

“Second-Class” Rhetoric, Ideology, and Doctrinal Change

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A common refrain in current constitutional discourse is that lawmakers and judges are systematically disfavoring certain rights. This allegation has been made about the rights to free speech and free exercise of religion, but it is most prominent in debates about the right to keep and bear arms. Such “second-class” treatment, the argument goes, signals that the Supreme Court must intervene aggressively to police the disrespected rights. Past empirical work casts doubt on the descriptive claim that judges and policymakers are disrespecting the Second Amendment, but that simply highlights how little we know about how the second-class argument functions as a matter of rhetoric. What do people mean when they allege that a constitutional right is subject to second-class treatment? What are the relevant audiences for these arguments? And how does such rhetoric travel throughout the legal system—from briefs, for example, into court opinions?

*In this Article, we use Second Amendment litigation to illuminate the complex interplay between attorneys and judges invoking the second-class claim. After situating the second-class argument within the literature on law and rhetoric, we empirically investigate its development by isolating each use of second-class rhetoric in briefs and opinions in the decade following *District of Columbia v. Heller*. We show that the second-class argument is, indeed, increasingly prevalent in litigation as a justification for enhanced judicial protection of the Second Amendment. We also find support for the proposition that advocates use the second-class claim differently depending on the court they are in. Finally, we show how the second-class claim is ideological, appealing to a small but growing number of Republican-nominated judges. Our analysis provides a clearer picture of an increasingly common argument that has the potential to shape individual rights jurisprudence for years to come. And by illustrating a more nuanced picture of how a consequential legal argument operates on a rhetorical level, we hope to advance our understanding of how constitutional change happens.*

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INTRODUCTION

In a remarkable address to the Federalist Society’s National Lawyers Convention in November 2020, Justice Samuel Alito inveighed against what he saw as persecution of cultural conservatives by universities, big corporations, the media, and other forces.¹ He claimed, for example, that “many” do not see religious liberty as “a cherished freedom,” but merely as “an excuse for bigotry.”² And he suggested that freedom of speech and the right to keep and bear arms are subjected to similar attacks and disrespect.³

One implication of Alito’s comments was that the Supreme Court must stand firm against such threats and vindicate these rights by crafting doctrines to provide the protection that other institutions—including even other courts—have

1. Aaron Blake, *Samuel Alito’s Provocative, Unusually Political Speech*, WASH. POST (Nov. 13, 2020), <https://www.washingtonpost.com/politics/2020/11/13/samuel-alitos-provocative-unusually-political-speech/>; *see also Alito Speaks at Federalist Society National Convention*, SCOTUSBLOG, <https://www.scotusblog.com/media/alito-speaks-at-federalist-society-national-convention/> [https://perma.cc/7V7K-49SU] (last visited Dec. 18, 2021) (reproducing remarks in full).

2. Blake, *supra* note 1.

3. *See id.*

not.⁴ If a majority of Justices agree that lower courts and legislators are systematically disregarding a protected right, the Court will be more likely to replace the current doctrinal framework with an especially protective set of rules or standards. Indeed, arguments about disrespect seem to have found purchase recently in cases involving affronts to the “equal sovereignty” of the states⁵ and business owners who assert religious exemptions from antidiscrimination laws.⁶

But nowhere is second-class rhetoric more prominent, nor more poised to reshape constitutional doctrine, than in the context of the Second Amendment—which Alito said is, “[o]f course, the ultimate second-tier constitutional right in the minds of some.”⁷ The claim that policymakers, litigants, and courts are disrespecting the right to keep and bear arms is common in litigation,⁸ scholarship,⁹

4. In that respect, it is worth noting that religious conservatives won all three of their cases during the 2019–2020 Term. See *Symposium on the Roberts Court and the Religion Clauses*, SCOTUSBLOG, <https://www.scotusblog.com/category/special-features/symposium-on-the-roberts-court-and-the-religion-clauses/> [https://perma.cc/YVR8-5WM2] (last visited Sept. 19, 2021) (discussing *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020); and *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020)). This trend continued through the 2020–2021 Term. See Linda Greenhouse, Opinion, *What the Supreme Court Did for Religion*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-religion.html> (discussing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021)); Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html> (discussing a “35-percentage-point increase in the rate of rulings in favor of religion”).

5. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013) (emphasis omitted) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)); see also Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 177 (2013), <http://yalelawjournal.org/forum/the-dignity-of-the-south> [https://perma.cc/EWB7-558Q] (discussing the “fundamental principle of equal sovereignty” invoked by the Court in *Shelby County*).

6. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729 (2018) (“The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”).

7. The Federalist Society, *Address by Justice Samuel Alito [2020 National Lawyers Convention]*, YOUTUBE, at 26:59–27:03 (Nov. 25, 2020), <https://www.youtube.com/watch?v=VMnukCVIZWQ>.

8. See, e.g., Petition for Writ of Certiorari at 22, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2018 WL 4275878, at *22 (“[G]overnments [are] disregarding Second Amendment rights and courts [are] endorsing such efforts while purporting to apply heightened scrutiny”); see also Brief of Amici Curiae Professors of Second Amendment Law et al. in Support of Petitioners at 15, *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. 1525 (No. 18-280), 2019 WL 2173978, at *15 (“Like other circuits, the Second Circuit has invented a unique and feeble version of intermediate scrutiny for the Second Amendment.”); Brief of Amicus Curiae National Rifle Ass’n of America, Inc. in Support of Petitioners at 4, *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. 1525 (No. 18-280), 2019 WL 2173975, at *4 (“If the Court declines to invalidate Respondents’ prohibition categorically, it should strike it down under strict scrutiny. Because the Second Amendment is a fundamental, enumerated right, any lesser form of scrutiny would demote it to second-class status”).

9. See, e.g., Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J.L. & PUB. POL’Y 17, 33 (2016) (alleging “[u]nderenforcement of the Second Amendment as a constitutional norm”); Marc A. Greendorfer, *After Obergefell: Dignity for the Second Amendment*, 35 MISS. COLL. L. REV. 128, 128 n.* (2016) (“It is the author’s hope that this article will be used to effect what Justice Scalia called for in *Friedman*: ending the second class treatment of the rights protected by the Second Amendment and restoring them to the sacrosanct status of all other fundamental rights.”); Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle*

and public commentary.¹⁰ In 2018, when a gun rights organization asked the Supreme Court to strike down a New York City handgun regulation, it emphasized the claim that the Second Amendment is being treated as a “second-class right.”¹¹ In December 2019, that case, *New York State Rifle & Pistol Ass’n v. City of New York (NYSRPA I)*,¹² became the first Second Amendment dispute argued before the Court in almost a decade.¹³ It was ultimately dismissed as moot,¹⁴ but not before prompting four Justices (including Alito) to voice “concern that some federal and state courts may not be properly applying” Second Amendment doctrine.¹⁵ Soon thereafter, the Court denied ten pending cert petitions, prompting two Justices to bemoan the Court’s willingness to tolerate “blatant defiance” of its Second Amendment precedent.¹⁶ A few months later, the Senate confirmed then-Judge Amy Coney Barrett, who had invoked the second-class argument in a prominent Second Amendment opinion written while she sat on the Seventh Circuit.¹⁷ And now another Second Amendment case is pending before the Court,

over the Legitimacy of the Individual Right to Arms, 70 HASTINGS L.J. 717, 720 & n.15 (2019) (noting increased accusations among scholars that the “Second Amendment is evolving into a ‘disfavored right’”); Joyce Lee Malcolm, *Defying the Supreme Court: Federal Courts and the Nullification of the Second Amendment*, 13 CHARLESTON L. REV. 295, 304 (2018) (asserting that “states and local authorities ride roughshod over Second Amendment rights” and that judges “display this increasingly dismissive approach”); Christopher M. Johnson, Note, *Second-Class: Heller, Age, and the Prodigal Amendment*, 117 COLUM. L. REV. 1585, 1612 (2017) (“Ultimately, the Second Amendment is not, as members of the Supreme Court have observed, ‘a second-class right,’ and the current restrictions on handgun purchases by law-abiding 18-to-20-year-old adults raise serious concerns regarding its infringement.” (footnote omitted)).

10. See, e.g., Josh Blackman, *Justice Thomas: Second Amendment Is Not a ‘Second-Class Right,’* NAT’L REV. (Dec. 8, 2015, 9:00 AM), <http://www.nationalreview.com/article/428173/justice-thomas-second-amendment-not-second-class-right-josh-blackman> [<https://perma.cc/LGC3-N8LT>]; David Kopel, Opinion, *The 2nd Circuit’s Second-Class Second Amendment Intermediate Scrutiny*, WASH. POST: VOLOKH CONSPIRACY (Oct. 23, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/23/the-2nd-circuits-second-class-second-amendment-intermediate-scrutiny/>; Opinion, *Waiting for Justice Gorsuch*, WALL ST. J. (Feb. 23, 2017, 7:17 PM), <https://www.wsj.com/articles/waiting-for-justice-gorsuch-1487893991> (postulating a “lower-court assault on gun rights”).

11. Petition for Writ of Certiorari, *supra* note 8, at 17, 21.

12. 140 S. Ct. 1525.

13. Along with Darrell A.H. Miller of Duke Law School, we filed an amicus brief in *NYSRPA I* in support of neither side, defending the current two-part framework against doctrinal alternatives such as universal strict scrutiny or a test of “text, history, and tradition.” Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party at 4–5, 18, *N.Y. Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (No. 18-280), 2019 WL 2173981, at *4–5, *18.

14. *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. at 1526.

15. *Id.* at 1527 (Kavanaugh, J., concurring) (noting that he shared that concern with Justice Alito, whose opinion was in turn joined by Justices Thomas and Gorsuch). Justice Alito, for his part, wrote “[w]e are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern.” *Id.* at 1544 (Alito, J., dissenting).

16. *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., dissenting from denial of certiorari) (arguing against the denial of certiorari, in an opinion joined by Justice Kavanaugh).

17. *Kanter v. Barr*, 919 F.3d 437, 469 (7th Cir. 2019) (Barrett, J., dissenting) (“On this record, holding that the [felon-in-possession] ban is constitutional as applied to Kanter . . . treats the Second Amendment as a ‘second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees’” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion))).

New York State Rifle & Pistol Ass’n v. Bruen,¹⁸ where the second-class claim again features prominently in the briefing in support of petitioners.¹⁹

18. See *N.Y. State Rifle & Pistol Ass’n v. Corlett*, 141 S. Ct. 2566, 2566 (mem), *cert. granted sub nom. N.Y. State Rifle & Pistol Ass’n v. Bruen*, No. 20-834 (U.S. argued Nov. 3, 2021) (granting certiorari on the question “[w]hether the State’s denial of petitioners’ applications for concealed-carry licenses for self-defense violated the Second Amendment”).

19. See, e.g., Brief of Amici Curiae Firearms Policy Coalition and Firearms Policy Foundation in Support of Petitioners at 3, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, No. 20-843 (U.S. Jan. 21, 2021) (“Until this Court reinforces its precedents, lower courts will continue to treat the right to bear arms as a second-class right.”); Brief of Amicus Curiae the Claremont Institute’s Center for Constitutional Jurisprudence in Support of Petitioners at 7, *Bruen*, No. 20-843 (U.S. July 14, 2021) (“This is consistent with the resistance to this Court’s decisions in *Heller* and *McDonald* that seems to underlie several decisions of the various Courts of Appeals.”); Brief of Amici Curiae Bay Colony Weapons Collectors, Inc. in Support of Petitioners at 4, *Bruen*, No. 20-843 (U.S. July 14, 2021) (“The right to ‘bear arms’ should not be treated as a second-class right.”); Brief of Association of New Jersey Rifle & Pistol Clubs, Inc. as Amicus Curiae in Support of Petitioners at 17, *Bruen*, No. 20-843 (U.S. July 15, 2021) (“Of all the courts to have relegated the Second Amendment to a second-class right, however, few have done it as thoroughly as the United States Court of Appeals for the Third Circuit.”); Brief of Amicus Curiae the Buckeye Institute in Support of Petitioners at 17–18, *Bruen*, No. 20-843 (U.S. July 19, 2021) (“The Second Circuit’s watered-down standard does not require New York’s law to be narrowly tailored, despite this Court’s clear instruction for decades.”); Brief Amicus Curiae of American Constitutional Rights Union in Support of Petitioners at 4, *Bruen*, No. 20-843 (U.S. July 20, 2021) (“Any less rigor would make the Second Amendment . . . ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,’ a step this Court declined to take in *McDonald*.” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion))); Brief of the National Shooting Sports Foundation Inc. as Amicus Curiae in Support of the Petitioners at 5, *Bruen*, No. 20-843 (U.S. July 20, 2021) (“The right to carry arms in public is as fundamental today as it was when the Second Amendment was ratified, and it should not be relegated to second-class constitutional citizenship with an ‘intermediate scrutiny’ standard of review.”); Brief for Amici Curiae California Rifle & Pistol Ass’n, Inc. & Second Amendment Law Center, Inc. in Support of Petitioners at 31, *Bruen*, No. 20-843 (U.S. July 20, 2021) (“For these reasons, the Court should not only reverse the Second Circuit’s decision but should do so by setting forth standards that make clear beyond cavil that the Second Amendment is not to be treated as a ‘second-class’ constitutional guarantee.” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion))); Brief Amicus Curiae of Gun Owners of America, Inc. et al. in Support of Petitioners at 10, *Bruen*, No. 20-843 (U.S. July 20, 2021) (“To the court below, the Second Amendment not only is, but should be, a ‘constitutional orphan.’” (quoting *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari))); Brief of Amici Curiae Center for Defense of Free Enterprise et al. in Support of Petitioners at 10, *Bruen*, No. 20-843 (U.S. July 20, 2021) (“Despite this Court’s clear teaching, in both *Heller* and *McDonald*, that the Second Amendment cannot be treated as a guarantee of second-class rights, the lower courts have in fact done just that.”); Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 3, *Bruen*, No. 20-843 (U.S. July 20, 2021) (“It’s no secret that many federal courts have engaged in systematic resistance to *Heller* and *McDonald*.”); Brief of United States Senator Ted Cruz and 24 Other U.S. Senators as Amici Curiae Supporting Petitioners at 11, *Bruen*, No. 20-843 (U.S. July 20, 2021) (“What matters is that the Framers’ balancing was incorporated into the Constitution and may only be reweighed by *amending* the Constitution—not by legislative resistance or judicial fiat.”); Brief of Amici Curiae National Foundation for Gun Rights & National Ass’n for Gun Rights in Support of Petitioners at 21, *Bruen*, No. 20-843 (U.S. July 20, 2021) (“This Court should put to rest states’ and lower courts’ treating the right to keep and bear arms, as protected by the Second Amendment, as a second-class right.”); Brief for Amicus Curiae NRA Civil Rights Defense Fund in Support of Petitioners at 2, *Bruen*, No. 20-843 (U.S. July 20, 2021) (“Just like every other Bill of Rights guarantee, the Second Amendment secures a fundamental right, not ‘a second-class right, subject to an entirely different body of rules.’” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion))).

The dominance of competing cultural visions in the gun debate makes rhetorical appeals especially common in discussions about the right to keep and bear arms.²⁰ Consider the radically different narratives that have already begun to emerge about the role of guns in the turbulent summer of 2020. Some, focusing on Black Lives Matter protests and alleged law enforcement abdication, celebrate the importance of guns “in a time of lawless violence,”²¹ picking up the themes of persecution that have emerged in cases challenging COVID-19 restrictions.²² Others, however, focus on a different set of paradigm scenes—such as armed right-wing “militias” storming legislatures and other public places—where gun carriers effectively privilege their gun rights over others’ freedoms to speak, worship, or peaceably assemble.²³ From either perspective, a crucial question is whether and which rights are being treated as second-class.

This public and scholarly debate is reflected in an ample set of briefs and opinions. And because Second Amendment doctrine is relatively undeveloped—*District of Columbia v. Heller*,²⁴ after all, was decided little more than a decade ago—the argument stands to make a significant legal impact. If judges embrace the second-class claim and agree with gun rights advocates about the need for

20. See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1318 (2003) (“The only philosophically cogent way to resolve the gun control controversy is to address explicitly, through democratic deliberations, the question of what stance the law should take toward the competing cultural visions that animate the gun control debate.”); see also Philip J. Cook & Jens Ludwig, Commentary, *Fact-Free Gun Policy?*, 151 U. PA. L. REV. 1329, 1329 (2003) (arguing that the debate can and should involve both empirics and competing cultural visions). An increasingly rich sociological literature has provided a deeper view of the cultural stakes. See generally JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE (2015) (describing how many gun carriers have come to regard concealed carry as a civic virtue); David Yamane, *The Sociology of U.S. Gun Culture*, SOCIO. COMPASS (June 16, 2017), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/soc4.12497> [<https://perma.cc/73PQ-7M4G>].

21. Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. U. L. REV. 81, 81 (2021) (capitalization omitted); see, e.g., David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J.L. & PUB. POL’Y 177, 177 (2021); Glenn Harlan Reynolds, Opinion, *Riots of 2020 Have Given the Second Amendment a Boost*, USA TODAY (Oct. 8, 2020, 4:00 AM), <https://www.usatoday.com/story/opinion/2020/10/08/riots-2020-have-given-boost-second-amendment-column/5901798002/>; see also *Law Professors Make Case for Second Amendment Rights in Uncertain Times*, NRA-ILA (Oct. 19, 2020), <https://www.nraila.org/articles/20201019/law-professors-make-case-for-second-amendment-rights-in-uncertain-times> [<https://perma.cc/M7XZ-4JKR>] (highlighting several draft articles arguing for broader gun rights in light of the 2020 tumult).

22. See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 72 (2020) (Gorsuch, J., concurring) (“It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.”).

23. See, e.g., Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139, 139 (2021); Eric Ruben, *Protests, Insurrection, and the Second Amendment*, BRENNAN CTR. FOR JUST. (June 29, 2021), <https://www.brennancenter.org/our-work/protests-insurrection-and-second-amendment> [<https://perma.cc/L59N-R7VY>] (introducing papers addressing the relationship between guns, democracy, and other constitutional interests).

24. 554 U.S. 570 (2008).

more stringent doctrinal protection, they will not have to unwind as much precedent as they would in, say, the First Amendment context.²⁵ Given recent changes in the federal bench, including the Supreme Court, there is reason to think that the Second Amendment is ripe for transformation. And although a growing scholarly discussion has appropriately focused on issues such as the oft-misunderstood history of gun regulation²⁶ or the much-disputed effectiveness of modern gun laws,²⁷ the second-class argument itself could end up being the most significant catalyst for reshaping doctrine.

Some scholars have sought to evaluate the substantive accuracy of the second-class argument—comparing, for example, the kinds of doctrinal tests that apply in First and Second Amendment cases.²⁸ As Second Amendment case law has multiplied, empirical analysis can also be helpful in this regard. In past work, we analyzed more than 1,000 post-*Heller* challenges and found no clear empirical support for claims of systemic second-class treatment.²⁹

But the ultimate test may have less to do with the second-class claim’s veracity than whether litigants can persuade judges to adopt it—especially appellate

25. Cf. David S. Han, *Constitutional Rights and Technological Change*, 54 U.C. DAVIS L. REV. 71, 106 (2020) (“Once core doctrinal rules and principles have been established—like, for example, the expansive rule that all content-based speech restrictions are subject to strict scrutiny—they are not easily subject to critical reassessment.”); Deborah M. Ahrens & Andrew M. Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 HARV. C.R.-C.L. L. REV. 49, 92 (2019) (“[L]egal doctrine is often ‘sticky,’ refusing to budge for some time or in some places or to some degree even after popular sentiments and habits of thought have shifted.”).

26. See, e.g., A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT (Jennifer Tucker et al. eds., 2019) (collecting essays on gun rights and regulation).

27. See, e.g., JAMES B. JACOBS, CAN GUN CONTROL WORK? (2002); John J. Donohue, Abhay Aneja & Kyle D. Weber, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis* 20 (Nat’l Bureau of Econ. Rsch., Working Paper No. 23510, 2017), https://www.nber.org/system/files/working_papers/w23510/w23510.pdf [<https://perma.cc/AP7Y-REPS>]; ROSANNA SMART, ANDREW R. MORRIS, SIERRA SMUCKER, SAMANTHA CHERNEY, TERRY L. SCHELL, SAMUEL PETERSON, SANGEETA C. AHLUWALIA, MATTHEW CEFALU, LEA XENAKIS, RAJEEV RAMCHAND & CAROLE ROAN GRESENZ, THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES 52 (2020), https://www.rand.org/pubs/research_reports/RR2088-1.html [<https://perma.cc/TP9K-KBT3>].

28. See, e.g., Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 656–80 (2019) (arguing that, if anything, the Second Amendment has been enforced even more rigorously since *Heller* than freedom of speech was during its first decade of doctrinal development).

29. See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1507–08 (2018); see also Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 59 (2018) (concluding that there are plausible alternative explanations for the data other than the “second-class” argument). Others have reached divergent conclusions. See, e.g., David B. Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79, 79 (2018) (concluding that “[t]he data . . . are inadequate to support a conclusion that the Second Amendment is being fully enforced”); George A. Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 DUKE L.J. ONLINE 41, 43 (2018) (concluding that data show “evidence of judicial defiance” (footnote omitted)). This might reflect underlying normative disagreement about how the Second Amendment should be interpreted relative to other rights. See *infra* notes 83–84 and accompanying text.

judges with the greatest influence over doctrinal development.³⁰ As with political rhetoric, as recent events tragically demonstrate,³¹ truth and falsity matter, but they are not the only—nor necessarily even the primary—predictors of influence.³² Thus, beyond evaluating the “substance” of the argument, understanding how second-class claims can influence constitutional doctrine also requires considering an alternative set of questions: Who makes the argument? To whom? Who adopts it? And in what form? Such inquiries can reveal how an argument does or does not persuade particular audiences. This approach takes constitutional rhetoric seriously as such,³³ recognizing that metaphors,³⁴ memes,³⁵ frames,³⁶ and argument-bites³⁷ have the power to shape constitutional doctrine independently of what many would consider to be their merits.³⁸

We make three primary contributions in this Article. First, we connect the debate about second-class treatment of the right to keep and bear arms to the rich scholarly literature on the relationship between rhetoric and law. Doing so contextualizes the second-class argument as a kind of persuasive language, a frequently overlooked step in understanding how arguments gain influence. Debates about constitutional rights—in public discourse, scholarship, and in courts—have

30. Cf. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

31. See Greg Miller, Greg Jaffe & Razzan Nakhlawi, *A Mob Insurrection Stoked by False Claims of Election Fraud and Promises of Violent Restoration*, WASH. POST (Jan. 9, 2021, 8:49 PM), https://www.washingtonpost.com/national-security/trump-capitol-mob-attack-origins/2021/01/09/0cb2cf5e-51d4-11eb-83e3-322644d82356_story.html.

32. See generally Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUR. J. INT’L RELS. 35 (2007) (analyzing, *inter alia*, the coercive power of political rhetoric).

33. See Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 UMKC L. REV. 285, 294 (1998) (“Rhetoric and realism have much in common. The former studies the manner in which the advocate can persuade an audience; the latter observes in particular what that audience decides, rather than the body of authority the audience may rely upon in making its decision. Despite differences in emphasis, both the legal realist and the classical rhetorician keep the audience center stage.”).

34. The “marketplace of ideas” metaphor, for example, has a powerful grip on First Amendment law and theory, despite mixed evidence of its accuracy. See Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 451–59 (2019) (canvassing critiques); Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1160, 1222 (2015) (noting that there is “at best mixed support for the [marketplace] metaphor’s veracity,” and reporting results of empirical study of “buffer zones” at polling places and health care facilities providing abortions (emphasis omitted)).

35. J. M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 43 (1998) (“Memes encompass all the forms of cultural know-how that can be passed to others through the various forms of imitation and communication.”).

36. Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 232 (2020) (“Frames construct realities, sharpen grievances, and motivate participants in constitutional movements.”).

37. Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 75 (1991) (describing “argument-bites” as a “stereotyped” “basic unit” of legal argument, “such as, ‘my rule is good because it is highly administrable’”).

38. See *infra* notes 123–24, 131 and accompanying text (noting that memes, for example, can take hold via repetition rather than reflection).

become laden with arguments alleging persecution, so appreciating the structure of those arguments is important for understanding modern rights discourse. If claims of persecution take hold in that discourse, especially between litigants and judges, then doctrinal change is more likely.

Second, we develop a methodology for empirically analyzing the use of second-class rhetoric in briefs and opinions. Applying this methodology to Second Amendment litigation, we chart the evolution of the second-class claim and test hypotheses related to its invocation and influence in the courts.

Third, we demonstrate through our case study how constitutional arguments are formed and move between litigants and judges. By illustrating a more nuanced picture of how a consequential legal argument operates on a rhetorical level, we hope to advance the understanding of how constitutional change happens.

We begin in Part I by exploring the relationship between law and rhetoric—not “rhetoric” in the dismissive contemporary sense but as a practice that is deeply intertwined with (and perhaps constitutive of) law itself.³⁹ Doing so makes it easier to understand and evaluate constitutional arguments—such as the second-class right claim—not only as propositions that can be evaluated as true or false but as attempts to persuade and generate legal meaning.

The practice of rhetoric and its influence in law has been studied for millennia. Indeed, Aristotle’s classical rhetorical forms of *logos* (logical argument), *pathos* (emotional argument), and *ethos* (ethical appeal or credibility) remain the starting place for many analyses of persuasive language today.⁴⁰ These forms of rhetoric are particularly useful for understanding and evaluating second-class claims—whether about gun rights or other constitutional rights—precisely because those claims do not always fit neatly within the traditional boxes of constitutional argument (doctrinal, historical, pragmatic, and so on). We thus situate the second-class claim against the backdrop of these rhetorical forms to illuminate how the argument works, beyond simply being a claim for broader individual rights.

Armed with a clearer view of the persuasive potential of the second-class claim, Parts II and III explore its prevalence and effectiveness. Here, we turn to modern methods and employ a novel empirical approach to study the second-class claim in Second Amendment litigation. As described in Part II, we derive a list of phrases used to make the second-class argument, including variations such as Justice Clarence Thomas’s assertion that the Second Amendment is being

39. See James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985); see also Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.” (footnote omitted)).

40. See Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 86 (1994) (noting that “Roman rhetoricians and lawyers like Cicero and Quintilian, relying on Aristotle’s rhetorical analyses, divided persuasive discourse, and legal arguments in particular, into [these] three categories”).

treated like a “constitutional orphan.”⁴¹ We then collect all federal appellate briefs and opinions using those phrases in the decade following *Heller* and code them across several variables. The resulting dataset allows an empirical analysis that would be impossible by reading a smaller subset of briefs or opinions.

We present the results of our analysis in Part III. Our dataset allows us to describe the origins, development, forms, speakers, and audiences of the second-class claim. We trace the second-class claim to *McDonald v. City of Chicago*, in which the Supreme Court (in an opinion by Justice Alito) rejected the argument that the Second Amendment should not be incorporated against state and local governments.⁴² We then track the subtle ways in which the second-class argument evolved in the following years. Close reading reveals a spectrum from the platitude that the Second Amendment is not a second-class right to the damning claim that the judiciary is engaged in massive resistance to *Heller*.⁴³

In addition to this detailed descriptive work, our dataset allows us to test hypotheses. We find empirical support for the proposition that the second-class argument is becoming more prevalent in briefs.⁴⁴ We also reveal ways that its invocation is strategic, with advocates alleging that different actors are disrespecting the Second Amendment right depending on the court they are in.⁴⁵ Moreover, we find support for the hypothesis that the appeal of second-class rhetoric in the Second Amendment context is ideological, in that a relatively small number of Republican-nominated judges account for almost all judicial invocations.⁴⁶ This ideological pattern might explain why the relationship between second-class

41. *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari).

42. *See* 561 U.S. 742, 791 (2010).

43. The latter claim is often paired with a plea for Supreme Court intervention. *See* Ruben & Blocher, *supra* note 29, at 1446–49 (noting that such claims suggest “that resolving the particular case on appeal could have far-reaching benefits by addressing an objectionable doctrinal trend”); *see also* Darrell A. H. Miller, *The Second Amendment and Second-Class Rights*, HARV. L. REV. BLOG (Mar. 5, 2018), <https://blog.harvardlawreview.org/the-second-amendment-and-second-class-rights/> [<https://perma.cc/C2R8-QCGH>] (“[Justice Thomas], like many gun rights advocates, thinks the Second Amendment is not enforced enough, and he wants the [Supreme] Court to get involved.”).

44. *See infra* Figure 2.

45. *See infra* Sections III.B–C.

46. *See infra* Section III.D. This finding is consistent with other recent scholarship on ideology and the Second Amendment. *See, e.g.,* Lee Epstein & David T. Konig, *The Strange Story of the Second Amendment in the Federal Courts, and Why It Matters*, 60 WASH. U. J.L. & POL’Y 147, 161 (2019) (“[L]itigation over the Second Amendment now joins abortion and affirmative action as among the most polarizing areas in the courts today. In all three the difference between Democratic and Republican appointees is statistically significant at $p < .01$.”); Michael P. O’Shea, *The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Background Recordkeeping Legislation*, 46 CONN. L. REV. 1381, 1421, 1423–24 (2014) (noting, in review of federal appellate decisions, that only Republican-nominated judges, with one exception, voted to strike down gun laws); Adam M. Samaha & Roy Germano, *Judicial Ideology Emerges, at Last, in Second Amendment Cases*, 13 CHARLESTON L. REV. 315, 345 (2018) (“The most recent data indicate that, unlike the early years after *Heller*, judge ideology has become a significant predictor of judge votes in civil gun rights cases.”).

rhetoric in briefs and opinions is non-linear—it has increased faster in briefs than in opinions.

I. FROM RHETORIC TO RULES

Constitutional doctrine is shaped by the rhetorical moves that litigants, commentators, scholars, and judges make. Such rhetoric can become embedded in popular and legal understandings of constitutional rights. Consider, for example, phrases such as the “wall of separation between church and state,”⁴⁷ or “the marketplace of ideas,”⁴⁸ or the notion that the corporation is a legal person.⁴⁹ Although none are decisional rules sufficient to resolve a case, each has a profound impact on the way that constitutional baselines are conceptualized—separate and apart from what might be deemed their truth value. It is unsurprising, then, that scholars have devoted reams of articles to tracing the origins of those arguments, as well as evaluating the desirability and justifiability of their influence.

One need look no further than the Second Amendment itself to see an illustration. For more than two centuries, no federal case anywhere struck down a law on the grounds that the Amendment protects an “individual right.”⁵⁰ Not until 2001 did any federal case specifically endorse that conception of the right—and it did so, as *District of Columbia v. Heller*⁵¹ eventually would, based on historical evidence.⁵² This represented a massive shift in the meaning of the Second Amendment.

What changed evidence justified this transformation? Not the historical record itself—the evidence cited in *Heller* was available long before 2008 and would have looked the same to a disinterested historian in 1908, 1958, and 2008. But if one were to consider the individual right claim from the lens of who was making it, to whom, and in what form, it would be apparent that the baseline was shifting even if the history was not: more scholarly articles invoked the individual right

47. See generally Julie A. Oseid, *The Power of Metaphor: Thomas Jefferson's "Wall of Separation Between Church & State,"* 7 J. ASS'N LEGAL WRITING DIRS. 123 (2010) (describing the impact of “Thomas Jefferson’s metaphor describing the First Amendment religion clause as ‘building a wall of separation between Church & State’”).

48. See generally Blocher, *supra* note 34 (providing an epistemic account of the First Amendment through, among others, the understanding of the marketplace of ideas); Ho & Schauer, *supra* note 34 (analyzing the marketplace of ideas through an empirical study).

49. Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POL’Y 147, 183 (2013) (noting that this metaphor “has become so conventional that it goes unnoticed”); see also ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018) (recounting history of American corporate personhood); Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563 (1987) (exploring philosophical, constitutional, and linguistic implications of treating corporations as persons).

50. The district court opinions that led to *United States v. Miller*, 307 U.S. 174 (1939), and *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), both did so, but were overturned on appeal. See *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939); *United States v. Emerson*, 46 F. Supp. 2d 598, 598–611 (N.D. Tex. 1999).

51. 554 U.S. 570 (2008).

52. *Emerson*, 270 F.3d at 236.

position,⁵³ groups such as the National Rifle Association (NRA) increasingly made claims about the Second Amendment,⁵⁴ and—importantly—there was a growing tendency to cast those claims in the historical terms that the Supreme Court ultimately adopted.⁵⁵ Our point here is not that an objective account of the unchanged historical record necessarily leads to the individual right view of the Second Amendment⁵⁶; rather, the point is that the rhetorical frame for understanding the Second Amendment shifted in the decades leading to the decision, and that shift enabled the Court to articulate the individual right holding in *Heller*.

Of course, political power, the composition of legislatures and courts, popular beliefs, institutional limitations, and many other factors beyond rhetoric and the dialogic space of litigation help shape the law. Those factors can and should be evaluated. Yet, the form of legal arguments is another important input, and close attention to constitutional rhetoric can help illustrate important mechanisms of constitutional change. We begin our analysis in this Part with a short exploration of the relationship between law and rhetoric, and we connect the second-class right claim to that framework.

A. CONSTITUTIONAL RHETORIC: WHAT IT IS AND WHY IT MATTERS

“Let us begin with the idea that the law is a branch of rhetoric. Who, you may ask, could ever have thought it was anything else?”⁵⁷ As James Boyd White’s (rhetorical) question implies, law and rhetoric are historically and conceptually intertwined.⁵⁸ The two long traveled together in American legal education; Joseph Story gave rhetoric higher billing than history in his list of subjects that law students should attempt to master.⁵⁹ Given that legal practice (and legal education) is centrally concerned with persuasion, this pride of place is unsurprising.

53. See, e.g., ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 95–96 (2011) (“Between 1980 and 1999, there appeared 125 law review articles on the Second Amendment, the vast majority of which argued that the amendment was about individual rights.”).

54. See, e.g., *id.* at 95.

55. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 239 (2008).

56. See *id.* (questioning the historical evidence used to justify an individual right conception of the Second Amendment in *Heller*).

57. White, *supra* note 39; see also Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 LEGAL WRITING 3, 39–40 (2010) (discussing the role and effectiveness of metaphors).

58. See Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108, 109 (1993) (“Law and contemporary rhetoric share a kindred origin in what is now referred to as forensic rhetoric.”); *id.* at 109–10 (“In antiquity, the study of law and the study of rhetoric were collateral. The separation of law from rhetoric occurred during the Middle Ages and the Renaissance at about the same time that rhetoric came to mean the *art* of oratorical eloquence distinct from the *science* of logic and dialectic.”).

59. *Id.* at 110–11 (“In 1829, when Joseph Story joined the faculty of Harvard Law School, he urged the student of law to ‘addict himself to the study of philosophy, of rhetoric, of history, and of human nature.’ By 1857, the law curriculum at Columbia included instruction in the works of Plato, Aristotle, and Cicero. At Yale, in 1893, William C. Robinson recommended in his treatise *Forensic Oratory* the study of logic, rhetoric, and elocution” (footnotes omitted)).

Gorgias—a subject of Plato’s philosophical examination of rhetoric⁶⁰—called rhetoric a craft of “persuasion.”⁶¹ Aristotle, whose works on rhetoric still form the starting point for much contemporary scholarship,⁶² defined it as “the faculty of observing in any given case the available means of persuasion.”⁶³

The self-conscious study of rhetoric in law declined with the rise of Christopher Columbus Langdell’s case method in the 1870s and the turn toward the “science” of law.⁶⁴ Scholars increasingly understood themselves to be studying and teaching something akin to a system of rules. But despite this move away from rhetoric as such, legal education still teaches students how to persuade, and legal theory and scholarship remain focused on problems of language, including the text of the Constitution, statutes, and judicial opinions.⁶⁵ When scholars evaluate those sources—and seek to convince others of their analysis—they are studying and engaging in rhetoric.

We suspect that downplaying rhetoric in modern legal education and practice is due at least in part to, as Jamal Greene observes, “[r]hetoric ha[ving] a bad reputation.”⁶⁶ It is often conflated with efforts to take advantage of another person—to use words and symbols to bypass reason, cloud judgment, and bend the listener to the speaker’s will. By these lights, training in rhetoric is a matter of style at best and an incitement to sociopathy at worst. This negative view of rhetoric is

60. See generally Charles L. Griswold, *Plato on Rhetoric and Poetry*, STAN. ENCYCLOPEDIA OF PHIL., at § 4 (Feb. 12, 2020), <https://plato.stanford.edu/entries/plato-rhetoric/> [<https://perma.cc/YK4B-2AKW>] (summarizing the exchanges in *Gorgias*).

61. Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 682 (1999).

62. See generally EDWARD P. J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* (4th ed. 1999) (describing, *inter alia*, the classical foundations of the New Rhetoric Movement).

63. David McGowan, (*So*) *What If It’s All Just Rhetoric?*, 21 CONST. COMMENT. 861, 861 (2004) (reviewing EUGENE GARVER, *FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF* (2004)) (quoting ARISTOTLE, *RHETORIC* bk. 1, ch 2, 1355b, in *THE RHETORIC AND THE POETICS OF ARISTOTLE* 24 (W. Rhys Roberts & Ingram Bywater trans., 2d ed. 1984)).

64. Levine & Saunders, *supra* note 58, at 111 (“Yale had attempted to devise a more practical course of study based on a rhetorical theory of lawyering. As the Langdellian model became the cornerstone of American legal education, the study of rhetoric and rhetorical theory was abandoned. We can only speculate about the shape of modern American legal education had the Yale approach predominated.” (footnote omitted)).

65. Examples of modern legal scholarship explicitly addressing rhetoric are legion. See, e.g., NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* (2005); *THE RHETORIC OF LAW* (Austin Sarat & Thomas R. Kearns eds., 1994); JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443 (2014); Kronman, *supra* note 61; Timothy C. MacDonnell, *The Rhetoric of the Fourth Amendment: Toward a More Persuasive Fourth Amendment*, 73 WASH. & LEE L. REV. 1869 (2016); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

66. Jamal Greene, *Constitutional Rhetoric*, 50 VAL. U. L. REV. 519, 536 (2016). Plato’s own views are somewhat ambiguous. See Griswold, *supra* note 60 (“Is all of rhetoric bad? Are we to avoid—indeed, can we avoid—rhetoric altogether? Even in the *Gorgias*, as we have seen, there is a distinction between rhetoric that instills belief, and rhetoric that instills knowledge, and later in the dialogue a form of noble rhetoric is mentioned, though no examples of its practitioners can be found (503a-b).”).

consistent with negative stereotypes of lawyers as manipulators.⁶⁷ These views of rhetoric and lawyers are unfortunate: lawyers who learn and engage in rhetoric, or the “means of persuasion,”⁶⁸ are engaging in a practice that is essential for a well-functioning legal system, not to mention a well-functioning democratic republic.

In any event, the study of rhetoric seems to be experiencing something of a renaissance. Some legal scholars (and others in adjacent and overlapping fields⁶⁹) have explicitly returned to classical rhetoric⁷⁰ and its relationship to law.⁷¹ As Anthony Kronman puts the question underlying much recent scholarship: “Does the craft of rhetoric have a separate and legitimate place in human life, in between pure reason and pure power?”⁷²

Studies of rhetoric and the law are especially prominent in constitutional law, where scholars have focused explicitly on identifying the legitimate forms of argument⁷³—a task analogous to that of the classical rhetoricians. For example, Phillip Bobbitt argues that legitimate constitutional discourse consists of a finite number of modalities; other forms of argument violate the “grammar” of constitutional law.⁷⁴ Greene, in turn, has connected Bobbitt’s work to Aristotelian rhetoric, arguing that Bobbitt’s modalities—text, history, structure, precedent, and so on—can be understood through the lenses of the three classic forms of rhetoric: *logos*, *pathos*, and *ethos*.⁷⁵

Arguments, including the second-class claim, do not typically sort themselves neatly into one or another of the three classical forms of rhetoric. But those forms nonetheless help illuminate particular arguments’ potential power and appeal.

67. See Leo J. Shapiro & Associates, *Public Perceptions of Lawyers: Consumer Research Findings*, 2002 A.B.A. SEC. LITIG. 8 (“Another common criticism is that lawyers are manipulative. They are believed to manipulate both the system and the truth.”).

68. McGowan, *supra* note 63.

69. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 485–94 (1989) (discussing disciplines in which study of rhetoric is increasing).

70. See Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61, 64–65 (2002).

71. See, e.g., *supra* notes 65–66 and accompanying text.

72. Kronman, *supra* note 61, at 691.

73. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189, 1197–98 (1987).

74. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 6–7 (1982). Bobbitt’s project draws on Ludwig Wittgenstein, rather than Aristotle, as his goal is to offer a justification for judicial review and constitutional interpretation *internal* to legal discourse—a kind of grammar—just as Wittgenstein found meaning from within language itself. See J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1775, 1780, 1802 (1994) (calling Wittgenstein Bobbitt’s “mentor”). See generally David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021) (identifying the forms of analysis and rhetoric that are accepted in debates about public policy or political morality, but not in constitutional law).

75. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1424–46 (2013). What Bobbitt calls the “ethical” mode is a bit more complicated. Greene also argues that Bobbitt’s framework elides an important difference between “subjects of argument” and the “forms of rhetoric.” Greene, *supra* note 66, at 537–39; Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1351 (2016).

B. UNDERSTANDING THE FORCE OF SECOND-CLASS RHETORIC THROUGH AN ARISTOTELIAN LENS

The recent prominence of arguments alleging second-class treatment of particular rights represents an important development in legal discourse. Claims of persecution or disfavored status are nothing new in law, nor in political and social debates more broadly. But such rhetoric is ascendant⁷⁶ and stands poised to reshape public and legal narratives surrounding important areas such as religious freedom and free speech, which some argue are under attack.⁷⁷ Such narratives are especially prominent in the Second Amendment context, where cultural commitments often overwhelm arguments rooted in doctrine⁷⁸ or empirical evidence.⁷⁹

As our empirical analysis demonstrates, this argument also has a powerful appeal to some judges. We can and do test some hypotheses about that appeal—for example, whether it correlates with ideology. However, the empirical analysis cannot fully explain *how* the argument is persuasive. To do that, we consider the potential power of the claim through the classical Aristotelian modes of persuasion: *logos* (reason), *ethos* (status of the speaker), and *pathos* (emotion). Doing so helps clarify the appeal of the argument—beyond the simplistic for-or-against guns paradigm—and also sets up the empirical analysis in the remainder of this Article.

1. Second-Class Logos

First, the second-class argument can be understood as being rooted in *logos*, or “reason.”⁸⁰ This type of rhetoric often takes the form of “if X, then Y,” building interlocking propositions into a doctrinally dictated outcome. For example, the justifiability of active judicial review in constitutional rights cases is often thought to turn on whether those rights (or the people who seek to exercise them)

76. See generally MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* (2019) (exploring examples of “victim-claiming” in current constitutional rhetoric).

77. See, e.g., Elana Schor & Hannah Fingerhut, *Religious Freedom in America: Popular and Polarizing*, ASSOCIATED PRESS (Aug. 5, 2020), <https://apnews.com/article/donald-trump-religion-u-s-news-virus-outbreak-reinventing-faith-535624d93b8ce3d271019200e362b0cf> [<https://perma.cc/ZX2R-TU6L>] (“While 35% of U.S. adults overall said they believe their own religious freedom is threatened at least somewhat, conservatives were more likely than liberals to say so.”). Debates about whether speech is being stifled have focused on the campus context, with prominent voices arguing strenuously on both sides. Compare GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* (2018) (arguing that policies such as trigger warnings and safe spaces are harming U.S. university students), with Lee C. Bollinger, *Free Speech on Campus Is Doing Just Fine, Thank You*, ATLANTIC (June 12, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/free-speech-crisis-campus-isnt-real/591394/> (arguing that controversial ideas are still regularly presented in U.S. universities).

78. See JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 5–12 (2018) (describing some of the pathologies in the popular debate over guns, and sketching a “positive” alternative rooted in constitutional doctrine).

79. See generally Kahan & Braman, *supra* note 20 (arguing that positions on gun regulation largely derive from cultural worldviews).

80. Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1622 (1998).

are subject to a political process failure of one kind or another.⁸¹ In such a situation, judicial protection is not only justified but also democracy-protecting. Hence, if the Second Amendment is being systematically and unjustifiably disfavored in law and politics,⁸² the Supreme Court might be inclined to step in. That is the logic of judicial review from the perspective of political process theory.

Alternatively, if the purpose of the Second Amendment is to guard against governmental overreach—a bar against tyranny, as it were—then there might be an especially heightened demand for judicial review. The Second Amendment, according to the title of an NRA magazine, is “America’s 1st Freedom.”⁸³ Under that view, gun rights are not only on par with other rights but also first among equals. Translating that view into doctrinal consequences, some prominent advocates have suggested a standard of scrutiny in Second Amendment cases *stricter* than strict scrutiny.⁸⁴ This all proceeds as a matter of reason if one accepts the premise that the Second Amendment is entitled to the highest possible protection—anything else is second-class treatment.

Another version of logical argument is keyed to the Supreme Court’s institutional legitimacy. In this telling, by disregarding the individual right to keep and bear arms that the Court recognized in *Heller* and proclaimed to be “fundamental” in *McDonald v. City of Chicago*,⁸⁵ lower courts and legislatures are allowing their bias against guns to undermine the Supreme Court’s role as the final word on the meaning of the Constitution. The second-class treatment of the Second Amendment thus becomes a harm not only to the right to keep and bear arms but also to the Court itself. And heightened scrutiny or some other stringent protection for the right to keep and bear arms is thus an institutional imperative, flowing logically from the Court’s need to preserve its status and legitimacy. This form of the second-class argument must be taken seriously, especially when considering what might persuade institutionalist Justices such as Chief Justice John Roberts.⁸⁶

81. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing, *inter alia*, that active judicial review is most justified in cases of political process failure).

82. We are not suggesting that it is. See Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 260 (2008) (“There is no special reason for an aggressive judicial role in protecting against gun control, in light of the fact that opponents of such control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process.”).

83. NRA: AM.’S 1ST FREEDOM, <https://www.americas1stfreedom.org/> [<https://perma.cc/Z27G-8C2T>] (last visited Dec. 20, 2021).

84. Brief Amicus Curiae of Gun Owners of America, Inc. et al. in Support of Appellants and Reversal at 12, *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (No. 10-7036), 2010 WL 5108962, at *12 (“The Second Amendment Right Is Subject to a Constitutional Test More Strict than Strict Scrutiny.”).

85. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (plurality opinion).

86. See Adam Liptak, *John Roberts, Leader of Supreme Court’s Conservative Majority, Fights Perception That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), <https://www.nytimes.com/2018/12/23/us/politics/chief-justice-john-roberts-supreme-court.html>; Jeffrey Rosen, *Can the Judicial Branch Be a Steward in a Polarized Democracy?*, 142 DÆDALUS 25, 25 (2013) (noting Roberts’s professed goal “to help persuade his colleagues to put the institutional legitimacy of the Court above their own ideological agendas”).

Of the three forms of Aristotelian rhetoric, arguments from *logos* are by far the most common in the dataset we explore in Parts II and III of this Article. As we describe in more detail in Section III.B, there has been a marked increase in what we call “strong” claims: that the Second Amendment is being treated as second class by a broad set of institutional actors such as judges or policymakers.⁸⁷ For advocates seeking not just individual victories but also systemic doctrinal change, this makes sense. Claims of widespread mistreatment in violation of some principle such as respect for Court precedent (an argument from *logos*) are more likely to motivate a broad doctrinal response—the desired remedy is not merely error correction, but systemic transformation. We find support for this understanding as well.⁸⁸

The second-class claim has rhetorical appeal for the same reason that originalism had in the runup to *Heller*: it appears to be determined by logical relationships, rather than contestable normative propositions. Reva Siegel has demonstrated how “[t]he originalist narrative presents change as legitimate precisely *because* it is impersonal and *not* responsive to the ‘personal preferences’ of the interpreter.”⁸⁹ The same can be said of the second-class claim, which refers to seemingly static benchmarks: *Heller* and the treatment of other constitutional rights.

Of course, the logic of the second-class claim could apply to any number of rights. It is not hard to imagine, for example, how the claim might arise for rights thought to be particularly essential for our constitutional structure, or which have an especially countermajoritarian (or even antityrannical) cast. Voting and free speech rights, for example, are often referred to as *primus inter pares* among constitutional rights.⁹⁰ Defending them from second-class treatment is thus, in some sense, a simple matter of “reason”—the purpose of the right demands it. Moreover, to the degree that voting and free speech rights are (perhaps like equal protection, but arguably unlike the criminal procedure rights) specifically designed to guard against disfavored treatment by government, second-class treatment calls out for a vigorous judicial response like heightened scrutiny. The conclusion follows from the premise; that is the nature of *logos*.

87. See *infra* Figure 4 (charting increase in strong claims); *infra* Figure 5 (breaking down claims by category: courts generally, litigants, policymakers, and specific courts).

88. See *infra* Section III.C.

89. Siegel, *supra* note 55, at 222.

90. In one recent poll, bipartisan supermajorities believed that free speech (94%) and voting (93%) are “essential rights important to being an American today.” *Reimagining Rights and Responsibilities in the United States: National Survey Finds Bipartisan Support for Expansive View of Rights*, CARR CTR. FOR HUM. RTS. POL’Y, <https://carrcenter.hks.harvard.edu/reimagining-rights-responsibilities-united-states> [https://perma.cc/AK7P-9RP9] (last visited Dec. 20, 2021). Gun rights (73%) and LGBTQ rights (71%) also commanded supermajorities, albeit smaller ones. *Id.*

2. Second-Class Ethos

Second, the second-class right claim can be understood as a form of *ethical* argument, a category that includes arguments deriving their strength from the status or character of the speaker.⁹¹

In one sense, nearly all second-class claims (at least those keyed to the speaker's class) are a form of ethical argument: the speaker is being denied the credibility to which they are entitled. But it is also common for these arguments to channel the moral authority of others with greater standing. When, for example, gun rights advocates present themselves as if they are speaking on behalf of self-sufficient heroes of the Founding Era and the American frontier,⁹² they are engaged in a kind of *ethical* argument. Some point to statements by the Framers arguably suggesting that gun ownership “foster[s] both personal and societal virtue.”⁹³ The Framers’ decision to “enshrine[] [the Second Amendment] in the first ten amendments” is invoked in opposition to “the lower courts’ massive resistance to *Heller* and their refusal to treat Second Amendment rights as deserving respect equal to other constitutional rights.”⁹⁴ The Framers’ personal use of guns is sometimes invoked in support.⁹⁵

The contrast is clear: those advocating for gun regulation are cast as breaking from the tradition of people whose views and authority are more worthy of respect.⁹⁶ In one of his speeches as NRA vice president, Charlton Heston managed to weave together veneration for the Founding generation (*ethos*) with the kind of emotion-laden persecution rhetoric (*pathos*, discussed in the following Section) that sometimes animates the second-class argument: “The Constitution was handed down to guide us by a bunch of those wise old dead white guys who invented this country. Now, some flinch when I say that. Why? . . . I’ll tell you

91. See Greene, *supra* note 75, at 1394. Such claims can be distinguished from those involving a person or institution’s authority to dictate outcomes. We thank Greg Magarian for bringing this relevant distinction to our attention.

92. See Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 822 (2014); see also ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 9–12 (1995) (describing how America’s militia and frontier tradition has contributed to a “mythical elevation of the gun”); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 454–55 (1999) (arguing that America’s militia and frontier heritage has driven opposition to gun control).

93. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 468 (1995) (citing Thomas Jefferson).

94. Petition for Writ of Certiorari at 24, *Friedman v. City of Highland Park*, 577 U.S. 1039 (2015) (No. 15-133), 2015 WL 4550385, at *24 (capitalization omitted).

95. See, e.g., Brief of Amici Curiae Professors of Second Amendment Law et. al. in Support of Petitioners at 28, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, No. 20-843 (U.S. July 13, 2021) (“John Adams, as a 9-or-10-year-old schoolboy, carried a gun daily so that he could go hunting after class.” (citing 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 257–59 (L. H. Butterfield et al. eds., 1961))); *id.* (“Patrick Henry would ‘walk to court, his musket slung over his shoulder to pick off small game.” (citing HARLOW GILES UNGER, *LION OF LIBERTY: PATRICK HENRY AND THE CALL TO A NEW NATION* 30 (2010))); *id.* at 27 (“Moreover, both the Founders and the founding citizenry at large voluntarily carried arms routinely for defense and sport.”).

96. See, e.g., NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* 14, 286 (2014) (arguing that the civil rights movement, among other events, caused a shift away from “the black tradition of arms” toward a “modern orthodoxy” of gun control).

why: Cultural warfare.”⁹⁷ Heston was blunt: “That’s why you don’t raise your hand. That’s how cultural war works. And you are losing.”⁹⁸ The argument is both *emotional*, suggesting that gun owners are silenced and oppressed,⁹⁹ and *ethical*, in the sense that it invokes the views of the “wise old dead white guys who invented this country.”¹⁰⁰ Although Heston did not explicitly use the words “second class,” the message was obvious: gun owners and their rights are being disrespected and subordinated, contrary to the intentions of the Framers of the Constitution.

Such arguments regularly appear in constitutional law, often in the context of originalist reasoning rooted in the wisdom and authority of the Framing Generation—defending that traditional authority against contemporary developments that threaten it.¹⁰¹ But originalism is not the only interpretive mode that can deploy ethical argument in service of second-class claims or broader suggestions about persecution. Such arguments have long been a staple of claims about supposed judicial activism (that judges are subverting the character or status of “the American people”)¹⁰² and more recently have emerged amidst calls for civility and charity in politics and law.¹⁰³ The basic suggestion is that a wide range of contested views and speakers are entitled to respect simply because they are participants in the same civic discourse. That is an argument from *ethos*.

3. Second-Class Pathos

Classical rhetoricians characterized arguments that appeal to the emotions as “pathetic,” though the word carried different connotations then than it does today. Such emotional arguments are widespread in constitutional discourse,¹⁰⁴ though their role is more nuanced and controversial than those with logical or ethical appeal. Michael Frost notes that “Aristotle and the other rhetoricians decry the

97. Charlton Heston, Vice President, Nat’l Rifle Ass’n, Address at the Free Congress Foundation’s 20th Anniversary Gala (Dec. 7, 1997), <http://perma.cc/62KF-JFXC>.

98. *Id.*

99. See *infra* Section I.B.3 (discussing how language of persecution can be a form of emotional argument).

100. Heston, *supra* note 97.

101. See David B. Kopel, *Pretend “Gun-Free” School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 557 (2009) (“The debate over campus carry exposes a much broader cultural divide: the divide between traditional American attitudes of self-reliance, confidence, and readiness to take personal action, versus a desiccated feeling that individuals are victims of their circumstances, and not capable of changing them, except perhaps by asking the government to change their circumstances for them.”); Reynolds, *supra* note 93 (“Thomas Jefferson was a vigorous advocate of gun ownership because he believed that it fostered both personal and societal virtue . . .”).

102. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing, in the course of criticizing *Roe v. Wade*, that “the American people love democracy and the American people are not fools”).

103. See, e.g., Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 120 (2020) (“We must seek to understand one another, to treat each other not as enemies but as friends, and to secure justice for all without demonizing and ostracizing those with whom we disagree.”).

104. See Greene, *supra* note 75, at 1390 (“Much successful constitutional argument is, in a classical sense, pathetic. A pathetic argument is one that appeals to pathos, or emotion.”); see also Greene, *supra* note 66, at 540–41 (discussing Justice Thomas’s emotional appeals in two of his opinions).

effect emotions may have on judges, but grudgingly concede that, since they often have a profound effect, advocates must exploit them whenever possible.”¹⁰⁵ In keeping with that discomfort, modern treatises on appellate advocacy tend to downplay the importance of emotion in persuading judges, even as works on trial advocacy—where juries are a more prominent audience—give the subject much more consideration.¹⁰⁶ In *Making Your Case: The Art of Persuading Judges*, Antonin Scalia and Bryan Garner “strongly” reject the use of emotional arguments, while noting that it is “essential” that one appeal to a judge’s “sense of justice.”¹⁰⁷ And yet, Justice Scalia himself often deployed arguments that can only be described as emotional.¹⁰⁸

One way to understand the distaste for emotional appeals *to* judges, and yet acceptance of their use *by* judges,¹⁰⁹ is that the two practices simply involve different speakers and audiences, and that what is prevalent, appropriate, or effective for one might not be for another. In our empirical analysis, we find that the second-class claim is much more common in some vectors of constitutional discourse than others.

Emotional appeals have long been a staple of gun rights advocacy. Twenty-nine years ago, Osha Gray Davidson noted “two of the NRA’s most important grass roots lobbying tactics: portraying every fight over gun legislation as *the final showdown* between gun owners and ‘gun grabbers’; and dividing the world into two mutually exclusive factions: ‘with us’ and ‘against us.’”¹¹⁰ Some gun owners earnestly believe that they are a persecuted out-group akin to a racial or religious minority.¹¹¹

105. Frost, *supra* note 40, at 90.

106. *See id.* at 85.

107. Greene, *supra* note 75, at 1414 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 31–32 (2008)). Greene contends that the distinction Scalia and Garner draw may be less clear than they suggest because an appeal to one’s sense of justice can be understood as an emotional appeal. *See id.* at 1414–19.

108. J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia’s Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 219–20 (2017) (“By the end of [Justice Scalia’s] judicial career, his separate opinions had been variously described as ‘harshly worded,’ ‘sarcastic and divisive with a cutting writing style,’ ‘acid,’ ‘corrosive,’ ‘belligerent,’ ‘hostil[e],’ ‘caustic,’ ‘invective,’ ‘degrading,’ ‘brutal,’ ‘outside the boundaries of judicial discourse,’ ‘strident and contentious,’ ‘bold vitriol,’ a ‘torrent of outrage,’ ‘prone to stylish stabs,’ ‘vituperative,’ and even ‘nasty.’” (second alteration in original) (footnotes omitted)).

109. Greene, *supra* note 66, at 521 (defending “judicial rhetoric in constitutional cases as not just pervasive and inevitably descriptive, but also as normatively desirable”).

110. OSHA GRAY DAVIDSON, *UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL* 67 (1993).

111. Any simple online search will turn up dozens of examples. *See, e.g., Today’s Gun Owners: Parallels to Jews in Germany in the 1930s*, GUNSAVELIFE.COM (Jan. 27, 2013), <http://www.gunssavelife.com/?p=5239> [<https://perma.cc/DTR8-PGR2>] (“Propaganda about gun owners has reached a fever pitch in America today, leaving American gun owners feeling like the Jews in Germany before the Second World War.”); *see also* FRANKS, *supra* note 76, at 58 (describing NRA rhetoric as relying on a “potent mix of white male grievance, antigovernment sentiment, paranoia, and constitutional fundamentalism”); *id.* at 77 (“Second Amendment fundamentalists are overwhelmingly white and male, members of the one group that has never experienced systematic victimization by either the state or by private citizens.”).

The second-class claim fits into this emotional narrative of persecution, which can be seen in one of its more extreme forms: the notion that lower courts are engaged in “massive resistance” to the Second Amendment in general and *Heller* in particular.¹¹² The phrase evokes southern intransigence to school integration after the Supreme Court’s decision in *Brown v. Board of Education*,¹¹³ and seems designed to galvanize those who believe that the Second Amendment is being treated today as equal protection was in the 1950s. In other words, having claimed *Heller* as their *Brown*,¹¹⁴ some gun rights advocates are now clamoring for a *Cooper v. Aaron*¹¹⁵—the remarkable post-*Brown* opinion (issued not only unanimously but signed by each Justice individually) in which the Supreme Court asserted its constitutional authority against segregationists.¹¹⁶ This is an argument invoking both *pathos* (the persecution of an out-group, and an invitation to heroic action) and *logos* (the preservation of the Court’s institutional status).

As with the other forms of rhetoric we explore here, gun-rights *pathos*—and, in particular, the second-class right claim—is prominent in other areas of constitutional discourse as well. The kinds of second-class arguments that Justice Alito asserted about religious conservatives can likewise be understood as a form of emotional argument. Like Heston’s invocation of “cultural warfare” that gun-owners are losing,¹¹⁷ Alito claimed that his dissent in *Obergefell v. Hodges*¹¹⁸ has been vindicated and that the Court’s decision has been used to “vilify” those who oppose same-sex marriage: “You can’t say that marriage is a union between one man and one woman. Until recently, that’s what the vast majority of Americans

112. See, e.g., Petition for a Writ of Certiorari at 3, *Drake v. Jerejian*, 572 U.S. 1100 (2014) (mem.) (No. 13-827), 2014 WL 117970, at *3 (describing “lower courts’ massive resistance to *Heller*”); Petition for Writ of Certiorari, *supra* note 94 (“Review Is Needed To Correct the Lower Courts’ Massive Resistance to *Heller*”); Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court’s Second Amendment Decisions*, 81 TENN. L. REV. 673, 673 (2014) (“In the wake of the Supreme Court’s *District of Columbia v. Heller* (*‘Heller I’*) and *McDonald v. Chicago* decisions that clarify, expand, and protect Second Amendment rights, federal and state inferior courts have been engaging in massive resistance.” (footnotes omitted)); Editorial, *Massive Gun Resistance: State Rifle Bans Are in Plain Defiance of the U.S. Supreme Court*, WALL ST. J., Apr. 13, 2013, at A14.

113. 347 U.S. 483 (1954); see Judith A. Hagley, *Massive Resistance—the Rhetoric and the Reality*, 27 N.M. L. REV. 167, 167 (1997) (analyzing the “Massive Resistance” that followed the Court’s decision in *Brown v. Board of Education*).

114. See generally Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223 (2014) (comparing post-*Heller* developments in gun rights to the struggle for racial equality after *Brown v. Board of Education*); David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. F. 230 (2014) (same).

115. 358 U.S. 1 (1958).

116. See, e.g., John Yoo & James C. Phillips, *The Second(-Class) Amendment*, NAT’L REV. (Nov. 19, 2018, 6:30 AM), <https://www.nationalreview.com/2018/11/supreme-court-second-amendment-rights/> [<https://perma.cc/9BZN-H3W8>] (“After the Supreme Court struck down racial segregation in *Brown v. Board of Education*, for instance, it took more than two decades for the Court to finish applying the decision to other institutions beyond public schools and to articulate principles to guide the remedy. The lower courts and resistant states took years to get the message. But the Court has not followed that pattern with gun possession.”).

117. See Heston, *supra* note 97.

118. 135 S. Ct. 2584, 2640 (2015).

thought. Now it's considered bigotry."¹¹⁹ Similar themes emerged from *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in which the Court considered whether a bakery violated state antidiscrimination law by refusing to bake a cake for a same-sex couple.¹²⁰ The Court ruled 7–2 in favor of the baker, based on its conclusion that the state Civil Rights Commission demonstrated “a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”¹²¹ In his Federalist Society speech, Justice Alito emphasized as much, and noted that the couple “was given a free cake by another bakery, and celebrity chefs have jumped to the couple’s defense.”¹²²

II. MEASURING RHETORIC: A METHODOLOGY

The evaluation of a legal argument often begins and ends with an assessment of the argument’s substantive accuracy. But those evaluations are often disputed or indeterminate, and moreover, they do not show how the argument is used by speakers and whether it is adopted by listeners. Many sound arguments never make an impact; some spurious ones do. Beyond evaluating the substance of legal arguments, it is also illuminating to evaluate whether and how they are reproduced and adopted in practice. Legal arguments “are social,” after all, in that their usage or adoption within the legal system “is an existential condition.”¹²³ In this and the next Part, we seek to measure the usage and adoption of the second-class argument.¹²⁴ This empirical analysis pairs with the theoretical frames in Part I: having analyzed *why* second-class arguments might persuade, we can now chart *whether* and *how* they are employed. Together, these two angles—one analytical, one empirical—provide a rich picture of the argument’s rhetorical force.

In legal scholarship, empirical analysis can be employed in novel ways to evaluate the use of language. Corpus linguistics, for example, studies legal language in large, electronic collections of texts.¹²⁵ Claims about the original public

119. Blake, *supra* note 1.

120. See 138 S. Ct. 1719, 1723 (2018).

121. *Id.* at 1719, 1729.

122. Blake, *supra* note 1.

123. Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 281 (2016). Greene was speaking of memes, but the same is true of legal arguments. See White, *supra* note 39, at 692 (“In the formal legal process, [a] story is then retold, over and over, by the lawyer and by the client and by others, in developing and competing versions, until by judgment or agreement an authoritative version is achieved.”); cf. Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS 291, 298 (1999) (“[M]emes, like genes, will succeed if they are good replicators, whether or not they are correct or good for their human carriers.”).

124. See Karen A. Schriver, *Theory Building in Rhetoric and Composition: The Role of Empirical Scholarship*, 7 RHETORIC REV. 272, 272 (1989) (“Since the mid 1960s, empirical approaches to scholarship in rhetoric and composition have emerged.”).

125. See Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 833 (2018) (discussing possible development of a legal corpus for legal terms of art, and providing examples of existing linguistic corpora); James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 21, 24 (2016) (advocating for studies of public meaning originalism to be assisted by use of corpora).

meaning of certain words—including, notably, “keep and bear arms”¹²⁶—can be evaluated by reference to thousands or millions of usages, not just a string cite of secondary sources or a dictionary. Scholarship in experimental jurisprudence¹²⁷ and at the intersection of law and psychology¹²⁸ is bringing a new kind of empirical rigor to understandings of basic legal concepts such as fraud and consent. Legal scholars have also begun to use datasets to explore constitutional discourse in Congress and other extrajudicial settings.¹²⁹

But as far as we know, a similar rigor has not yet been used to evaluate the progression of an argument within the legal dialogic space—how it travels between and influences different speakers and audiences. Instead, legal scholars have focused on abstract questions about what categories of argument are legitimate and persuasive in constitutional law,¹³⁰ without empirical attention to how those categories function in practice. Yet, it is also important to consider prevalence, practice, and use for the same reason such considerations are relevant to linguists outside the legal context. Linguists have shown, for example, that metaphors “draw their strength from their frequency of use and commonality.”¹³¹ In a similar way, the more briefs that make a given claim, such as the second-class right argument, the more influence one might expect that claim to have on judges. Meanwhile, the adoption of the second-class argument in judicial opinions both reflects and contributes to the power of the argument. Finally, who adopts the claim can reflect the sometimes-obscured role of ideology in constitutional discourse.

Of course, constitutional discourse is complex and driven by many factors that do not lend themselves to quantitative evaluation. No empirical study, for example, will supplant the need for histories of the NAACP Legal Defense Fund’s

126. See, e.g., Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509, 513 (2019); Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (Aug. 7, 2018), <https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/> [https://perma.cc/97SX-DBUQ]; Neal Goldfarb, *Corpora and the Second Amendment*, LAWNLINGUISTICS (Aug. 8, 2018), <https://lawnlinguistics.com/corpora-and-the-second-amendment/> [https://perma.cc/4MU5-SCXZ]; Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, PANORAMA (Aug. 3, 2018), <http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/> [https://perma.cc/5GJV-ARH3].

127. See, e.g., Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 734 (2020) (discussing the implications of empirical results regarding ordinary meaning analysis).

128. See, e.g., Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2232 (2020) (using techniques from psychology and philosophy to discuss people’s ordinary intuitions about consent).

129. See, e.g., David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1 (2019) (using machine learning and text analysis to show, *inter alia*, growing polarization in constitutional discourse).

130. See *supra* notes 104–08 and accompanying text.

131. Otto Santa Ana, *Empirical Analysis of Anti-Immigrant Metaphor in Political Discourse*, 4 U. PA. WORKING PAPERS LINGUISTICS 317, 319 (1997); see also Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1604 (1991) (book review) (“As a tradition now identified with Wittgenstein and his successors insists, there are only ‘practices,’ each constituted by inchoate and unformalizable standards that establish one’s statements . . . as ‘legitimately assertable’ by persons within the interpretive community that constitutes the practice in question.” (footnotes omitted)).

campaign against *Plessy v. Ferguson*.¹³² But empirical studies of discourse might serve as a useful complement. One might demonstrate, for instance, that anti-segregation rhetoric shifted from arguing that particular institutions were not truly “equal” to attacking the whole edifice of “separate but equal.” *That* is an important part of the story that can be hypothesized and measured.

We take these measurements with respect to the second-class argument, focusing on the most obvious speakers (though by no means the only ones¹³³) in constitutional dialogue: litigants and judges. Our study has two main goals. First, we want to describe the origins of second-class rhetoric and how that rhetoric has been used in recent years. Second, we seek to test hypotheses related to the spread of second-class rhetoric, including that (1) second-class rhetoric is becoming more prevalent and “stronger,” as we define the term in Section III.B, in briefs and opinions;¹³⁴ (2) the relationship between the rates of use in briefs and opinions is positive (the more the argument is used by lawyers, the more it will be picked up by judges);¹³⁵ (3) the use of second-class rhetoric is strategic in briefs, targeting different actors depending on the court an advocate is in;¹³⁶ and (4) the appeal of the second-class claim among judges is ideological.¹³⁷

We pursue these goals through a systematic content analysis, which has three basic steps: first, collecting data; second, coding that data; and third, analyzing the results.¹³⁸ To collect our data, we conducted searches in Westlaw¹³⁹ for different variations of the second-class claim, including:

- “second-class”,¹⁴⁰

132. 163 U.S. 537 (1896). For a history of the litigation, see generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (rev. ed. 2004).

133. See, e.g., Jeffrey L. Fisher & Allison Orr Larsen, *Virtual Briefing at the Supreme Court*, 105 CORNELL L. REV. 85, 90 (2019) (evaluating the potential influence of blogs and podcasts on Supreme Court jurisprudence).

134. See *infra* Sections III.B–C.

135. See *infra* notes 225–38 and accompanying text.

136. See *infra* Sections III.B–C.

137. See *infra* Section III.D.

138. See Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 79 (2008) (discussing three distinct components of content analysis—collection, coding, and analysis).

139. Our data are limited to federal appellate opinions and briefs. Despite most Second Amendment litigation occurring in state courts, Ruben & Blocher, *supra* note 29, at 1508, our past work identified significant gaps in state-court data, *id.* at 1458 & n.114. We therefore omitted state-court data for the purpose of our analysis. The scope of our dataset is limited by the collection of federal appellate opinions and briefs available on Westlaw.

140. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion) (“Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.”).

- “disfavored”;¹⁴¹
- “watered-down”;¹⁴²
- “diluted”;¹⁴³
- “underenforced”;¹⁴⁴
- “abandoned”;¹⁴⁵
- “orphan”;¹⁴⁶
- “resistance”;¹⁴⁷
- “equal treatment”;¹⁴⁸ and
- “failed to protect.”¹⁴⁹

We limited the time period of our analysis to between June 26, 2008, the date *District of Columbia v. Heller* was decided,¹⁵⁰ and May 7, 2019, the petitioner’s briefing deadline in *NYSRPA I*, the first Second Amendment case argued before the Supreme Court in nearly a decade.¹⁵¹ *NYSRPA I* was an outlier case in that it received a grant of certiorari, and as a result, it prompted a deluge of briefs that would inflate the data. It thus served as a logical end date for the study.

141. See, e.g., *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari) (“The Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”).

142. See, e.g., Brief of Amici Curiae Western States Sheriffs’ Ass’n et al. in Support of Petitioners at 3–4, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2018 WL 4913728, at *3–4 (“This case is a demonstration of the dangers of applying watered-down interest balancing to a fundamental, enumerated constitutional right.”).

143. See, e.g., Brief of Amicus Curiae Cato Institute in Support of Petitioners at 14, *Woollard v. Gallagher*, 571 U.S. 952 (2013) (mem.) (No. 13-42), 2013 WL 4070390, at *14 (“In the absence of guidance from this Court, many lower courts have relegated the Second Amendment to a diluted, deferential form of ‘intermediate scrutiny’ review.”).

144. See, e.g., Brief of the National Shooting Sports Foundation as Amicus Curiae in Support of the Petitioners at 18, *Worman v. Healey*, 141 S. Ct. 109 (2020) (mem.) (No. 19-404), 2019 WL 5566397, at *18 (“The use of ‘intermediate scrutiny’ in Second Amendment litigation is spreading rapidly among the federal courts, and if left unchecked it will return the Second Amendment to its pre-*Heller* status as a disfavored and underenforced constitutional provision.”).

145. See, e.g., Brief of Appellants at 21, *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019) (No. 18-1545), 2018 WL 4182335, at *21 (“The district court abandoned *Heller*’s text, history, and tradition analysis and ‘in common use’ test in favor of a ‘two-part approach’ and a ‘most useful in military service test’ to exclude the Banned Firearms and Magazines from the Second Amendment and uphold the Challenged Laws.”).

146. See, e.g., *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari) (“The right to keep and bear arms is apparently this Court’s constitutional orphan.”).

147. See, e.g., Petition for Writ of Certiorari at 16, *Gould v. Lipson*, 141 S. Ct. 108 (2020) (mem.) (No. 18-1272), 2019 WL 1501532, at *16 (“This Court’s review is needed to correct the lower federal courts’ massive resistance to *Heller* and *McDonald*.” (capitalization omitted)).

148. See, e.g., Brief Amicus Curiae of Gun Owners of America et al. in Support of Petitioners at 19, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2018 WL 4943806, at *19 (advocating for “equal treatment of the Second Amendment among the Bill of Rights”).

149. See, e.g., *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (mem.) (Thomas, J., dissenting from denial of certiorari) (“Despite the clarity with which we described the Second Amendment’s core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it.”).

150. 554 U.S. 570, 570 (2008).

151. See *supra* notes 11–15 and accompanying text.

After preliminary analysis, we noticed a fairly large number of false positives involving trademark disputes, so we omitted briefs and opinions referencing “trademark.” Our final search was:

advanced: (“second amendment” heller “bear arms”)/p ((disfavor!s right)
 “second-class” “second class” watered-down dilut! underenforc! abandon
 orphan resistance “equal treatment” “failed to protect”) & DA(aft 06-26-2008
 & bef 05-07-2019) BUT NOT trademark

We manually removed false positives.¹⁵² One notable category of false positives were eleven briefs¹⁵³ and one opinion¹⁵⁴ disputing an allegation of unfair treatment—arguing, in other words, that the Second Amendment is *not* being subject to second-class treatment. The relative absence of such counterarguments in briefs and opinions is notable—perhaps reflecting a lack of appreciation for the claim’s persuasive potential or a sense that it is too difficult to evaluate empirically. Because of the small size of this subset and because our goal is primarily to chart the allegation of unfair treatment, we excluded these twelve documents.

The final dataset contained 174 briefs and 21 opinions (including dissents and concurrences) with 52 judge votes.¹⁵⁵ We populated two variables (court and year) directly from Westlaw. We then conducted a manual review to code additional variables.¹⁵⁶ One of the most significant trends we had observed

152. The reasons for false positives were various and reflect the challenge in devising search terms that captured the desired opinions without being unduly overbroad. Some briefs and opinions, for example, discussed one of our search terms in connection with the Supreme Court’s equal protection decision. *See, e.g., Heller v. Doe*, 509 U.S. 312, 336 n.1 (1993) (Souter, J., dissenting) (“unequal treatment”); *Windsor v. United States*, 833 F. Supp. 2d 394, 404 n.4 (S.D.N.Y.), *aff’d*, 699 F.3d 169 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013) (“abandon[ed]”). Others quoted Blackstone for the proposition that the right to keep and bear arms relates to “the ‘natural right of *resistance*,’” but without alleging the Second Amendment was being treated unfairly. *See, e.g., Petition for a Writ of Certiorari at 7, Davis v. Duncan*, 574 U.S. 1121 (2015) (mem.) (No. 14-539), 2014 WL 5868956, at *7 (emphasis added). We could have refined our search parameters to remove such groups of false-positives, but we determined it would be more efficient to remove them manually.

153. *See, e.g., Respondents’ Brief in Opposition at 13, Jackson*, 135 S. Ct. 2799 (No. 14-704), 2015 WL 1223716, at *13 (“Unable to identify any division of authority, petitioners instead seek review in order to remedy what they perceive as the lower courts’ ‘resistance’ to *Heller* and *McDonald*. But petitioners’ general disagreement with the development of Second Amendment jurisprudence is not a reason to grant review in this case.” (citations omitted)).

154. *Mance v. Sessions*, 896 F.3d 390, 391 (5th Cir. 2018) (Higginson, J., concurring) (per curiam).

155. The data is on file with the authors.

156. We author-coded the opinions. The briefs were coded in part by an author and in part by a research assistant. By one measure, fewer than 15% of systematic reviews include statistical testing for intercoder reliability, Hall & Wright, *supra* note 138, at 112, but we agree with those who assert it is important for these sorts of analyses. *Id.* Thus, for the briefs, our two coders each coded the same twenty-four briefs, which accounted for more than 10% of the briefs dataset, and we compared the answers using two statistical measures: percent agreement and Cohen’s kappa. *See* Mary L. McHugh, *Interrater Reliability: The Kappa Statistic*, 22 *BIOCHEMIA MEDICA* 276, 282 (2012) (suggesting that researchers “calculate both percent agreement and kappa” in the context of healthcare research projects); Ruben & Blocher, *supra* note 29, at 1464–67 (discussing intercoder reliability measures). Those calculations revealed a kappa figure between 0.60 and 0.80 for all variables, suggesting “substantial” agreement as between our coders. *Id.* at 1465 n.153.

anecdotally was that the second-class claim is directed at different targets, each with its own jurisprudential significance.¹⁵⁷ We wanted to chart the subtle evolution of the second-class claim, so we coded for these different usages: whether the second-class claim was made in connection with the Second Amendment overall—as in the standalone statement that “the Second Amendment is not a second-class right”—or as an allegation about the treatment of the right by litigants, policymakers, specific courts, or courts generally.¹⁵⁸ This categorization is explained in greater detail below.¹⁵⁹ We also coded opinions for the Second Amendment issue involved in the case—for example, public carry restrictions or safe storage. Finally, we coded for the political party of the President who nominated each judge writing or joining an opinion as a proxy for ideology.¹⁶⁰

The resulting dataset is broad and deep enough to provide insight into how the second-class claim has been used on the level of opinion, authoring judge, and judge votes. Our methodology is substantially more rigorous and comprehensive than the second-class claim itself, which is typically backed by no more than a litigant’s or judge’s impression.

III. THE DEVELOPMENT OF THE “SECOND-CLASS” ARGUMENT

In earlier research, we determined that from the date *District of Columbia v. Heller* was decided, June 26, 2008, through February 1, 2016, the number of Second Amendment decisions was relatively flat from year to year.¹⁶¹ That pattern did not change between February 2, 2016, and the end date for our current dataset.¹⁶²

157. See *infra* Section III.B.

158. Almost all of our search results included the overall claim. We only coded a result as falling into that category if it *only* made the overall claim and did not direct it at any particular actor. If an opinion or brief directed the claim at more than one actor (for example, litigants *and* a specific court), we coded the result for each actor implicated.

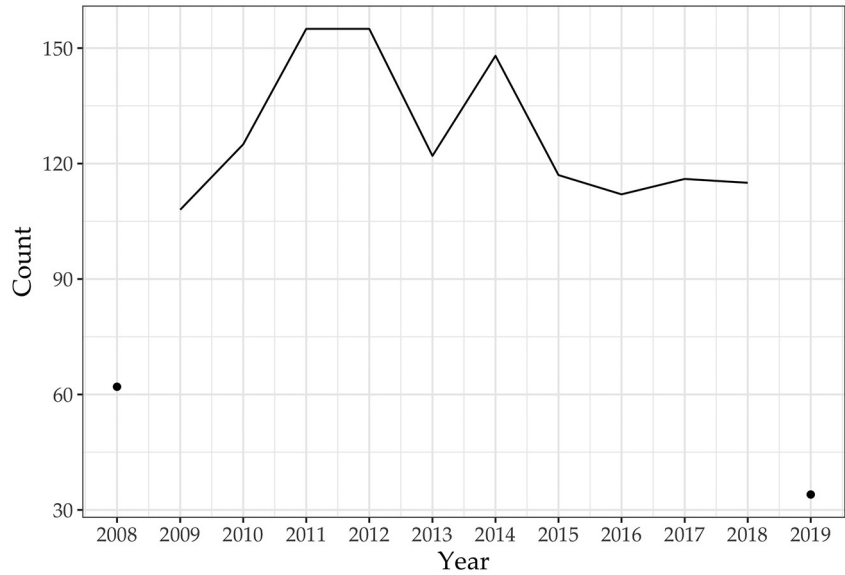
159. See *infra* Section III.B.

160. See Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 WM. & MARY BILL RTS. J. 827, 849 (2017) (noting that “the political party of the appointing president . . . is a simple dichotomous variable that nonetheless tends to perform well compared to competitor proxies [for judicial ideology]”).

161. See Ruben & Blocher, *supra* note 29, at 1487–88. The earlier study counted 997 decisions, which addressed 1,153 separate Second Amendment challenges, between *Heller* and February 1, 2016. *Id.* at 1455, 1458. For our methodology and search terms, see *id.* at 1454–71.

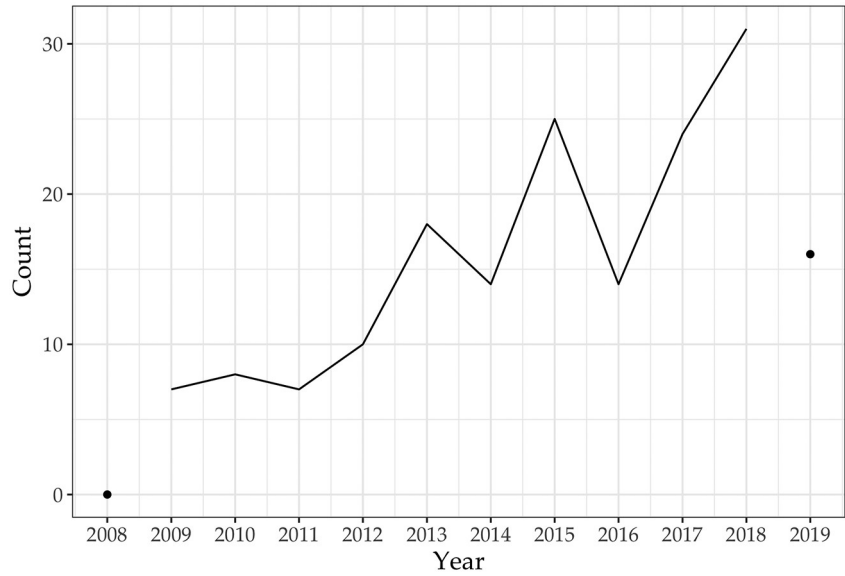
162. We reached these figures using the same methodology as our 2018 study.

Figure 1: Second Amendment Decisions by Year

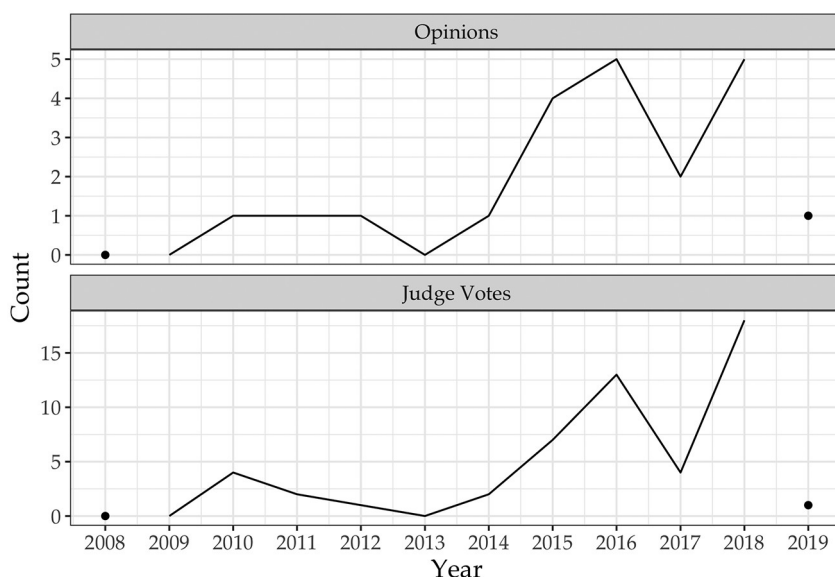


And yet, invocations of the second-class claim in briefs and opinions have increased significantly.¹⁶³

Figure 2: Total Briefs by Year



163. We only collected data from part of 2008 (after *Heller*) and part of 2019 (before briefs were filed in *NYSRPA I*). To avoid misleading comparisons, we do not connect the 2008 and 2019 datapoints to the remaining datapoints with a solid line.

Figure 3: Total Opinions and Judge Votes by Year

Between 2008 and 2010, the language appeared in fifteen briefs and one opinion that garnered four judge votes. In the next three years, from 2011 through 2013, the language appeared in thirty-five briefs and two opinions that attracted three judge votes. From 2014 through 2016, the numbers increased to fifty-three briefs and ten opinions with twenty-two judicial votes. And finally, from 2017 through the end of our study period—roughly two and a half years—the numbers increased to seventy-one briefs and eight opinions joined by twenty-three judges.

How did this language enter the Second Amendment litigation lexicon? How is it used and how has that use evolved? The following subsections explore those questions.

A. *HELLER*, *MCDONALD*, AND SECOND-CLASS BEGINNINGS

As a matter of Second Amendment argument, the second-class claim has its roots in the briefs and plurality opinion in *McDonald v. City of Chicago*.¹⁶⁴ But to contextualize the claim, we begin a few years earlier with *District of Columbia v. Heller*.¹⁶⁵

Heller was a landmark decision with regard to the legal meaning of the right to keep and bear arms because the Supreme Court embraced the view that the right includes certain private purposes, especially self-defense in the home.¹⁶⁶ But the practical impact of the opinion was somewhat ambiguous, because the law it struck down was such an outlier: the District of Columbia handgun ban at issue

164. 561 U.S. 742 (2010) (plurality opinion).

165. 554 U.S. 570 (2008).

166. *See id.* at 628–29.

was one of only two such laws on the books in major American cities.¹⁶⁷ The Court declined to articulate any particular standard of review for Second Amendment challenges to other weapons restrictions,¹⁶⁸ so it was hard to predict with confidence how future claims would be resolved.¹⁶⁹

Moreover, *Heller* only dealt with the Second Amendment's application vis-à-vis the federal government, while the vast majority of gun laws in the United States are state and local laws. More than a century before *Heller*, in *United States v. Cruikshank*, the Supreme Court held that the Second Amendment is not a restraint on state (and therefore local) gun laws.¹⁷⁰ Until the Supreme Court revisited its holding in *Cruikshank*, most gun laws thus fell outside the orbit of the federal right to keep and bear arms. Indeed, in the time between *Heller* and *McDonald*, courts invoking *Cruikshank* dismissed more than three dozen challenges to state and local gun laws.¹⁷¹

Before the Second Amendment was incorporated to apply against state and local governments in 2010,¹⁷² there simply had not been enough time for generalizable conclusions about *Heller*'s impact or whether the Second Amendment was being treated unfairly by policymakers and judges. And as we would expect, the notion that the Second Amendment was being treated as a second-class right was not prominent in briefs or opinions. Indeed, before the litigation leading to *McDonald*, we see no examples of the argument in our dataset.

However, the narrow (albeit consequential) questions of whether *Cruikshank* should be overturned and whether the Second Amendment should restrain all levels of government provided an opening for the second-class claim. The Supreme Court eventually incorporated all but a handful of the rights enumerated in the Bill of Rights.¹⁷³ And yet, the City of Chicago argued that its handgun ban, which was practically identical to the law struck down in *Heller*, should not be subject to Second Amendment scrutiny. "[I]f it is possible to imagine *any* civilized legal system that does not recognize a particular right," Chicago argued, "then the Due Process Clause does not make that right binding on the States."¹⁷⁴

It was against this backdrop that the second-class right argument emerged. The first document in our dataset is a petition for certiorari filed by the NRA arguing that the Second Amendment should be incorporated and that anything less would be to disfavor the right:

167. The other was struck down in *McDonald*, 561 U.S. 742.

168. *Heller*, 554 U.S. at 634–35.

169. Justice Stevens feared that *Heller* might lead to laws being struck down like "dominoes." *Id.* at 680 (Stevens, J., dissenting). Other commentators argued that "*Heller*'s bark is much worse than its right." Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1553 (2009).

170. 92 U.S. 542, 553 (1876) ("The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.").

171. Our research in *From Theory to Doctrine* revealed thirty-seven challenges dismissed on these grounds. See generally Ruben & Blocher, *supra* note 29. This research is on file with the authors.

172. *McDonald*, 561 U.S. at 750.

173. *Id.* at 763–65.

174. *Id.* at 780–81 (citing Brief for Respondents City of Chicago & Village of Oak Park at 9, *McDonald*, 561 U.S. 742 (No. 08-1521)).

The Second Amendment does not represent an inferior right which a court may subjectively relegate as beneath the usual rules of incorporation. “To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.” No constitutional right is “less ‘fundamental’ than” others, and “we know of no principled basis on which to create a hierarchy of constitutional values”¹⁷⁵

Subsequently, four additional briefs in the *McDonald* litigation invoked second-class rhetoric.¹⁷⁶

It is impossible to prove empirically how any given brief influences a judge’s ultimate opinion. Nonetheless, Justice Alito’s plurality opinion in *McDonald* endorsed the second-class argument in similar terms to those asserted in the NRA’s brief: “Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.”¹⁷⁷

Justice Alito’s *McDonald* opinion catapulted the second-class claim to the forefront of gun rights rhetoric and litigation. After *McDonald*, the argument that the Second Amendment is not a “second-class” right was seized by advocates, commentators, politicians, and judges—many of them citing Justice Alito’s opinion in contexts having nothing to do with the issue it was written to address.¹⁷⁸

B. THE STRENGTHENING OF THE SECOND-CLASS CLAIM IN BRIEFS

Justice Alito’s opinion in *McDonald* used the phrase “second-class right” in the course of describing the litigation position of the respondents,¹⁷⁹ not the view of a broader set of policymakers, let alone lower court judges. The petitioners in *NYSRPA I*, in contrast, alleged that the *lower courts* (as opposed to litigators) are

175. Petition for a Writ of Certiorari at 12, *Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago*, 561 U.S. 1041 (2010) (mem.) (No. 08-1497), 2009 WL 1556563, at *12 (citation omitted).

176. See Reply Brief at 6, *McDonald*, 561 U.S. 742 (No. 08-1521), 2009 WL 2574073, at *6 (contesting respondents’ assertion that the Second Amendment is not a fundamental right); Brief of Amicus Curiae Eagle Forum Education & Legal Defense in Support of Petitioners at 6–7, *McDonald*, 561 U.S. 742 (No. 08-1521), 2009 WL 4099516, at *6–7 (arguing that the Second Amendment merits being incorporated against the States more than certain other parts of the Bill of Rights); Brief for Amici Curiae Senator Kay Bailey Hutchison et al. in Support of Petitioners at 19–27, *McDonald*, 561 U.S. 742 (No. 08-1521), 2009 WL 4099522, at *19–27 (arguing that there is no special reason to exclude the Second Amendment from incorporation because “nearly every other individual right guaranteed by the Bill of Rights has been held to apply against the States”); Brief Amicus Curiae of Gun Owners of America, Inc. et al. in Support of Petitioners at 25–35, *McDonald*, 561 U.S. 742 (No. 08-1521), 2009 WL 4099523, at *25–35 (arguing that the Second Amendment should be incorporated under the Privileges or Immunities Clause rather than through selective incorporation under the Due Process Clause because doing so would protect against potential erosion of the right over time).

177. *McDonald*, 561 U.S. at 780 (plurality opinion).

178. Some of the opinions were filed in connection with Supreme Court petitions for a writ of certiorari; Justice Alito himself never joined any of them. See, e.g., *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari) (citing the second-class statement from *McDonald* in the course of criticizing lower courts generally).

179. *McDonald*, 561 U.S. at 780.

“drain[ing] *Heller* . . . of meaning” by systematically disregarding the Second Amendment right.¹⁸⁰ They also claimed that New York City’s regulation was “exemplary of a broader push by *local governments* to restrict Second Amendment rights through means that would never fly in any other constitutional context.”¹⁸¹ These two statements, while similar, are directed at different actors: courts and local policymakers.

The target of a second-class claim—the entity that is allegedly treating the right as such—is an important variable, in part because of what it implies for doctrinal change. The Supreme Court would be unlikely to disrupt settled doctrine in the lower courts just because a *litigant* staked out an extreme position. That would simply call for disregarding the litigant’s position. The calculus could be different, however, if *judges across the country* are giving short shrift to the right to keep and bear arms. In that case, doctrinal change might be necessary to correct a systemic problem. In terms of *logos*, the argument might be that heightened scrutiny is necessary to preserve not only the Second Amendment but the Supreme Court’s institutional standing against the anti-gun biases of lower court judges.¹⁸²

To capture this variation within second-class rhetoric, we coded for five different targets of the second-class claim: (1) the Second Amendment overall, (2) specific litigants, (3) specific courts, (4) the courts generally, and (5) policymakers. We think of (4) and (5) as especially “strong” forms of the second-class claim, because they cast the widest net and suggest broader doctrinal implications. By this metric, alleging second-class treatment by litigants (as in *McDonald*) is less strong than alleging disrespect by a judge, let alone the entire judiciary or local governments (as in *NYSRPA I*). We wanted to know whether stronger versions of the second-class claim have become more common. If so, this could reflect widening appreciation of the scope of the perceived problem of judicial disrespect or increasing frustration that such disrespect has not been remedied.¹⁸³ It also could reflect, however, a strategic conclusion among litigants that stronger second-class claims are more likely to lead to doctrinal upheaval.

As noted above, second-class claims have become more prominent in Second Amendment briefs.¹⁸⁴ But that overall trend does not apply to each of the five categories of second-class claims. Through 2010, the majority of all second-class briefs filed took the weakest form—merely stating that the Second Amendment is not a second-class right but stopping short of claiming that any particular person or

180. Petition for Writ of Certiorari, *supra* note 8 (“[G]overnments [are] disregarding Second Amendment rights and courts [are] endorsing such efforts while purporting to apply heightened scrutiny . . .”).

181. *Id.* at 21 (emphasis added).

182. See *supra* notes 85–86 and accompanying text. Ethical and pathological arguments could also take strong forms—for example, in asserting that the Framers treated the Second Amendment as an especially treasured right (*ethos*), *supra* notes 93–94 and accompanying text, or in invoking the resistance to school integration after *Brown v. Board of Education* (*pathos*), *supra* notes 112–16 and accompanying text.

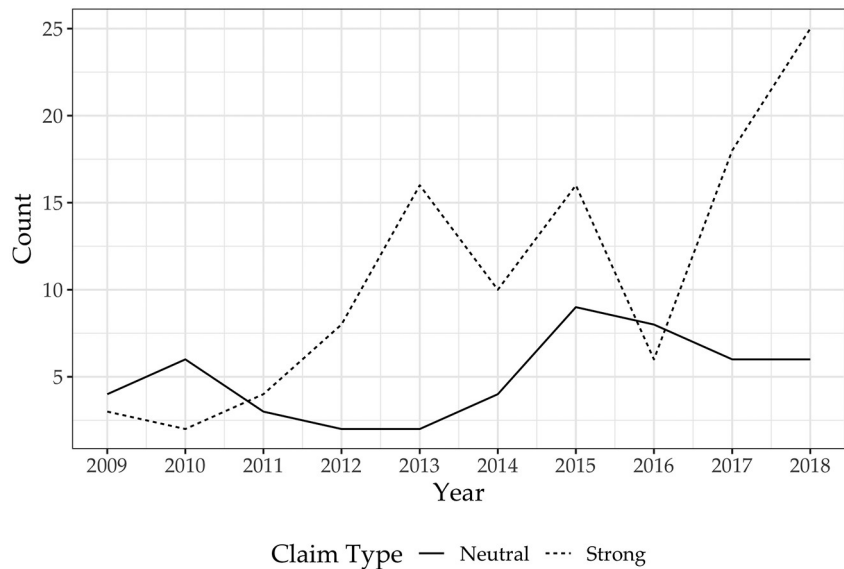
183. The structure of the second-class right claim is such that to reject it is to confirm it in the eyes of the claim’s proponents, potentially leading to greater frustration on the part of those making it. We are grateful to Tim Zick for pointing this out.

184. See *supra* Figure 2.

institution is treating the Amendment as such.¹⁸⁵ So stated, the second-class claim is impossible to reject or even really to evaluate—it is more of a general platitude about constitutional rights, none of which are typically considered “second-class.”¹⁸⁶

Although this version of the claim accounts for about 32% (55/174) of the briefs in the dataset, the number of these briefs has receded relative to those making the other, stronger versions of the claim.¹⁸⁷

Figure 4: Briefs Making Neutral vs. Strong Claims



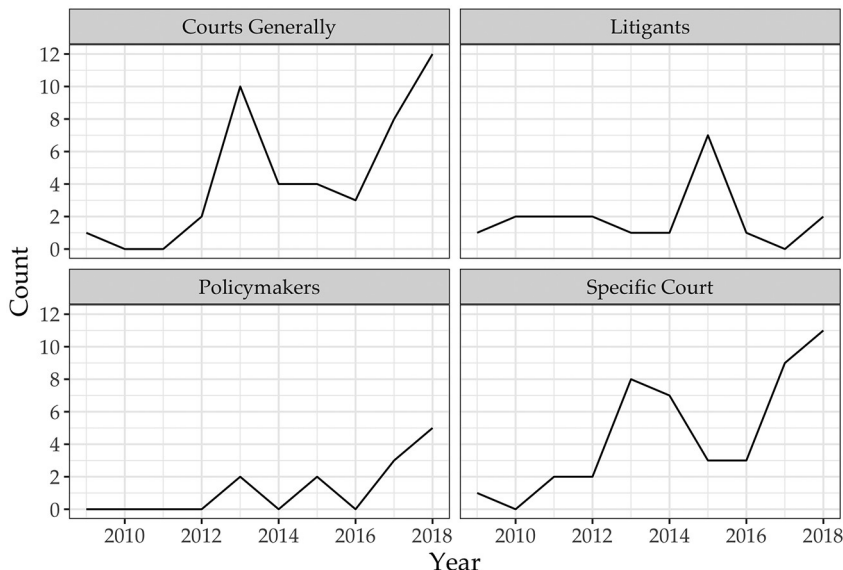
185. For example, a brief submitted to the D.C. Circuit asserted that “*McDonald* rejected the view ‘that the Second Amendment should be singled out for special – and specially unfavorable – treatment.’ It refused ‘to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees’” Brief for Appellants at 21, *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (No. 10-7036), 2010 WL 5108968, at *21 (alteration in original) (citation omitted).

186. Nonetheless, when the second-class claim is made in these broad terms, it is often part of an effort to minimize the differences between the Second Amendment and the First Amendment, and in turn, to contend that courts should apply strict scrutiny to more Second Amendment challenges. For example, in one public carry case, the plaintiff-appellants asserted that “[a]pplying anything less than strict scrutiny would relegate the Second Amendment to ‘a second-class right.’” Brief of Plaintiffs-Appellants at 39, *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018) (No. 17-2202), 2018 WL 1610774, at *39 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)). For an example of this argument in commentary, see Lawrence Rosenthal & Joyce Lee Malcolm, Colloquy Debate, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 Nw. U. L. REV. 437 (2011). “Since fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights.” *Id.* at 455 (comments of Joyce Lee Malcolm). As a matter of doctrine, it should be noted that strict scrutiny does *not* apply to all constitutional rights, even those deemed “fundamental.” See Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227–28 (2006).

187. See *infra* Figure 4.

In contrast to the relatively consistent number of briefs making only the neutral form of the second-class claim, we discern a rise in the number of briefs making strong second-class claims—those targeting litigants, judges, the judiciary as a whole, or policymakers.¹⁸⁸ This increase in strong claims accounts for the growth in the set as a whole.

Figure 5: Briefs Making Strong Claims by Category



When Justice Alito invoked second-class rhetoric in *McDonald*, he singled out litigants in the case—the City of Chicago and the Village of Oak Park—as asking for second-class treatment of the right to keep and bear arms.¹⁸⁹ Except for the two years immediately following *McDonald*, however, briefs targeting litigants account for a relatively small number of the briefs in the dataset.¹⁹⁰ This may suggest that the second-class claim is deployed primarily to motivate systemic change. Alleging disrespect by litigants is a narrow allegation, only implicating the parties to a specific case. It is a way of attacking the other side and warning the court of potential error if that side’s view prevails. The implicated parties, meanwhile, have litigation positions that are predictably tilted toward their desired outcomes. For precisely those reasons, this version of the argument does

188. See *infra* Figure 5.

189. See *McDonald v. City of Chicago*, 561 U.S. 742, 780 (plurality opinion) (“Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.”).

190. As an example of this version of the claim during that time period, just six months after *McDonald*, the Illinois Association of Firearm Retailers and several individuals complained in a brief that Chicago was again “insist[ing] that Second Amendment rights do not deserve the same judicial vigilance as other rights” by arguing that a zoning ordinance should be adjudged under a test of reasonableness. Brief Amicus Curiae of Brett Benson et al. in Support of Appellants Urging Reversal at 3, *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (No. 10-3525), 2010 WL 6636439, at *3.

not necessarily suggest a *systemic* problem and therefore is less likely to motivate the sort of broad doctrinal change many gun rights litigants desire.

Briefs alleging unfair treatment by a specific court are more common than those alleging unfair treatment by litigants, accounting for at least 20% of the briefs in which second-class claims appeared for seven out of eleven years.¹⁹¹ The goal is usually to demand an appellate court’s attention not simply to correct an error but to reprimand an outlier court for disrespecting the Second Amendment. In 2013, for example, the American Civil Rights Union submitted an amicus brief in a public carry case contending that “[t]he court below also embraced stepchild, second class status for the Second Amendment, contrary to both *Heller* and *McDonald*.”¹⁹² However, this set of briefs does not appear to explain the jump in overall second-class briefs—indeed, their relative prominence dropped consistently over the last three years of the study from roughly 40% in 2017, to roughly 35% in 2018, to under 20% during the first four months of 2019.¹⁹³

The overall rise in second-class claims is therefore due to increases in the strongest versions of the claim: those alleging unfair treatment by the courts generally or policymakers. The most drastic trend in our briefs dataset is the rise in briefs alleging that the judiciary *as a whole* is mistreating the Second Amendment.¹⁹⁴ These briefs assert a systematic failure. At the Supreme Court level, such briefs are more likely to attract attention from the Justices, who accept

191. The claim of unfair treatment by specific courts has been a frequent complaint by some commentators. See, e.g., AWR Hawkins, *President Trump Can Free Second Amendment from Ninth Circuit’s Grip*, BREITBART (Jan. 3, 2017), <https://www.breitbart.com/politics/2017/01/03/president-trump-can-free-2nd-amendment-ninth-circuits-grip/> [<https://perma.cc/9KSZ-5TQA>] (singling out the Ninth Circuit as “chipping away at the Second Amendment”); Daniel Horowitz, *4th Circuit Limits Second Amendment Right to Own Common Firearms*, BLAZE MEDIA (Feb. 22, 2017, 6:00 AM), <https://www.theblaze.com/conservative-review/4th-circuit-limits-second-amendment-right-to-own-common-firearms> [<https://perma.cc/7A8F-MDRR>]; Charles C. W. Cooke, *The Fourth Circuit Runs Roughshod over Heller and the Second Amendment*, NAT’L REV. (Feb. 22, 2017, 2:19 PM), <https://www.nationalreview.com/2017/02/fourth-circuit-decision-maryland-assault-weapons-ban-constitutional-travesty/> [<https://perma.cc/349K-XLAC>] (suggesting “the Fourth Circuit has taken it upon itself to rewrite *Heller*”).

192. Amicus Curiae Brief of the American Civil Rights Union in Support of Petitioners at 4, *Kachalsky v. Cacace*, 569 U.S. 918 (2013) (mem.) (No. 12-845), 2013 WL 522039, at *4; see also Petition for Writ of Certiorari at 21, *Silvester v. Becerra*, 138 S. Ct. 945 (2018) (mem.) (No. 17-342), 2017 WL 3948480, at *21 (“It is no secret that various lower courts, and the Ninth Circuit especially, are engaged in systematic resistance to this Court’s *Heller* and *McDonald* decisions.”); Kopel, *supra* note 10 (making a similar argument about the Second Circuit).

193. See *supra* Figures 2, 5.

194. See, e.g., Petitioners’ Reply Brief at 2, *Bonidy v. U.S. Postal Serv.*, 136 S. Ct. 1486 (2016) (mem.) (No. 15-746), 2016 WL 722179, at *2 (“[T]he deferential form of intermediate scrutiny applied by the panel majority below is inconsistent with this Court’s precedents regarding how infringements on fundamental rights are analyzed and demonstrates how the lower courts are turning the Second Amendment into a second-class right.”); Brief of Members of Congress as Amici Curiae in Support of the Petition for a Writ of Certiorari at 4, *Drake v. Jerejian*, 572 U.S. 1100 (2014) (mem.) (No. 13-827), 2014 WL 636382, at *4 (arguing that “second-class treatment of the Second Amendment pervades the lower courts”); Petition for Writ of Certiorari at 12, *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799 (2015) (mem.) (No. 14-704), 2014 WL 7169757, at *12 (noting that “even after this Court’s admonishment that the Second Amendment may not ‘be singled out for special—and specially unfavorable—treatment,’ courts continue to do just that” (citation omitted) (quoting *McDonald*, 561 U.S. at 778–79 (plurality opinion))).

only a tiny portion of the petitions they receive.¹⁹⁵ As Adam Samaha and Roy Germano have noted, “an allegedly deep judicial opposition to gun rights has become an argument for renewed Supreme Court attention.”¹⁹⁶ This category comprised 16% of briefs in 2015 but rose steadily to 44% of briefs in 2019.¹⁹⁷

A close relative is the claim that policymakers (legislatures, city governments, and so on) are disrespecting the right to keep and bear arms. In one case, the NRA complained that California “require[d] its residents to beg the leave of local officials before bearing arms publicly” in contravention of *McDonald*’s statement that the Second Amendment is not a second-class right.¹⁹⁸ Litigants have likewise argued that Congress has treated the Second Amendment as a second-class right by restricting the gun rights of eighteen to twenty-one year-olds: “Each day [the statute] remains in effect will further entrench the misconception that Congress may treat the Second Amendment as a second-class right.”¹⁹⁹ This form of second-class claim also appeared in the cert petition in *NYSRPA I*.²⁰⁰ Alleging mistreatment of the Second Amendment by policymakers might be considered as strong as those alleging mistreatment by the courts because it suggests that government actors are aligned against the right to keep and bear arms. It has been relatively limited in briefs, though there was a rise in the last two full years in our study (2017 and 2018).²⁰¹

In addition to measuring the prominence of second-class claims in briefs overall, we also tracked the court in which the claim was made. If invocation of the second-class argument is designed to prompt broad doctrinal revision, we would expect stronger versions to be made more frequently to the Supreme Court, which is best positioned to make such changes.²⁰²

And indeed, litigants made stronger second-class arguments to the Supreme Court more frequently than to lower appellate courts. While litigants submit neutral and strong briefs in roughly equal proportions to circuit courts, more than 85% of briefs submitted to the Supreme Court contain a strong second-class claim.

This version of the claim also has been common among some commentators. *See, e.g.*, Cottrol & Mocsary, *supra* note 9 (arguing that lower courts are “undercutting . . . Supreme Court precedent” in a way that is suggestive of “something other than a desire to control crime”); O’Shea, *supra* note 46, at 1425 (characterizing the “tenor” of lower court Second Amendment decisions as “deeply skeptical, bordering on hostile, to claims that the Second Amendment limits government action”).

195. *See, e.g.*, *The Supreme Court, 2016 Term—The Statistics*, 131 HARV. L. REV. 403, 410 tbl.II(B) (2017) (showing a 1.2% overall grant rate for petitions, with a 4.6% grant rate for appellate docket).

196. Samaha & Germano, *supra* note 29, at 58.

197. *See supra* Figures 2, 5.

198. Brief of Amicus Curiae National Rifle Ass’n of America, Inc. in Support of Plaintiffs-Appellants & Reversal Upon Rehearing En Banc at 23, *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (Nos. 10-56971 & 11-16255), 2015 WL 2064205, at *23.

199. Brief of Alabama & 21 Other States as Amici Curiae in Support of Petitioners at 1, *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 571 U.S. 1196 (2014) (mem.) (No. 13-137), 2013 WL 4761429, at *1.

200. *See supra* note 181 and accompanying text.

201. *See supra* Figure 5.

202. *Cf. SUP. CT. R. 10* (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”).

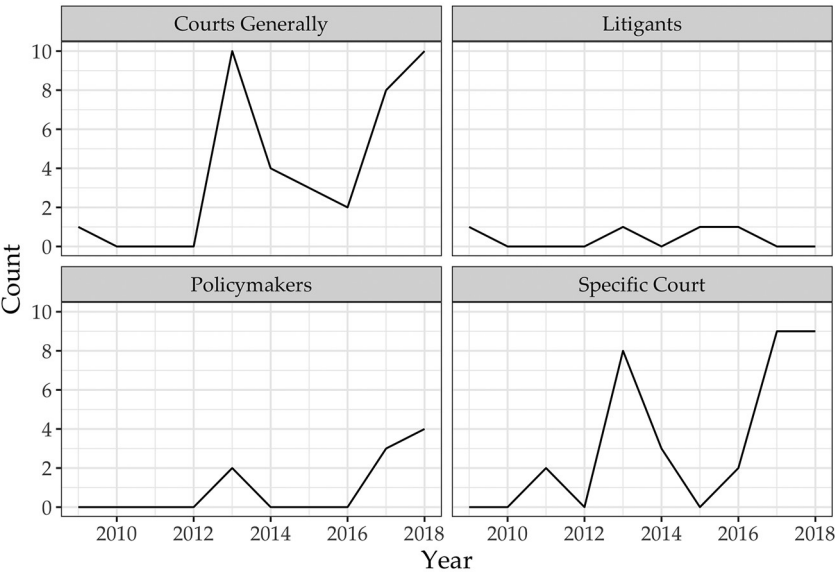
Among the briefs making the strong claim to the Supreme Court, we observe evidence of increasing claims about the judiciary as a whole and about specific courts.²⁰³

Table 1: Briefs Making Neutral vs. Strong Claims by Court

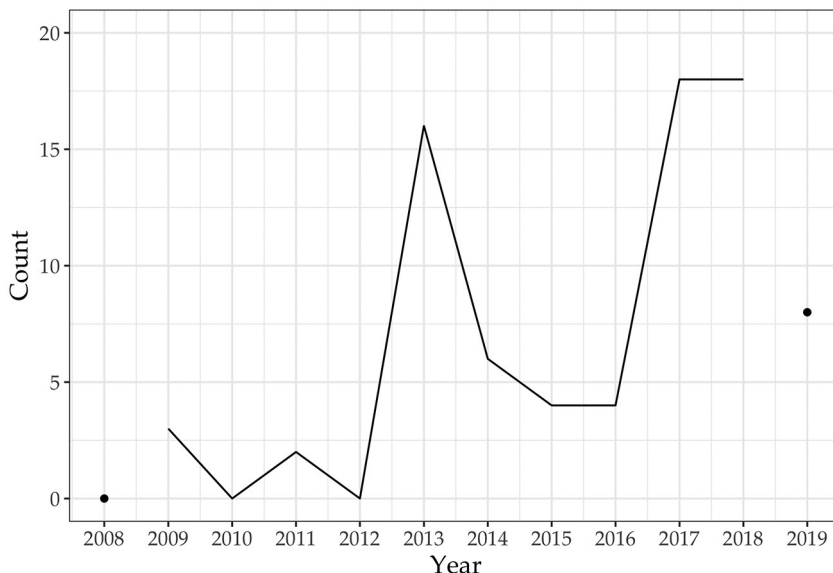
	Circuit Courts	Supreme Court	Total
Neutral	43	12	55
	52%	13%	32%
Strong	40	79	119
	48%	87%	68%
Total	83	91	174
	100%	100%	100%

The volume of Supreme Court briefs making strong versions of the second-class claim shot up beginning in 2017.²⁰⁴ After an outlier year in 2013, when sixteen such briefs were filed in the Supreme Court, there was a lull between 2014 and 2016.²⁰⁵ In 2017, 2018, and 2019, in contrast, eighteen, eighteen, and eight such briefs were directed to the high court (the latter representing only part of 2019).²⁰⁶

Figure 6: Briefs Making Strong Claims to SCOTUS by Category



203. See *infra* Figure 6.
204. See *infra* Figure 7.
205. See *infra* Figure 7.
206. See *infra* Figure 7.

Figure 7: Overall Briefs Making Strong Claims to SCOTUS

The data alone cannot explain the ebbs and flows of these claims, but they seem plausibly connected to perceptions about which arguments would appeal to the Justices.²⁰⁷ Until November 2016, there was uncertainty about how the Supreme Court would decide Second Amendment cases—uncertainty that only increased with Justice Scalia’s death, the debate over Judge Merrick Garland’s nomination, and the 2016 election.²⁰⁸ Amidst that uncertainty, it is plausible that litigants opted not to make bold claims for fear that they would fall on deaf ears at the high court. The election of President Trump and subsequent changes in the makeup of the federal judiciary may have prompted a jump in the number of Supreme Court briefs making second-class claims.

C. THE STRENGTHENING OF THE SECOND-CLASS CLAIM IN OPINIONS

The last Section showed how second-class rhetoric is increasing in briefs, but the key question, so far as doctrinal development is concerned, is whether that rhetoric is influencing judges. In *McDonald*, we saw an opinion deploying second-class rhetoric after it appeared in several briefs.²⁰⁹ This is consistent with the notion that lawyers’ arguments influence judges. We would expect the same to be

207. Cf. TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS* 111 (2018) (observing that “internal Court agenda-setting may have influenced” the Supreme Court’s doctrinal preference for expanding the Free Speech Clause instead of relying on other rights afforded by the First Amendment).

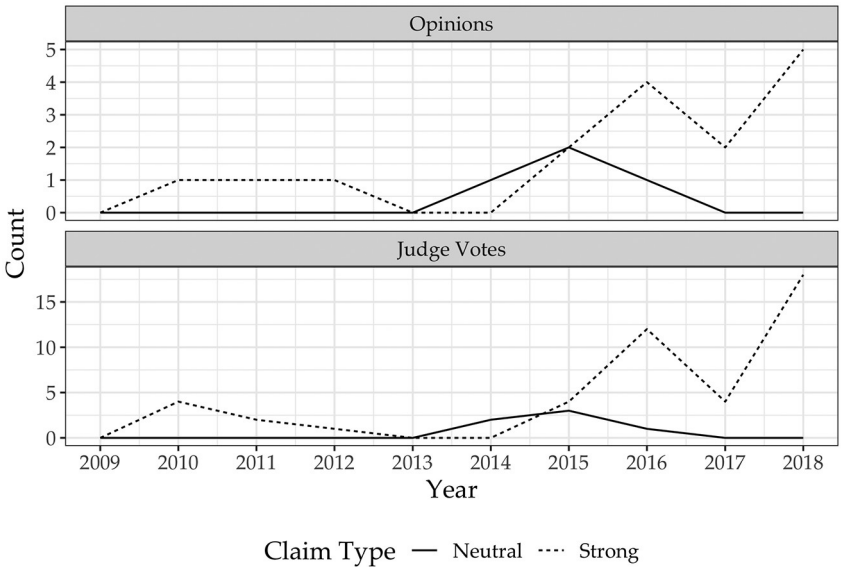
208. See Chris W. Cox, Opinion, *NRA: Why We Oppose Merrick Garland’s Supreme Court Nomination*, WASH. POST (Mar. 18, 2016), https://www.washingtonpost.com/opinions/nra-why-we-oppose-merrick-garlands-supreme-court-nomination/2016/03/18/1ea4c9d0-ec5b-11e5-b0fd-073d5930a7b7_story.html (“Make no mistake about it: We believe [Judge Merrick Garland’s confirmation] would mean the end of the fundamental, individual right of law-abiding Americans to own firearms for self-defense in their homes.”).

209. See *supra* notes 175–77 and accompanying text.

true in the lower courts as more advocates invoke second-class rhetoric. And as seen above in Figure 3, there has in fact been an increase in second-class rhetoric in lower court opinions.

Opinions making the second-class argument, like the briefs we discuss above, have increasingly made stronger versions of the claim. Indeed, the neutral form—mere invocations of the platitude that the Second Amendment is not a second-class right²¹⁰—accounts for just four of the twenty-one opinions in the dataset and no more than two opinions in any given year. In contrast, while only five strong second-class opinions were written from 2008 through 2015, twelve were drafted from 2016 through the end of the study period in 2019, accounting for 57% of all second-class opinions.²¹¹ The number of judge votes for opinions making strong versions of the second-class claim likewise increased from eleven between 2010 and 2015 to thirty-five between 2016 and May 2019, accounting for more than 90% of judge votes in each of those years.²¹²

Figure 8: Opinions and Judge Votes, Neutral vs. Strong Claims



The most common targets of the second-class rhetoric in opinions have been specific courts, accounting for 43% (9/21) of the opinions in the dataset.²¹³ No opinion alleged unfair treatment by the courts generally until 2015, but in the last two full years of the study (2017 and 2018) they account for more than 50% (4/7)

210. See, e.g., *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015) (“In the post-*Heller* world, where it is now clear that the Second Amendment right to bear arms is no second-class entitlement, we see no principled way to carve out the Second Amendment and say that the unauthorized (or maybe all noncitizens) are excluded.”).

211. See *infra* Figure 8.

212. See *infra* Figure 8.

213. See *supra* Figure 8; *infra* Figure 9.

of opinions making second-class claims and more than 80% (17/21) of judge votes.²¹⁴ Litigants have been the focus of the claim on just three occasions (including *McDonald*). Interestingly, policymakers have never been the target of a second-class allegation in judicial opinions.

Figure 9: Opinions Making Strong Claims by Category

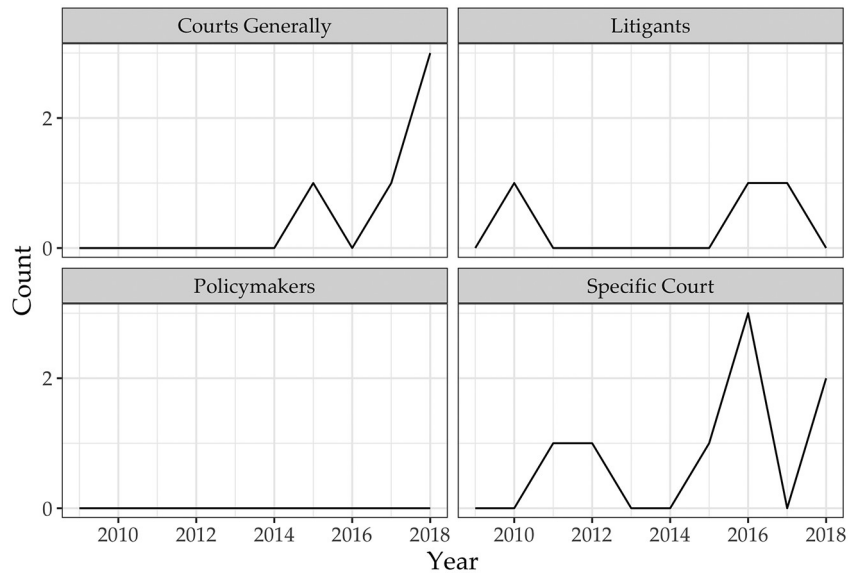
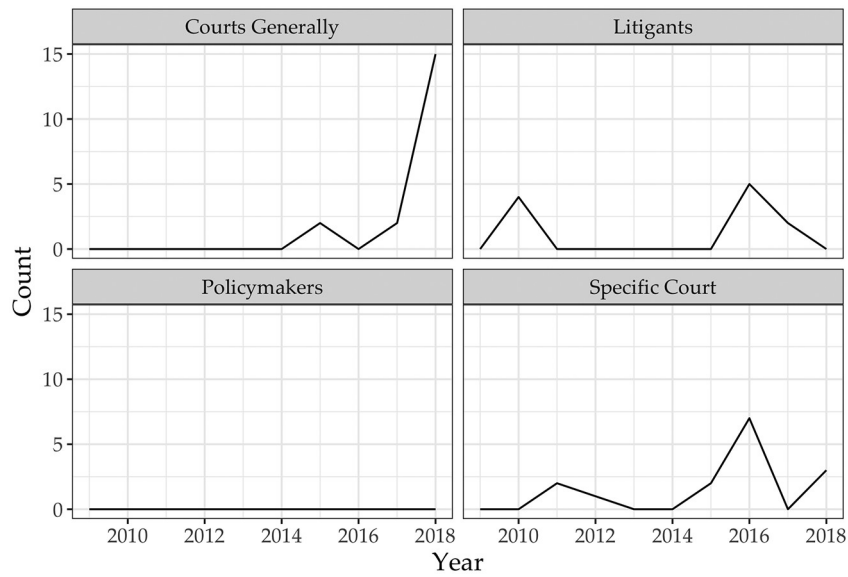


Figure 10: Judge Votes in Opinions Making Strong Claims by Category



214. See *supra* Figure 8; *infra* Figures 9–10.

The data suggest that courts may be more comfortable critiquing other participants in the judicial process—litigants and judges—as opposed to a coequal branch of government engaged in policymaking. The data also are consistent with the hypothesis that increased usage in briefs influences courts. But drilling down into which judges are adopting second-class rhetoric adds a layer of complexity to that hypothesis.

D. THE IDEOLOGY OF THE SECOND-CLASS CLAIM IN OPINIONS

Second-class rhetoric appears to be generating more judicial interest, but among which judges? Language and ideology are often intertwined,²¹⁵ and we wanted to see if the same was true of second-class rhetoric.²¹⁶ Consistent with commentary and scholarship suggesting that Republican-appointed judges are more amenable to Second Amendment claims than Democratic-appointed judges, we hypothesized that the second-class argument would have ideological appeal among judges.²¹⁷ The data not only support that hypothesis but also demonstrate a strikingly partisan division.

From the first judicial invocations of the second-class rhetoric to the last, the authors of opinions in the dataset, and the judges signing onto them, were overwhelmingly appointed by Republican Presidents. Twenty of the twenty-one opinions—95%—were authored by Republican-nominated judges.²¹⁸ The percentage rises to 100% if isolating for those opinions containing strong versions of the second-class claim. A similar trend exists with respect to judge votes. Just 6% (3/52) of judge votes belonged to Democratic-nominated judges. Isolating for only the strong versions of the second-class claim, Democratic-nominated judges accounted for 4% (2/46) of judicial votes.

Because Republican-nominated judges account for virtually all of the opinions containing the second-class language, one could have the impression that most Republican-nominated judges endorse the claim. But a closer look reveals that the rhetoric has been expressly adopted by only a small subset of such judges, some of whom have invoked second-class rhetoric repeatedly. Opinions written

215. See generally JEF VERSCHUEREN, *IDEOLOGY IN LANGUAGE USE: PRAGMATIC GUIDELINES FOR EMPIRICAL RESEARCH* (2012) (providing a framework for the study of ideology in written language using pragmatics and discourse analysis).

216. One recent study showed how the polarization of constitutional discourse in Congress has “exploded” in recent decades, with Democrats and Republicans owning certain terms. Pozen et al., *supra* note 129, at 34, 59–61. Although Second Amendment opinion writing does not provide decades’ worth of data, our analysis suggests that constitutional discourse—at least regarding the right to keep and bear arms—might also be polarized among judges.

217. See, e.g., O’Shea, *supra* note 46; Samaha & Germano, *supra* note 46, at 322, 345.

218. As mentioned above, we omitted the one opinion returned by our search terms that asserted that the Second Amendment has been treated *fairly* by the courts. See *supra* note 154 and accompanying text. That opinion was drafted by a Democratic-nominated judge. See *Mance v. Sessions*, 896 F.3d 390, 391–94 (5th Cir. 2018) (Higginson, J., concurring in denial of rehearing en banc) (per curiam); Press Release, The White House: Off. of the Press Sec’y, President Obama Announces Intent to Nominate Stephen Higginson to Serve on United States Court of Appeals (May 5, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/05/president-obama-announces-intent-nominate-stephen-higginson-serve-united> [<https://perma.cc/EEL4-3F8Z>].

by two jurists in the dataset, Justice Clarence Thomas and Judge Diarmuid O'Scannlain of the Ninth Circuit, comprise 43% (9/21) of the dataset and 47% (8/17) of the opinions invoking the strong versions of the claim. Each adopted the second-class rhetoric soon after *McDonald* and then invoked it in several additional cases. The first post-*McDonald* opinion to contain the second-class language was Judge O'Scannlain's 2011 opinion in *Nordyke v. King*.²¹⁹ Judge O'Scannlain drafted three additional opinions invoking second-class rhetoric.²²⁰ Justice Thomas, meanwhile, contributed five opinions to the dataset.²²¹

Each of the opinions by Judge O'Scannlain or Justice Thomas was either a dissenting opinion or a controlling opinion that subsequently was vacated. Overall, only a small percentage of opinions containing a second-class claim has controlled the outcome in any given litigation. By the numbers, about 67% (14/21) of the opinions containing second-class language were dissents or concurrences. Of the seven opinions in the dataset that were controlling, four were subsequently vacated upon the grant of a rehearing en banc. All four of the vacated opinions were drafted by Judge O'Scannlain.²²² Excluding those opinions, just 14% (3/21) of the opinions in the dataset garnered enough votes to control, including Justice Alito's plurality opinion in *McDonald*.

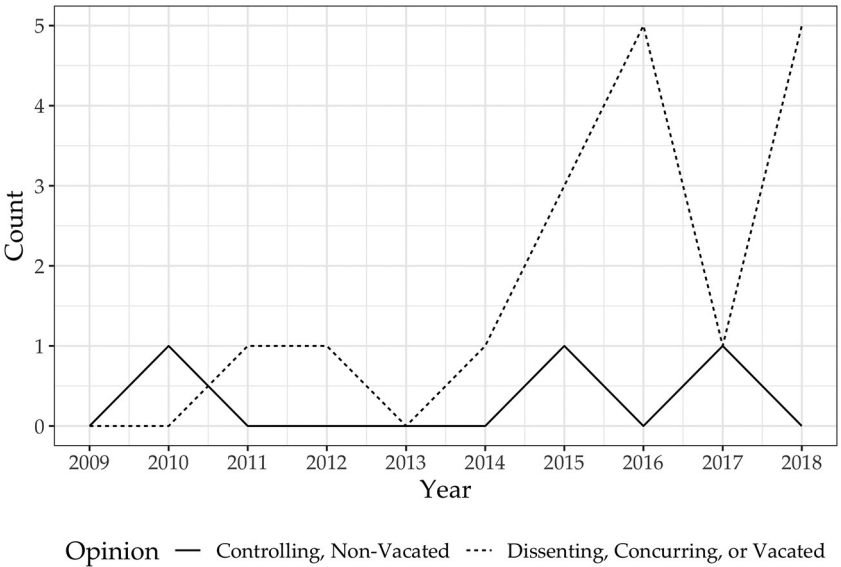
219. 644 F.3d 776, 790 (9th Cir. 2011), *aff'd on reh'g en banc*, 681 F.3d 1041 (9th Cir. 2012).

220. See *infra* note 222 (listing opinions).

221. Four of Justice Thomas's opinions were dissents from denials of certiorari. See *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari) ("Nearly eight years ago, this Court declared that the Second Amendment is not a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion))); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari) ("The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (mem.) (Thomas, J., dissenting from denial of certiorari) ("I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right."); *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (mem.) (Thomas, J., dissenting from denial of certiorari) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it."). One was a dissent filed in a case resolved on non-Second Amendment grounds. See *Voisine v. United States*, 136 S. Ct. 2272, 2292 (2016) (Thomas, J., dissenting) ("[T]he Court continues to 'relegat[e] the Second Amendment to a second-class right.'" (second alteration in original) (quoting *Friedman*, 136 S. Ct. at 450)).

222. See *Young v. Hawaii*, 896 F.3d 1044, 1048, 1051 (9th Cir. 2018), *rev'd on reh'g en banc*, 992 F.3d 765 (9th Cir. 2021); *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1049, 1063 (9th Cir. 2016), *rev'd on reh'g en banc*, 873 F.3d 670 (9th Cir. 2017); *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1147, 1179 (9th Cir. 2014), *rev'd on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016); *Nordyke*, 644 F.3d at 780, 790, *rev'd on reh'g en banc*, 681 F.3d 1041 (9th Cir. 2012).

Figure 11: Opinions Making Claims, Controlling vs. Noncontrolling



We hypothesized that the relationship between briefs and opinions would be linear and that, as the rhetoric in briefs expanded, the rhetoric in opinions would become equally widespread. The ideological data, however, cut against that hypothesis. Second-class rhetoric was concentrated in opinions drafted by relatively few judges and almost never appeared in a controlling opinion. In other words, the second-class argument did not penetrate the judicial mainstream during the study period. Why might this be? At least three explanations are plausible.

One possibility is that judges agree with the second-class claim but do not want to say so on the record out of respect for their colleagues. Judicial norms counsel against accusing fellow judges of bias, especially when there are other grounds for decision.²²³ Perhaps some judges are willing to break with those norms, but most are not. This explanation warrants consideration because it could explain, at least in part, the paucity of explicit judicial buy-in for the second-class claim.

A second possibility is that the rhetoric is not overcoming the arguably weak substance of the second-class claim.²²⁴ Lower court judges of all ideologies, after all, reject more than 90% of Second Amendment challenges.²²⁵ Those judges who invoke second-class rhetoric, meanwhile, do so in a small subset of

223. We thank Tim Zick for this observation. Rule 1.2 of the Model Code of Judicial Conduct, titled “Promoting Confidence in the Judiciary,” states that “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS’N 2020). Accusing a judge of bias when there are other grounds for decision could run afoul of this rule.

224. See Ruben & Blocher, *supra* note 29, at 1507; *supra* text accompanying note 29.

225. See Ruben & Blocher, *supra* note 29, at 1473.

noncontrolling opinions. We see further support for this possibility if we pinpoint the sorts of cases in which second-class rhetoric arises. The data show that second-class rhetoric appears in challenges to a tiny fraction of gun laws.²²⁶

For example, two of the most controversial gun laws are strict restrictions on publicly carrying guns and prohibitions on assault weapons and large-capacity magazines. More than 25% (6/21) of the opinions in our dataset were drafted in connection with challenges to those two policies, which represent a relatively small proportion of all Second Amendment litigation. Another controversial issue is whether it is constitutional to disarm people with misdemeanor convictions or those who have suffered from brief bouts of mental illness. Challenges to those laws comprise 14% (3/21) of the opinions in the dataset. Only two other types of gun laws garnered more than a single opinion invoking second-class rhetoric: challenges to the federal restriction on out-of-state handgun purchases (2/21) and zoning restrictions on either a gun store or shooting range (2/21).

In other words, although the number of gun laws provoking second-class rhetoric in opinions is not trivial, it only accounts for a small percentage of the total number of gun laws subject to Second Amendment challenges. Some have claimed that there are 20,000 gun laws on the books.²²⁷ Even if that number is an exaggeration,²²⁸ few gun laws have prompted second-class rhetoric in judicial opinions despite a wide range of gun laws challenged resulting in more than 1,400 Second Amendment opinions,²²⁹ which may reflect broad judicial agreement about the constitutionality of most challenged laws.

A third explanation is that the second-class rhetoric is hyper-ideological, in that it appealed primarily to a small subset of Republican-nominated judges during the study period. To the extent ideology is a primary input, second-class rhetoric may find more support in a judiciary that has shifted quickly over the past four years. President Trump made an effort to appoint judges who favor a broad reading of the Second Amendment.²³⁰ It may be no coincidence that of the five opinions making a strong second-class claim in 2018, three were authored by Trump-appointed judges.²³¹ (The other two were authored by Justice Thomas and

226. See *id.* at 1463 n.142 (citing to Appendix B which categorizes gun laws subject to Second Amendment challenges).

227. See Glenn Kessler, *The NRA's Fuzzy, Decades-Old Claim of '20,000' Gun Laws*, WASH. POST (Feb. 5, 2013), https://www.washingtonpost.com/blogs/fact-checker/post/the-nras-fuzzy-decades-old-claim-of-20000-gun-laws/2013/02/04/4a7892c0-6f23-11e2-ac36-3d8d9dcaa2e2_blog.html.

228. See *id.*

229. See Giffords L. Ctr. to Prevent Gun Violence, *Post-Heller Litigation Summary*, GIFFORDS, <https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary/> [<https://perma.cc/659Q-4GN2>] (last updated Jan. 13, 2022).

230. See Betsy Klein & Jeremy Diamond, *Trump Reassures NRA: 'We Will Protect Your Second Amendment'*, CNN (May 4, 2018, 4:42 PM), <https://www.cnn.com/2018/05/04/politics/trump-nra-convention-dallas/index.html> [<https://perma.cc/PJ4H-SGNC>].

231. See *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting from denial of rehearing en banc) (per curiam); *id.* at 398 (Ho, J., dissenting from denial of rehearing en banc); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J.,

Judge O’Scannlain.²³²)

Ultimately, the most important player when it comes to constitutional doctrine is the Supreme Court. The history of second-class rhetoric tells us that the Court’s invocation of the second-class claim in *McDonald*—even though made in a different context—catalyzed some litigants and judges to invoke the language in briefs and opinions.²³³ In 2020, four Republican-nominated Justices endorsed the second-class argument.²³⁴ Since then, Justice Amy Coney Barrett has joined the Court. Barrett received hearty endorsements from gun rights advocates.²³⁵ More relevant for our purposes, she invoked second-class rhetoric before her elevation to the Supreme Court in an opinion critiquing her colleagues on the Seventh Circuit.²³⁶ The embrace of the second-class argument by five Justices might lead more like-minded judges to adopt second-class rhetoric in future cases, which in turn could herald a significant shift in Second Amendment doctrine. After all, Justice Thomas was writing only for himself when, in his concurring opinion in *Printz v. United States*, he narrowly construed precedent implying that the Second Amendment is a collective right and suggested instead that “the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.”²³⁷ Thomas’s opinion was soon cited by the first court of appeals to adopt the “personal right” reading,²³⁸ and in 2008 became the law of the land in *Heller*.²³⁹

What has proven true of Second Amendment rhetoric and doctrine might or might not be true of other areas of constitutional law and discourse. As we noted at the outset, similar claims are being made about, among other rights, religious liberty and freedom of speech. A study akin to ours could help clarify whether the litigation trends we chart are trans-substantive or unique to the Second Amendment. And future work, not all of it empirical, could further illuminate *why* the second-class argument has such ideological appeal. In Part I, we provided a broad Aristotlean map of ways in which the second-class claim manifests: “logical” arguments sounding in reason, “ethical” arguments based on the status of

dissenting); *51 Judges Named by Trump*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/14/us/appellate-judges-trump-appointees.html>.

232. See *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari); *Young v. Hawaii*, 896 F.3d 1044, 1048, 1051 (9th Cir. 2018), *rev’d on reh’g en banc*, 992 F.3d 765 (9th Cir. 2021).

233. See *supra* notes 164–78 and accompanying text.

234. See *supra* note 15 and accompanying text.

235. See, e.g., *The NRA Applauds Confirmation of Amy Coney Barrett*, NRA-ILA (Oct. 26, 2020), <https://www.nra-ila.org/articles/20201026/the-nra-applauds-confirmation-of-amy-coney-barrett> [https://perma.cc/399U-VNYE].

236. See *Kanter v. Barr*, 919 F.3d 437, 469 (7th Cir. 2019) (Barrett, J., dissenting) (“On this record, holding that the [felon-in-possession] ban is constitutional as applied to Kanter . . . treats the Second Amendment as a ‘second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees’” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion))).

237. 521 U.S. 898, 938 nn.1–2 (1997) (Thomas, J., concurring).

238. *United States v. Emerson*, 270 F.3d 203, 224 n.19, 236 (5th Cir. 2001).

239. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

the speaker, and “pathetic” arguments appealing to emotion. We focused our empirical analysis on the traditional, formal arena of legal discourse: lawyers and judges communicating through briefs and opinions. But constitutional culture is much broader than that,²⁴⁰ and future studies might consider what forms of rhetoric predominate in other arenas. Are second-class claims on the rise throughout constitutional discourse, and if so, in what form? How and why do emotional arguments have power, and with whom? We hope to have shown that taking such claims seriously, both analytically and empirically, can provide a rigorous and illuminating look at their prevalence and influence.

CONCLUSION

In light of the ascendance of the second-class claim, our goal has been to situate it within the literature on rhetoric and law and cast light on its origins and evolution. The force of the second-class argument, like that of all legal arguments, can be partially explained by considering the classical modes of *logos*, *ethos*, and *pathos*. And beyond the argument’s abstract persuasive force, we can learn a great deal from studying the second-class claim’s usage in litigation by lawyers and judges. For example, the most important factor influencing the constitutional dialogue between litigants and judges appears to be ideology. As the second-class argument has found its way into judicial opinions, a small but growing number of Republican-nominated judges have endorsed it.

What does this suggest about constitutional discourse more broadly? For one thing, it is complex—not a simple dialogue between isolated sets of lawyers and judges, but a set of overlapping conversations in which speakers hear and borrow each other’s arguments in a nonlinear way. The proliferation of an argument in briefs does not necessarily equate to adoption in courts. Especially on ideologically charged issues, the composition of the judiciary matters. Moreover, as we might expect, the Supreme Court is the most important speaker, and its endorsement of rhetoric is a significant factor in predicting overall adoption and doctrinal change.

More broadly, our hope is that we contribute a tool for understanding legal change by taking rhetoric seriously and deploying a novel approach to evaluate a discrete argument. Legal scholarship often traces the origins of specific rules and principles because their roots in case law or historical context can help shed light on their meaning and purpose. Considering legal arguments as rhetoric is one more way to analyze that development.

240. See generally Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (arguing that “constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture”).