in determining whether a challenged law violates the right to keep and bear arms” espouse an approach consistent with *Heller*. *Id.* (citations omitted); see also *Silvester*, 138 S. Ct. at 945 (Thomas, J., dissenting).

105 *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016), cert. denied sub nom. *Peruta v. California*, 137 S. Ct. 1995, 1996–98 (2017) (Thomas, J., dissenting).

106 *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1544 (2020) (Alito, J., dissenting).

107 *Id.* at 1526 (per curiam).

108 See *id.* at 1538–42, 1544 (Alito, J., dissenting) (“History provides no support for a restriction of this type.”). Justice Alito states that if history were insufficient to demonstrate that the law is invalid, then New York City lacks justification for their restriction. *Id.* at 1541–42. Justices Thomas and Gorsuch joined the dissent except for the last section analyzing the City’s justification. *Id.* at 1527. Justice Kavanaugh also proclaimed his support for Justice Alito’s analysis of *Heller* and *McDonald*, while expressing concern over lower courts improperly applying those cases. *Id.* at 1527 (Kavanaugh, J., concurring).

109 *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1295 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Justice Kavanaugh also, unsurprisingly, joined Justice Thomas’s most recent dissent from denial of certiorari where Justice Thomas

Heller—referred to as *Heller II*—then Judge Kavanaugh stated quite clearly his belief that history is the proper manner in which these regulations should be evaluated,¹¹⁰ and he decried the use of any traditional standard of review as “judge-empowering ‘interest-balancing inquir[ies].’”¹¹¹

Chief Justice Roberts does not have a written opinion discussing which analytical tools he believes should be used in analyzing Second Amendment challenges, but there may be hints that he too feels historical inquiry is the best methodology. During the *Heller* oral argument, the Chief Justice questioned the value of the traditional tiers-of-scrutiny standards of review, instead asking pointedly whether it would be better to simply look to the past and examine the regulations that were available at the time of the Amendment’s adoption:

[T]hese various phrases under the different standards that are proposed . . . none of them appear in the Constitution; . . . Isn’t it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time . . . and determine how these . . . how this restriction and the scope of this right looks in relation to those?¹¹²

If implemented, this approach would require the current restriction to be compared to what was acceptable historically and would avoid balancing the benefits and burdens of the law, as found in the traditional standards of review.

The potential for a majority of Supreme Court justices to rely primarily, if not solely, on a historical inquiry for constitutional analysis is quite troubling. For one thing, judges are not historians. As Fordham history professor Saul Cornell has pointed out, both Justice Scalia’s and Justice Stevens’s historical analysis in *Heller* fell short of the standards that historical scholarship demands.¹¹³ Even Justice Scalia, author of the majority opinion in *Heller*, conceded in his concurrence in *McDonald* that historical analysis is not necessarily an objective determinant of constitutionality, finding instead

advocated for a historical analysis and used that framework to analyze a restriction to carry a firearm in public. *Rogers v. Grewal*, 140 S. Ct. 1865, 1865 (2020) (Thomas, J., dissenting).

110 *Heller II*, 670 F.3d at 1295 (Kavanaugh, J., dissenting).

111 *Id.* at 1277.

112 Transcript of Oral Argument at 44, *Heller I*, 554 U.S. 570 (No. 07-290). Chief Justice Roberts, with a hint of disdain for tiers-of-scrutiny, went on to state that “these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up.” *Id.*

113 Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626 (2008).

that “it sometimes requires resolving threshold questions.”¹¹⁴

Judge Richard Posner took his critique of historical inquiry a step further, labeling the analysis “law office history.”¹¹⁵ Given the resources available to the Supreme Court, Judge Posner believes the Justices are able to selectively use historical sources to justify nearly any outcome.¹¹⁶ Whether this is indeed what actually occurs may be less relevant than the perceived notion that it does. In such a contentious area as Second Amendment rights, the public perception of the Court’s objectivity is paramount, and ignoring current empirical evidence, especially when available to the public, may create a tension that strains the public’s trust in the Court’s ability to avoid political partisanship.

The reliance on historical analysis, as opposed to current empirical data, also ignores the manner in which the police powers of the state authorize the government to be responsive to emerging threats to public health and safety. If government action is necessary to protect the public, the police powers enable some regulation of behavior and limitation of individual rights.¹¹⁷ A critical part of the analysis, then, is whether the threat to the public warrants and is amenable to government action and if the means—which would factor in the burden on the individual right—are justified.¹¹⁸ Without an actual threat to the public or a reasonable chance to mitigate the potential harm, government action is unwarranted. Empirical research would be a critical component of this evaluation because it would help to properly evaluate the nature of a modern public health threat and the potential for government action to mitigate that threat. This type of assessment demonstrates the limitation of a historical inquiry, at least in

114 See *McDonald v. City of Chicago*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring).

115 Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 35.

116 *Id.* (“The judge sends his law clerks scurrying to the library and to the Web for bits and pieces of historical documentation. When the clerks are the numerous and able clerks of Supreme Court justices, enjoying the assistance of the capable staffs of the Supreme Court library and the Library of Congress, and when dozens and sometimes hundreds of amicus curiae briefs have been filed, many bulked out with the fruits of their authors’ own law-office historiography, it is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position.”).

117 *Jacobson v. Massachusetts*, 197 U.S. 11, 27–28 (1905) (finding the evaluation of necessity important to prevent arbitrary and oppressive government action unrelated to a true public health threat). For a further discussion on *Jacobson*, see Ulrich, *supra* note 4, at 1077 (describing the framework used in *Jacobson* as requiring a public health threat to justify government action).

118 *Jacobson*, 197 U.S. at 30–31 (stating that the vaccine was an effective measure in addressing smallpox while the government also exempted those who would be overly burdened due to a medical contraindication).

being dispositive for a regulation's constitutionality.¹¹⁹

As the public health and safety threats evolve, diminish, and emerge over time, so too must the action the government is authorized to take in response. As gun violence has become a greater threat to society, especially to communities of color, the state must be empowered to respond. Individual rights are and have always been a limitation on state action, as well they should be. But the determination of whether an action qualifies as a protected right is not the end of a constitutional inquiry if that right can be limited in a reasonable manner that benefits the greater good. This has been true since the country's founding.¹²⁰ But given the risk of abuse inherent in paternalistic actions in the name of public health, there is logic in questioning the validity of state action. Indeed, there are plenty of historical examples of abuse of power in the name of public health.¹²¹ Again, this is where data provides a persuasive, though not necessarily conclusive, manner in which to evaluate the legitimacy of state action in the name of protecting the public.

119 As Justice Breyer notes in his dissent in *Heller*, “This historical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry.” *Heller I*, 554 U.S. at 687 (Breyer J. dissenting).

120 See Parmet, *supra* note 65, at 292 (discussing efforts in the early years of the country to protect public health, and the “relationship between limits on freedom and provision of care”).

121 See *e.g.*, *Buck v. Bell*, 274 U.S. 200, 207 (1927) (citing *Jacobson v. Massachusetts* to justify forced sterilization on individuals alleged to have insufficient mental capacity in an effort to “prevent our being swamped with incompetence” by those who “sap the strength of the State.”); *Wong Wai v. Williamson*, 103 F. 1, 10 (C.C.N.D. Cal. 1900) (striking down a San Francisco quarantine ordinance that only applied to people of Chinese descent); *Jew Ho v. Williamson*, 103 F. 10, 23–24 (C.C.N.D. Cal. 1900) (“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations, between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.”) (quoting *Yick Wo. v. Hopkins* 118 U.S. 356, 373 (1886)); see also Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 *HOFSTRA L. REV.* 53, 66–68 (1985) (describing health officials using quarantine against prostitutes as a complement to police work).

II. THE INFORMATIVE FUNCTION OF LITIGATION

In a dissenting opinion, Justice Kagan accused the Court majority of “weaponizing the First Amendment” after it overturned a prior case that had stood for over forty years.¹²² So, too, might the Second Amendment be weaponized to alter the legal landscape for firearm regulations at the federal, state, and local levels. With the PLCAA blocking impact litigation that would have the potential to regulate firearms, Second Amendment constitutional litigation is the new courtroom battleground. And this litigation will certainly have a significant impact on the future of gun control. Parts of the judiciary, including some justices, are focused primarily on the scope of the right and historic analogues,¹²³ but litigation provides a chance to inform them of the role the law plays in this growing public health crisis.

Public health research and law, therefore, must play a critical role in the future of Second Amendment jurisprudence.¹²⁴ Constitutional litigation provides an avenue to provide useful data relevant to the judiciary’s legal analysis and may influence their ultimate conclusions. For example, when discussing amicus briefs, Justice Breyer stated that “[s]uch briefs play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated laypersons and thereby helping to improve the quality of our decisions.”¹²⁵ The public health community, and experts in technical aspects of statistics and epidemiological principles, would be an excellent resource to convey emerging research on gun violence and the law in a manner that is easily understandable. Moreover, they can do so with credibility that the judiciary respects and appreciates. While the exact influence on an outcome may be incalculable, there is no doubt that amicus briefs, in particular, can provide important and relevant information that may not be well-represented—or represented at all—in the arguments put forth by the parties.

122 *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018). For more on how First Amendment interpretations impact public health directly, see Yale Law School Conference, *Public Health in the Shadow of the First Amendment*, YALE L. SCH. (Oct. 7, 2014), <https://law.yale.edu/yls-today/news/yale-law-school-hold-conference-first-amendment-shadow-public-health>, and the accompanying symposium on Balkanization from the *Public Health in the Shadow of the First Amendment Conference* (2014), <https://law.yale.edu/ghjp/events/past-events-archive/guest-bloggers-balkanization-public-health-shadow-first-amendment-conference> (last visited Aug. 18, 2020).

123 See *supra* Part I.B.ii.

124 See Ulrich, *supra* note 4, at 1096–98.

125 *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. TIMES (Feb. 17, 1998), <https://www.nytimes.com/1998/02/17/us/justice-breyer-calls-for-experts-to-aid-courts-in-complex-cases.html>.

The judiciary's role is to decide cases and controversies brought before them. But the impact of these decisions, particularly appellate and Supreme Court opinions which control lower courts, can be far-reaching.¹²⁶ Yet it is rational to think judges may, at times, be blinded by the narrow focus of the facts and legal theory before them in a particular case. It can often be useful to present a broader perspective on what their decision might mean to society.¹²⁷ According to Judge Posner, "appellate lawyers would be more effective if . . . they instead emphasized the practical stakes in the case and thus the consequences of the decision."¹²⁸ Third parties may present the judiciary with a broader view of the litigation's impact.¹²⁹

This is not to suggest that social science, storytelling, or historical contextualizing will always sway a court. To be sure, there are stories of judges disregarding, if not misunderstanding, the briefs they read.¹³⁰ For example, while Justice Brennan cited scientific studies quite often in his opinions, he was not immune to misinterpretations.¹³¹ In *Craig v. Boren*, Justice Brennan found a disparity between male and female drivers for driving under the influence of alcohol to "hardly . . . form the basis for employment of a gender line as a classifying device. Certainly, if maleness is to serve as a proxy for drinking and driving, a correlation of 20% must be considered an unduly tenuous 'fit.'"¹³² Yet there was no correlation involved, and the discrepancy was hardly trivial.¹³³ As Justice Rehnquist noted in his dissent, the discrepancy was higher by a factor of nearly eighteen.¹³⁴

126 See e.g. *infra* Part II.A (discussing *Brown v. Board of Education*, *Grutter v. Bollinger*, and *McCleskey v. Kemp*).

127 See Linda Greenhouse, *What Got Into the Court? What Happens Next?*, 57 MAINE L. REV. 1, 6–8, 10 (2005) (discussing the importance of considering not simply pure legal doctrine but how the opinions impact the real world).

128 Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1067 (2006). Professor Linda Sandstrom Simard has pointed out that "Judge Posner has been critical of the inefficiencies created by amicus briefs, noting that '[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs . . .'" Simard, *supra* note 12 at 681 (2008).

129 See Simard, *supra* note 12, at 680 (2008) ("[A]mici curiae may play . . . an educational role by presenting technical information that creates a fuller context for the court to decide the case.").

130 See Blake, *supra* note 11, at 231.

131 *Id.*

132 *Craig v. Boren*, 429 U.S. 190, 201–02 (1976).

133 Blake, *supra* note 11, at 231.

134 *Craig*, 429 U.S. at 223 (Rehnquist, J., dissenting). According to Blake, Justice Brennan makes three important mistakes. "First of all, there is no correlational analysis taking place, so the term 'correlation' is not appropriate. Second, he mistakes the concepts of statistical significance . . . for substantive significance Finally, the substantive significance of the difference in arrest rates for men and women is massive, not merely

A majority of judges at every level of the federal bench have stated that amici curiae help “offer[] new legal arguments that are absent from the parties’ briefs” and may provide perspective on the impact by highlighting “matters that extend beyond the parties’ dispute.”¹³⁵ This fact is consistent with the notion that the judiciary can, and at times must, be educated on critical information or perspectives. The Court’s limitations may result from a lack of expertise or understanding of a nuanced scientific matter, or it may be from a lack of experience. The latter has almost certainly been key throughout the history of the Court. Consider the representation of the Court over its history, predominantly white males, as they have sought to answer questions implicating the lives of people of color, women, and, more recently, sexual minorities. In cases involving these three areas, outcomes have been influenced by non-party involvement in the litigation, acting to better inform the judiciary.

A. Race

Perhaps the most well-known example where a case’s outcome may be credited to the research and data used to inform the judiciary is *Brown v. Board of Education*.¹³⁶ In the majority opinion, footnote eleven cites social science research to support the notion that school segregation causes psychological harm to Black students.¹³⁷ Many have questioned both the validity of the research cited in *Brown* and whether the Court relied on that research to reach its conclusion,¹³⁸ yet those questions do not necessarily

“not trivial.” Blake, *supra* note 11, at 231. Justice Rehnquist, despite citing science in less than one percent of his opinions, correctly made note of this in his dissent in *Craig v. Boren*, finding male drivers eighteen to twenty years old were arrested for driving under the influence nearly eighteen times as often as females in the same age group. *Id.* at 232.

135 Simard, *supra* note 129, at 690–92. For the educational function of providing new legal arguments, all Supreme Court respondents supported this function, as did 77.1% of Circuit Court respondents and 82.5% of District Court respondents. *Id.* at 690. Professor Simard provides an example using *Mapp v. Ohio*. *Id.* at 691. In the case, the Supreme Court agreed with the argument made by the ACLU, acting as amicus curiae, who urged the Court to overturn prior precedent, an argument absent from the appellant’s challenge. *Id.* Moreover, all Supreme Court respondents, along with 73.7% of judges on federal appellate courts and 72.7% of those on federal district courts, supported “focus[ing] the court’s attention on matters that impact a direct interest that is likely to be materially impacted by the case.” *Id.* at 692.

136 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

137 *Id.* at 494, n.11.

138 See, e.g., Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 294–95 (2005).

diminish the importance of the role social science played. While the former has the benefit of over sixty years of hindsight,¹³⁹ the latter still represents the fact that the Court felt this controversial decision might be more palatable with scientific support.¹⁴⁰

But *Brown* was certainly not the last race-centric case where information outside of the parties' legal arguments made a lasting impression. *Grutter v. Bollinger* was a highly visible affirmative action case involving Michigan Law School and the use of race in its admissions process.¹⁴¹ Some commentators thought *Grutter* was the opportunity for the Court to overturn its prior affirmative action case, *Regents of California v. Bakke*,¹⁴² but the Court provided "an unapologetic embrace of a proposition that put affirmative action on a stronger footing than Justice Powell's solitary opinion in *Bakke*."¹⁴³ An amicus brief from "retired military officers and superintendents of the military academies," among others, is credited with playing a central role in this surprising outcome.¹⁴⁴

The brief's impact was evident early, becoming a prominent feature at oral argument with the Justices using it as the basis for questions to the solicitor general.¹⁴⁵ Importantly, the brief was not simply focused on whether the use of race-preference programs was constitutional. Rather, the brief examined the legally relevant issue of whether the affirmative action policies could help the academies fulfill their purposes.¹⁴⁶ This brief, along

139 *Id.* at 296.

140 *See id.* at 293–94; *see also* Sanjay Mody, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 794 ("The Court . . . embraced the footnote eleven studies to lend authority to its highly controversial, and legally precarious, decision to strike down public school segregation.").

141 *See generally* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

142 *See* *Greenhouse*, *supra* note 127 at 5–6.

143 *Id.* *Greenhouse* continues by stating that the decision recognized that "diversity serves a compelling state interest not only as an educational tool for enriching life in the classroom . . . but as a pathway for full participation by members of minority groups in the civic and economic life of the country." *Id.*

144 *Id.* at 6. *See also* Sylvia H. Walbot & Joseph H. Lang, Jr., *Amicus Briefs Revisited*, 33 STETSON L. REV. 171, 173 (2003) ("[W]ithout question a powerful influence in the case[] was the single amicus brief of 'the military,' as it came to be informally called.").

145 JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 228 (2007) ("Amicus briefs are rarely mentioned in Supreme Court arguments, but four justices had referred to the military in the first several minutes of *Grutter*."); *see also* *Greenhouse*, *supra* note 127, at 6 ("It was clear during the argument that the Justices had read [the military] brief . . ."); Walbot & Lang, *supra* note 144, at 175. For a broader discussion of the impact of "the military's" amicus brief, *see* TOOBIN, *supra*, at 224–36.

146 *See* Walbot & Lang, *supra* note 144, at 175. *See also* Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 JUDICATURE 127, 131 (2005) (describing how

with the many others filed in support of affirmative action policies, provided the Court with “an ingredient that was crucial to the outcome of the case: a sense of the culture.”¹⁴⁷ Justice Ginsburg later singled out the military brief as “one of the most valuable briefs . . . submitted.”¹⁴⁸

People of color are underrepresented at every level and in every branch of governance. Social science and amicus briefs alone will not ensure they are appropriately represented or that they will receive the justice they seek. In fact, *McClesky v. Kemp* demonstrates the Court’s most explicit rejection of social science.¹⁴⁹ The case challenged the State of Georgia’s death penalty sentence against Warren McClesky, a Black man charged with killing a white police officer, by demonstrating empirically the systemic bias in death sentences if there is a white victim instead of a Black victim.¹⁵⁰ Ultimately, the majority rejected the claim because the data did not prove discrimination in the plaintiff’s case,¹⁵¹ though there is evidence the real reason for ignoring the data may have been a reluctance to create a precedent for evaluating racial disparities in a severely biased criminal justice system.¹⁵²

Yet a lack of universal success in educating the Court does not mean it cannot be effective. While the Justices almost certainly realize their decisions have a broad impact on society, it may be difficult for them to keep that impact at the forefront of their mind. By expanding the scope of the issue, briefs, such as the military brief in *Grutter*, can help to emphasize that a case is not simply one of legal theory. It is imperative that the judiciary, in particular—often the last vestige of hope for justice—be acutely aware of

the O’Connor opinion cited the military brief for the position that “diversity in the military is ‘essential’ for it to ‘fulfill its principle mission to provide national security.’”

147 Greenhouse, *supra* note 127, at 7. More specifically, Greenhouse notes the connection to what Robert Post refers to as “the constitutional culture in which the Court is operating” with culture referencing “beliefs and values of nonjudicial actors.” *Id.* at 7, n.13. “[T]he Court in fact commonly constructs constitutional law in the context of an ongoing dialogue with culture, so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law.” Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 1, 8 (2003).

148 Simard, *supra* note 12 at 696.

149 See generally *McClesky v. Kemp*, 481 U.S. 279 (1987).

150 *Id.* at 283, 286-87 (“[E]ven after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.”).

151 *Id.* at 292-93.

152 See Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 527-28 (1995) (quoting Justice Scalia in a memo to the Conference of Justices) (“Since it is my view that unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof.”).

the practical effect communities of color will endure after the legal academy has moved on to the next big case.

B. Sex

Sex-related legal questions are particularly interesting given the progression of women's status in society and the makeup of the Court. The relevance of social science influencing Supreme Court decisions is often traced to the famous brief filed by Louis Brandeis¹⁵³ in the case of *Muller v. Oregon*.¹⁵⁴ On the heels of *Lochner v. New York*,¹⁵⁵ which rejected protective labor laws for bakers, there was a question of how the Court would handle protective labor laws for women.¹⁵⁶ The Brandeis brief contained 111 pages of "new empirical evidence" as compared to a mere two pages of legal arguments.¹⁵⁷ Ultimately, the Court found this information persuasive and upheld the restrictions on women's work hours.¹⁵⁸

While arguments that employers should treat male and female workers differently seems misogynistic now—and sexist assumptions likely played a role as well¹⁵⁹—the reliance on social science rather than legal theory did prove successful.¹⁶⁰ Moreover, the evolving data corrects the mistaken understanding of female fragility and the need for paternalistic protection. If anything, research is often likely to evolve much more quickly than public sentiment and, therefore, gives us a better chance of correcting past decisions. A reliance on past precedent and legal theory would make it more difficult for the underrepresented—in particular, people of color,

153 See Blake, *supra* note 11, at 219 ("The conventional account of social science influencing Supreme Court decisions typically begins with the 'Brandeis Brief' in *Muller v. Oregon*.").

154 *Muller v. Oregon*, 208 U.S. 412 (1908).

155 *Lochner v. New York*, 198 U.S. 45 (1905).

156 Perhaps important to Brandeis's strategy in *Muller* was Justice Harlan's dissent in *Lochner*, which recognized the liberty of contract but stated that it may be limited due to the dangerous working conditions and health impact faced by bakers. *Id.* at 70–71 (Harlan, J., dissenting); Blake, *supra* note 11, at 220. The New York Attorney General in *Lochner* failed to raise these concerns and, instead, the Court deferred to legislative judgments about a state's use of police powers. *Id.* at 221.

157 Blake, *supra* note 11, at 220.

158 *Muller*, 208 U.S. at 419, 422–23.

159 See Judith Olans Brown, Lucy A. Williams & Phyllis Tropper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 470 (1996) ("Muller's holding that legislation limiting hours for women was constitutional rests on 'facts' (myths) about women workers that differentiated them from male workers, thereby avoiding the conundrum that, if men had a constitutional right to labor in an unregulated economy, women should enjoy the same 'right.'").

160 *Muller*, 208 U.S. at 419–22 (mentioning Brandeis's brief before describing the justifications for upholding the law).

women, and sexual minorities—to gain greater access to justice.

Another example can be found in the abortion context. Abortion rights suffered a crucial blow in *Gonzales v. Carhart*, where the Court essentially reclassified the undue burden test as a rational basis evaluation.¹⁶¹ Perhaps influenced by a pro-life brief that described women having adverse emotional and psychological effects from undergoing an abortion, the Court validated the government’s concern for women’s mental states.¹⁶² With echoes of *Muller*, the Court stated: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”¹⁶³

In an abortion case to follow, *Whole Woman’s Health v. Hellerstedt*,¹⁶⁴ abortion rights advocates countered this unsubstantiated claim with more than 100 female lawyers, law students, law professors, and former judges filing a brief explaining why abortion was the right decision for them and why it helped them achieve their position within the legal field.¹⁶⁵ This brief used a very specific group of women “inside the Justices’ rhetorical circle” to

161 *Gonzales v. Carhart*, 550 U.S. 124, 158, 166 (2007) (“Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”). Justice Ginsburg points out in her dissent what an incredibly low bar the majority sets for their evaluation: “Today’s ruling, the Court declares, advances ‘a premise central to [*Casey*’s] conclusion’—*i.e.*, the Government’s ‘legitimate and substantial interest in preserving and promoting fetal life.’ . . . But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion.” *Id.* at 181 (Ginsburg, J., dissenting) (alteration in original) (citation omitted). The Fifth Circuit relied on this when declaring “the first-step in the analysis of an abortion regulation, however, is *rational* basis review, not *empirical* basis review.” *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 596 (5th Cir. 2014).

162 See Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 MICH. ST. L. REV. 1327, 1343 (2015). The brief was particularly critical of prior abortion jurisprudence, which it claimed “made non-evidence based assumptions,” whereas this brief provided real life experiences. Brief of Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, & 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 2, *Gonzales*, 550 U.S. 124 (No. 05-380) [hereinafter *Cano Brief*]. Despite the implicit claim that this brief was based on evidence, there is no description of the sources or methodologies that produced the affidavits included from the women, nor do the affidavits provide information on what led to the women having abortions. See Edwards, *supra*, at 1344.

163 *Gonzales*, 550 U.S. at 159 (citing *Cano Brief*).

164 *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

165 Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 YALE J.L. & FEMINISM 29, 30–32 (2017).

counter the narrative that women needed the government or the judiciary to protect them from making poor decisions.¹⁶⁶

This brief helped to contextualize the case by reframing the issue before the Court. In *Whole Woman's Health*, Texas claimed the regulations were meant to protect the health and wellbeing of women by increasing the safety of abortion procedures.¹⁶⁷ But the opposition brief filed by women challenged the notion that they needed such paternalistic regulations that offered restriction with no protection, thus providing an avenue for the Court to focus on the merits of the claim instead of simply deferring to State authority.¹⁶⁸ Indeed, what is “undue” requires a close examination of the facts on the ground.¹⁶⁹

This opened the door for other amici to provide critical facts about the burden the Texas laws created while providing no benefits. For example, research demonstrated that abortion procedures were safer and had lower mortality rates than procedures that were not subject to the regulations, raising questions as to why the regulations applied only to abortion procedures.¹⁷⁰ Moreover, as Justice Breyer noted in his majority opinion, when complications do arise, they occur well after the procedure, making the necessity of the admitting privileges requirement doubtful.¹⁷¹ While providing little to no benefit, the evidence established to the Court the drastic increase in burdens on women, especially considering that the provider closures forced under the regulations drastically increased the distances needed to travel to obtain an abortion.¹⁷² This information led the Court to strike down the Texas regulations¹⁷³ in an opinion filled with data that gave specific details on the burdens and, importantly, the lack of benefits for the women of Texas.¹⁷⁴

166 *Id.* at 31. “It’s the Justices’ community—it’s their colleagues and people who have argued before them and former law school classmates and co-clerks.” *Id.* (citation omitted) (quoting Ruth Marcus, *In a Supreme Court Brief, Lawyers Bravely Tell Their Own Stories*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/opinions/in-a-supreme-court-brief-lawyers-tell-their-own-abortion-stories/2016/01/26/19c410fa-c457-11e5-a4aa-f25866ba0dc6_story.html).

167 *Whole Woman's Health*, 136 S. Ct. at 2320 (Ginsburg, J., dissenting).

168 *See* Edwards, *supra* note 165, at 31–33.

169 Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J.F. 149, 154 (2016).

170 *See Whole Women's Health*, 136 S. Ct. at 2315.

171 *See id.* at 2311.

172 *See id.* at 2313.

173 *Id.* at 2318–19, 2320.

174 *Id.* at 2311–14; *see also* Greenhouse & Siegel, *supra* note 169, at 156 (“The Court’s decision is rich with factual findings of the district court and of amici that bear on the balance of benefits and burdens in the case.”).

C. *Sexual Orientation*

Likewise, the evolution of gay rights in the Supreme Court owes significant credit not simply to new constitutional interpretation but to a broader understanding of the context in which that legal analysis takes place. In *Bowers v. Hardwick*, a decision that has since been overruled on the basis that it was “not correct when it was decided,”¹⁷⁵ the Supreme Court upheld a Georgia sodomy law¹⁷⁶ because the Constitution, including the right to privacy, does not extend to “homosexual sodomy.”¹⁷⁷ The Court declared that prohibitions of this conduct have “ancient roots,” precluding status as a fundamental right.¹⁷⁸ The Court went on to uphold the law under rational basis review, despite acknowledging that it was grounded in notions of morality¹⁷⁹ rather than the need to protect public health, safety, or welfare.

But the assumptions made about the historical treatment of gays by “Western civilization,” as Justice Burger noted in his concurrence,¹⁸⁰ were later shown to be inaccurate. The briefs in *Lawrence v. Texas* were critical of the faulty logic upon which *Bowers* relied.¹⁸¹ Briefs written by professors of history, and by organizations led by the Human Rights Campaign, focused on the historical treatment of gay people to undercut the *Bowers* assumptions.¹⁸² They also used social science research to explain stigma, internalized psychological harm, and the gay community’s exposure to violence.¹⁸³ It went on to demonstrate that the gay community does not conform to stereotypes and caricatures, but in fact, is quite diverse in their demographics and lived experiences.¹⁸⁴ Meanwhile, a brief filed by Yale law professor Harold Koh provided the Court with updated legal developments in other Western countries to counter the narrative in *Bowers* that gay sexual practices garnered near-universal rejection.¹⁸⁵ The brief stated that “foreign and international courts have barred the criminalization of sodomy between

175 *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

176 *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

177 *Id.* at 190, 196.

178 *Id.* at 192.

179 *Id.* at 196.

180 *Id.* at 196–97 (Burger, J., concurring).

181 *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 567–71 (2003) (citing briefs of amici curiae the ACLU, et al.; the Cato Institute; and Professors of History et al.).

182 Greenhouse, *supra* note 127, at 8.

183 *See* Edwards, *supra* note 162 at 1346.

184 *See* Amicus Brief of Human Rights Campaign et al. in Support of Petitioners at 19, *Lawrence*, 539 U.S. 558 (No. 02-102).

185 Greenhouse, *supra* note 127, at 8.

consenting adults” in South Africa, Israel, Columbia, and the European Court of Human Rights.¹⁸⁶

These briefs demonstrate the manner in which the Court can be updated on an evolving understanding of the gay community. In the fight for gay rights, briefs have been used to demonstrate the similarities between same-sex couples and different-sex couples.¹⁸⁷ For example, studies have been used to dispel the notion that children of same-sex parents are more likely to be harmed than children of different-sex parents.¹⁸⁸ The data used in these studies is not only about who those in the gay community are as people, such as psychological or personality characteristics but also how they value intimate relationships.¹⁸⁹

Research has also been critical to illustrate more tangibly the harm that seems so evident from discriminatory treatment. Sexual minorities suffer from disparities in mental health that are no longer seen as part of their sexual identity.¹⁹⁰ Instead, it is now clear that it is, in fact, the marginalization and social stigma they endure that has perpetuated health inequities, as well as stressors that put them at increased risk for physical health disparities.¹⁹¹

Evidence of damage was then demonstrated to extend to the children of same-sex parents. Again, these children suffered harm not because they had same-sex parents but, instead, because of societal discrimination these families faced. At oral argument for *Hollingsworth v. Perry*, which concerned California’s Proposition 8 ban on same-sex marriage, it became clear that there was a need to explain the difference between these conclusions to the Court.¹⁹² During oral argument, Chief Justice Roberts believed there was an inherent tension between the claims that children of same-sex couples were no less “healthy” than children of heterosexual couples but that the children of same-sex couples were harmed by denials to marriage.¹⁹³ But a

186 *Profs. Koh and Yoshino Submit Brief to Supreme Court on Lawrence v. Texas*, YALE L. SCH. (Jan. 22, 2003), <https://law.yale.edu/yls-today/news/profs-koh-and-yoshino-submit-brief-supreme-court-lawrence-v-texas>.

187 See Russell K. Robinson & David M. Frost, “Playing It Safe” With Empirical Evidence: *Selective Use of Social Science in Supreme Court Cases About Racial Justice and Marriage Equality*, 112 Nw. U. L. REV. 1565, 1576–77, 1583–84 (2018).

188 *Id.* at 1576–79.

189 *Id.* at 1578.

190 *See id.* at 1579.

191 *Id.*

192 See Transcript of Oral Argument at 61–62, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144); see also Robinson & Frost, *supra* note 187, at 1576 (discussing oral argument in *Hollingsworth*).

193 See Transcript of Oral Argument at 61–62, *Hollingsworth*, 570 U.S. 693 (No. 12-144). During oral arguments, Chief Justice Roberts made it clear he believed there to be an inconsistency: “[I]t seems to me that your position that you are supporting is somewhat

brief for the case helped by successfully highlighting the voices of children while integrating legal theory and social science data to demonstrate that these two stances are not mutually exclusive.¹⁹⁴

The evidence of damage was not featured as significantly or explicitly in major gay rights opinions as compared to evidence of sameness, but it seems likely that both were influential in the Court's evolution. *Obergefell v. Hodges*—the case recognizing the right to same-sex marriage—was primarily focused on the fact that heterosexual and same-sex couples find marriage essential for similar reasons and, therefore, marriage of same-sex couples deserves equal protection.¹⁹⁵ But there are references to the harm of exclusion as well. For the children of same-sex couples “suffer the stigma of knowing their families are somehow lesser . . . [and] [t]he marriage laws at issue here thus harm and humiliate the children of same-sex couples.”¹⁹⁶ For the adults denied the privilege of marriage, Justice Kennedy held that the law “demeans” them and “disrespect[s] and subordinate[s] them.”¹⁹⁷

The fight for marriage equality was an important step, but certainly not the end of the search for equality. In this regard, many civil rights battles share a common thread. They demonstrate both the promise of educating the judiciary through social science and the limitations. Far too often, the narrow legal arguments provide narrow understandings of the underrepresented.¹⁹⁸ The right to a marriage license does not eliminate the number of other barriers that sexual minorities continue to face. Likewise, increased access to Michigan Law School does not address the vast number of structural barriers people of color face starting in the womb.

But these cases provide an opportunity for change. And these areas of law exhibit the manner in which the Court can be informed and influenced in a way that enhances the Justices' thought process. In writing for the *Obergefell* majority, Justice Kennedy explicitly referenced the evolving understanding of the gay community: “the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread

internally inconsistent. We see the argument made that there is no problem with extending marriage to same-sex couples because children raised by same-sex couples are doing just fine and there is no evidence that they are being harmed. And the other argument is Proposition 8 harms children by not allowing same-sex couples to marriage [sic]. Which is it?” *Id.*

194 Edwards, *supra* note 162, at 1347.

195 *Obergefell v. Hodges*, 576 U.S. 644, 665–66 (2015).

196 *Id.* at 668.

197 *Id.* at 672–676.

198 See also, e.g., Robinson & Frost, *supra* note 187, at 1581 (“Judges should make decisions with a full understanding of LGBT people’s lives, not just the slivers that lawyers sometimes choose to serve up to them.”).

social conventions.”¹⁹⁹ Gone is the time when Justice Powell, in deciding to cast the decisive vote in *Bowers v. Hardwick*, would tell his fellow justices that he had never met a homosexual despite the fact that one of his clerks that term was gay.²⁰⁰ Now, due in part to briefs that included substantial and significant research, the Justices have a “sense that the culture ha[s] changed, not only outside the Court, but within it.”²⁰¹

These examples demonstrate how litigation can open the door for an opportunity to expand the judiciary’s view of what matters in a constitutional analysis. These cases are important given the precedential value appellate decisions can have, binding not only lower court judges but policymakers as well. In the Second Amendment arena, where the Supreme Court has made so few declarations, the Court must support future decisions with a proper framing on the impact those decisions can and will have on a country struggling to grapple with the growth of gun violence. Thus, gun reform stakeholders should view future cases as a chance to explain how the law can be a powerful tool in tackling gun violence.

199 *Obergefell*, 576 U.S. at 660–61.

200 Adam Liptak, *Exhibit A for a Major Shift: Justices’ Gay Clerks*, N.Y. TIMES (June 8, 2013), <https://www.nytimes.com/2013/06/09/us/exhibit-a-for-a-major-shift-justices-gay-clerks.html?smid=pl-share>.

201 Greenhouse, *supra* note 127, at 8.

III. CONSTITUTIONAL LITIGATION AS A PATH FOR EDUCATION

Given the evidence above that outside information can inform and influence the judiciary, the public health community, public health research, and public health law have essential roles to play in framing the future of firearm regulations and Second Amendment jurisprudence. If the analysis centers primarily around a search for historical analogues, the future of gun violence will be dictated by what people centuries ago thought was a proper method to reduce the harm of muskets. This would be inadequate. Thankfully, constitutional litigation provides an opportunity to engage the judiciary in the growing body of research assessing the connection between the law and gun violence and the consensus that gun violence is one of this country's most pressing public health issues. Moreover, public health law demonstrates that the scope of the Second Amendment right is not the end of a constitutional inquiry. As with all rights, the Constitution does not provide absolute protection, and, in certain circumstances, the good of the people can limit even the most protected fundamental rights.

A. *The Role of Public Health*

The role of public health research is vital for Second Amendment cases because evidence suggests that justices are more likely to reference scientific information in more prominent cases.²⁰² And any Second Amendment case would certainly qualify as prominent. Meanwhile, the majority of Supreme Court clerks have stated that briefs with “social science content merited special consideration.”²⁰³ Thus, constitutional litigation is a chance for public health research to highlight data that may not be at the forefront of the judiciary's analysis when determining the scope of Second Amendment protections. Indeed, this expert perspective is essential given that research reveals that a brief from “a credible public interest or research organization is much better positioned to provide social science findings than a typical litigant.”²⁰⁴

Public health experts are in a unique position to fulfill this role. In doing so, they can refocus the analysis on the state's ability to limit risk to the public. Risk is not simply the probability of harm occurring, but the magnitude of that harm as well. And while the *Heller* Court emphasizes the

202 Blake, *supra* note 11.

203 Kathleen E. Hull, *The Role of Social Science Expertise in Same-Sex Marriage Litigation*, 13 ANN. REV. L. & SOC. SCI. 471, 473 (2017).

204 Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 67 (2004).

rights of “law-abiding citizens,” a population perspective illuminates the fact that lax gun laws increase the risk of harm, and it does so to more than just the individual gun owner.²⁰⁵

To be sure, a state cannot necessarily predict when gun violence will occur or from whom. But they do know that it will occur. And the more guns that are prevalent in a community, the more likely that harm will occur. This population-level perspective is necessary to counter the more prevalent individual-level argument where a challenger is almost certain to argue that they have not and will not misuse their firearm. But as any public health professional knows, nobody expects the harm to happen to them until it does. And while opponents of gun regulations may make that claim in earnest, we know from data that arguments become escalated, emotional outbursts occur, and dark moments of sadness or isolation can turn deadly if guns are present.

The public health community has a role to play in conveying this key information to the judiciary and to do so in an understandable manner. In one of the few studies on the influence of *amici curiae* in federal courts, the data found that a majority of federal judges, including all Supreme Court justices who responded to the survey, indicated that the identity, prestige, or experience of the *amicus curiae* was influential.²⁰⁶ Public health experts lend credibility to the research, as well as an ability to discuss what the research does *not* say as much as what it does. Public health research is not about causation, but more often correlation. Consequently, the research is not meant to be dispositive of any legal query. Rather, it is informative of the manner in which the law may have a reasonable chance to mitigate or exacerbate gun mortality and morbidity.

This includes the fact that gun violence accounts for nearly 40,000 deaths annually.²⁰⁷ Estimates suggest another 100,000 or more individuals sustain nonfatal injuries by firearms each year.²⁰⁸ With a majority of these injuries sustained by people between fifteen and thirty-four years of age, the

205 *Heller II*, 670 F.3d at 1284.

206 Simard, *supra* note 12; see also Nathalie Gilfoyle & Joel A. Dvoskin, *APA's Amicus Curiae Program: Bringing Psychological Research to Judicial Decisions*, 72 AM. PSYCHOLOGIST 753, 753 (2017) (“Justice Harry Blackmun specifically noted in an opinion that the American Psychological Association’s (APA) *amicus* briefs informed and helped the Court in arriving at its decisions.”).

207 *Web-Based Injury Statistics Query and Reporting System (WISQARS)*, *supra*, note 1. This was the highest recorded account of gun deaths since the CDC began tracking the data over fifty years ago. Sarah Mervosh, *Nearly 40,000 People Died From Guns in U.S. Last Year, Highest in 50 Years*, N.Y. TIMES, Dec. 18, 2018, at A19.

208 *Facts and Figures*, U.C. DAVIS HEALTH, *supra*, note 3 (describing death statistics associated with gun violence).

chronic complications from these wounds will impact their remaining years.²⁰⁹ Emerging evidence shows that this chronic suffering can include previously unknown harms, such as “neurological problems, kidney dysfunction, and reproductive” complications stemming from lead poisoning from bullets designed to explode inside the body and that are unable to be safely removed during surgery.²¹⁰

And yet these physical harms do not fully encompass the harms being sustained. Those directly exposed to shootings who sustain no physical injury suffer from issues such as trauma, post-traumatic stress, anxiety, and depression.²¹¹ Survivor’s guilt can be particularly harmful because it can prevent survivors from seeking help.²¹² And with the increased gun violence across the country and the corresponding media coverage—especially for mass shootings—many are suffering from psychological effects even without direct exposure to shootings.²¹³ This includes a growing number of students who report regular concerns that they may become victims of a shooting in their school or community.²¹⁴

This data provides a broader, and certainly more accurate, depiction of what gun violence truly is and the impact it is having across the country. A mere nod to the state’s interest to protect public safety hardly provides the appropriate balance when considering the state’s justification for firearm regulations. The culture in which the courts make these Second Amendment decisions is relevant: “[T]o the extent that a court views the substance of constitutional law as, in part, dependent upon the outlook of nonjudicial actors, it will exercise what Felix Frankfurter once called the ‘awesome

209 *A More Complete Picture*, *supra*, note 3; see also Bindu Kalesan et al., *The Hidden Epidemic of Firearm Injury: Increasing Firearm Injury Rates During 2001–2013*, 185 AM. J. EPIDEMIOLOGY 546, 546 (2017).

210 Melissa Chan, *They Survived Mass Shootings. Years Later, the Bullets Are Still Trying to Kill Them*, TIME (May 31, 2019), <https://time.com/longform/gun-violence-survivors-lead-poisoning/>. These complications can include neurological problems, kidney dysfunction, and reproductive issues. *Id.*

211 See Sarah McCammom, *The Uninjured Victims of the Virginia Tech Shootings*, NPR (Apr. 14, 2017), <https://www.npr.org/transcripts/523042249>.

212 Patricia Mazzei & Miriam Jordan, *“You Can’t Put It Behind You”: School Shootings Leave Long Trail of Trauma*, N.Y. TIMES (Mar. 28, 2019), <https://nyti.ms/2UYsb3C>.

213 Sarah R. Lowe & Sandro Galea, *The Mental Health Consequences of Mass Shootings*, 18 TRAUMA, VIOLENCE, & ABUSE 62, 62-63 (2017).

214 PROTECTING THE NEXT GENERATION: STRATEGIES TO KEEP AMERICA’S KIDS SAFE FROM GUN VIOLENCE, GIFFORDS L. CTR. 12 (2018), <https://giffords.org/wp-content/uploads/2019/12/Giffords-Law-Center-Protecting-the-Next-Generation.pdf>; see also Liam Stack, *‘I Think About It Daily’: Life in a Time of Mass Shootings*, N.Y. TIMES (Dec. 3, 2015), <https://www.nytimes.com/interactive/2015/12/03/us/mass-shootings-fear-voices.html> (describing testimony from a fifteen-year-old: “I would say I think about the possibility of a shooting in my life regularly.”).

power' of judicial review with some attention to the understandings of those actors."²¹⁵

The public health community is equipped with the skillset to properly educate and frame the gun violence epidemic in a manner that is salient to constitutional decisions. Moreover, as experts, they can describe the research in a way that is approachable for the lay reader. This can help to avoid mistaken understandings of the data. The information will contextualize the case not only for the narrow interests of the challenger but also in terms of how the ruling may exacerbate or mitigate gun violence and, given the rash of media attention on mass shootings, influence the country's psyche as well.

As the great Supreme Court journalist Linda Greenhouse notes: "[N]o great Supreme Court case is only a question of law. It is always also an episode in the ongoing dialogue by which the Court engages with the society in which it operates and in which the Justices live."²¹⁶ In the time of Dayton, El Paso, Orlando, Virginia Tech, and Parkland, among many others, the notion that public health research has anything to teach the Court about gun violence may seem implausible. But a glance at remarks made by justices about Second Amendment rights and gun violence suggests the need for influence from the public health community is urgent.

Six days after the Parkland shooting, Justice Thomas issued a dissent from a denial of certiorari for a case upholding California's ten-day waiting period where he declared the Second Amendment the Court's "constitutional orphan."²¹⁷ Seeking to stifle what he deemed to be lower courts' "defiance," Justice Thomas made it clear that he intends to limit the judiciary's ability to uphold even regulations that do little more than make an individual wait ten days for their firearm.²¹⁸ Such an approach may amount to deregulation of firearms across the country and the weaponization of the Second Amendment against future gun control measures. As the deaths from firearms continue to climb, this is certainly a public health problem that warrants perspectives from experts in population-based analysis.

B. *The Role of Public Health Law*

Providing current public health data on gun violence is not simply to help the judiciary appreciate the cultural evolution of society's relationship with guns. The data must be accompanied by an explanation for why this

215 Post, *supra* note 147, at 7.

216 Greenhouse, *supra* note 127, at 2, 7.

217 *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from the Court's denial of certiorari).

218 *See id.* at 951.

data is necessary for a thorough constitutional analysis. The focus on the scope of Second Amendment protections has the potential to cast a shadow over the state's compelling interest in protecting public health and safety. But public health law experts can more accurately demonstrate that even fundamental rights can be limited in the name of public health and safety.²¹⁹ The question is whether there is sufficient justification to limit those rights, the degree to which those rights are limited, and whether the benefits to the public are sufficient in relation to those limitations.²²⁰ A proper analysis of these considerations almost invariably requires more than a simple categorical approach. Rather, it requires evaluating data if it is available.

Public health law is a constantly developing field that reflects the changes in our understanding of public health outcomes and the mechanisms that influence them. Gun violence was hardly seen as a public health issue decades ago. Viewed more as random, tragic events that resulted from criminal activity and unforeseeable accidents, it was difficult to argue that gun violence was a public health problem that warranted public health solutions. But now, thanks to social science research, we understand that gun violence is not always sporadic and random and, instead, can be amenable to proactive government solutions.²²¹ This relatively new understanding is what raises the question of when the government may limit Second Amendment rights to protect public health and safety.

Take, for example, carrying firearms in public. When analyzing the constitutionality of restrictions on carrying firearms in public, courts should consider what lessons public health research has to offer. Shall-issue concealed carry permit laws are significantly more lenient than may-issue carry permit laws because they remove the discretion of the licensing body to deny a license to a small portion of individuals meeting narrow qualifying criteria. Shall-issue laws have been associated with higher rates of firearm-related homicide—and, importantly, handgun-specific homicide in particular—as compared to those states that have the stricter may-issue regulations.²²² While these correlation studies do not demonstrate causation,

219 See *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 27–28 (1905).

220 Ulrich, *supra* note 4, at 1077–78.

221 See, e.g., Andrew V. Papachristos et al., *Tragic, but Not Random: The Social Contagion of Nonfatal Gunshot Injuries*, 125 SOC. SCI. & MED. 139, 148 (2015); Ben Green, et al., *Modeling Contagion Through Social Networks to Explain and Predict Gunshot Violence in Chicago, 2006 to 2014*, 177 JAMA INTERNAL MED. 326, 331–32 (2017).

222 Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923, 1928 (2017) [hereinafter *Legal Access*]; see also Michael Siegal et al., *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991-2016: A Panel Study*, 34 J. GEN. INTERN. MED. 2021, 2021 (2019), (finding that shall-issue laws are associated with a significant increase in the homicide

the researchers found no increase in long-gun homicide rates, which lends credence to the connection between the concealed carry laws and handgun violence.²²³

The data also pushes back on the increasingly suspect claim that more guns equate to less crime.²²⁴ If more guns result in less crime, “one would expect to see lower handgun, nonhandgun, and nonfirearm homicide rates in shall-issue states when compared with may-issue states.”²²⁵ Yet this simply was not what researchers found. The deterrent effect lacks empirically supported credibility, as the older, minimal research supporting the claim has been consistently contradicted with new research demonstrating the opposite. These facts should be relevant to any legal analysis of restrictions to carry firearms in public, but some courts are more apt to evaluate laws from the 1700s than they are the most up-to-date research.

While originalism may have strong support within the judiciary, the notion that states are limited in their efforts to combat the emerging gun violence epidemic by founding era analogues misunderstands the nature of police powers.²²⁶ Police powers authorize the state to act to protect public health, safety, and welfare.²²⁷ As threats to public health evolve and emerge, so too must the state’s ability to respond, both proactively and reactively, to those threats.²²⁸ Just as the public would question the legitimacy of the government if they failed to act during a contagious disease epidemic, so too are many looking to their elected leaders for answers to the growing threat of gun violence. The toolkit of policymakers cannot be limited to an excavation of historical records to see how our founding fathers may have responded, but instead must be grounded in empirical facts to support narrowly tailored yet effective interventions.

The nascent Second Amendment jurisprudence is like a nearly blank canvas with which the legal community can work. This raises the stakes further for the need to ensure data-driven decisions that appropriately factor in what public health research can teach us. But it is important to note that this does not necessarily always mean the data will push in the direction of restricting rights. As mentioned above, the Second Amendment rights

rate) [hereinafter *State Firearm Laws*].

223 *Legal Access*, *supra* note 222, at 1928.

224 See Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1285–86 (2003); Ian Ayres & John J. Donohue III, *Commentary, More Guns, Less Crime Fails Again: The Latest Evidence from 1977–2006*, 6 ECON. WATCH J. 218 (2009).

225 *Legal Access*, *supra* note 222, at 1928.

226 See Ulrich, *supra* note 63, at 194–98.

227 *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

228 Ulrich, *supra* note 63, at 198.

of felons and those deemed mentally ill are too easily extinguished even by those who generally support individual rights.

In *Moore v. Madigan*,²²⁹ a case focused on carrying firearms in public, Judge Posner felt compelled to discuss his lack of concern with not simply limiting, but completely eliminating, the fundamental constitutional rights of marginalized groups. In fact, he specifically states that data to support this claim is unnecessary: “And empirical evidence of a public safety concern can be dispensed with altogether when the ban is limited to obviously dangerous persons such as felons and the mentally ill.”²³⁰ This is contradictory to empirical evidence suggesting the mentally ill are no more violent than other citizens.²³¹ But as previously noted, people with mental illnesses are more likely to be victims of violence than perpetrators, which one would think makes for a strong argument to protect their constitutional right to self-defense. Therefore, an emphasis on the relevance of empirical data does not invariably lead to a restriction of rights and, in some cases, can expand Second Amendment protections.

229 *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

230 *Id.*

231 Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 241–42 (2015).

CONCLUSION

This article is not meant to suggest that empirical evidence is the answer to any and all constitutional questions. There may be many circumstances where research is unavailable or data supports both sides of an argument. Data can be manipulated, selectively used, and misleading to an audience. In fact, there is strong evidence that social science is most often used in a manner to protect the status quo.²³² But the fact that data is not controlling does not mean it cannot and should not be persuasive in certain circumstances. And data misuse only strengthens the argument that public health experts should be more heavily involved in the interpretation and presentation of emerging empirics on gun violence.

The judiciary's role in determining Second Amendment rights cannot, and should not, be isolated from the gun violence controversy playing out in public and political fora. The judiciary is inherently entangled in the "culture wars" that divide this country.²³³ But to recognize their role in this debate does not mean their decisions must be politically based. The judiciary can lead, and often has led, the country through contentious battles, often by relying on an evolving understanding informed through social science. Data has by no means helped the judiciary solve all the problems faced by underrepresented groups such as people of color, women, and sexual minorities. But outside education of the judiciary has helped courts better understand these groups and the impact judicial decisions have on their lives and wellbeing. In that regard, improvement became possible.

Gun violence is a growing plague in this country and one that the Supreme Court, along with the rest of the judiciary, will play a central role in addressing. Though the most recent Supreme Court case was essentially dismissed, another will soon be on the docket with all eyes watching closely. A more informed Court will provide a more thorough analysis. And an evidence-based decision, whatever the result, will be more palatable and hopefully lead the country in recognizing that protection of constitutional rights and the public are not mutually exclusive ends that we are forced to choose between.

232 See, e.g., Robinson & Frost, *supra* note 187, at 1576–77, 1583–84.

233 Post, *supra* note 147, at 10.

