

## FUNDAMENTAL FRAMES: HOW CULTURAL FRAMES INFORM THE FOURTEENTH AMENDMENT

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### INTRODUCTION

Few axioms are more familiar in constitutional law than the idea that some rights are so important they cannot be abridged without strict judicial scrutiny, even if they are not textually enumerated in the Constitution.<sup>1</sup> Such “fundamental” rights include the right to vote, the right to privacy, the right to procreate, the right to raise children, and the right to marry.<sup>2</sup> However, many of these rights boast a remarkably recent vintage, raising the perennial question why they came to be recognized when they did.<sup>3</sup>

The same could be said of certain rights that are referenced explicitly in the Constitution, including for example the right to bear arms, which remained dormant for much of American history, only to be declared an individual right by the Supreme Court in 2008,<sup>4</sup> and then incorporated to the states through the Fourteenth Amendment in 2010.<sup>5</sup>

Why certain rights are activated at certain times and not others tends to defy straightforward doctrinal analysis, often calling for additional lecture on the historical or political context of a particular opinion. From a teaching standpoint, however, such discussions can be vague and rambling, often lacking the doctrinal rigor that accompanies the various tests employed by the Court in other contexts. To compensate, this Essay proposes that a mode of analysis be imported from socio-legal studies to address the question of decisions that are determined primarily by context, or what socio-legal scholars call cultural frames.

This Essay proceeds in two parts. Part I will discuss the emergence of cultural frame theory in sociology and political science. Part II will apply the

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1. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 849, 949 (5th ed. 2017).

2. *Id.* at 821, 831, 849, 851, 949.

3. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–99 (2015) (the right to marriage); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (the right to vote); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (the right to privacy); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (the right to procreate); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right to raise children).

4. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

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

theory in the context of the right to bear arms, showing how cultural frame alignment provides a more precise analytic for understanding the emergence of the right than either doctrinal analysis or simple mention of historical and political context.

### I. CULTURAL FRAME ANALYSIS

Beginning in the 1970s, sociologists and political scientists inspired by the civil rights movement began to take an interest in the various ways that movement organizers articulated reform agendas in terms that average people could understand.<sup>6</sup> This led to the articulation of a concept called “frames,” or “schemata of interpretation” that average folks used to “locate, perceive, identify,” and in short, explain, events.<sup>7</sup> To be successful, activists needed to construct their own frames, or schematic interpretations, that diagnosed social problems, identified a clear prognosis of those problems, and then mobilized target audiences to solve them.<sup>8</sup> These “collective action frames,” as they came to be called, worked best when aligned with the ideas, assumptions, and beliefs already held by target audiences, a technique that David A. Snow, Robert Benford, and others called “frame alignment.”<sup>9</sup>

Beginning in the 1980s, socio-legal scholars began to identify different types of frame alignment, ultimately settling on four basic categories.<sup>10</sup> In the first, social movement actors who attempt to link two separate collective action frames, like gun rights and abortion, for instance, engage in “frame bridging.”<sup>11</sup> In the second, movement strategists who focus on one particular issue that average people may otherwise be apathetic towards, like global warming, engage in “frame amplification.”<sup>12</sup> Third, social movement actors who find little support for their particular positions may have to broaden their reform agenda, or engage in “frame extension” by expanding the boundaries of their claims to

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6. Early works on the civil rights movement tended to focus on the formation of movement structures. *See, e.g.*, ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 159 (1984); Lewis M. Killian & Charles U. Smith, *Negro Protest Leaders in a Southern Community*, 38 *SOC. FORCES* 253, 257 (1960); August Meier, *Negro Protest Movements and Organizations*, 32 *J. NEGRO EDUC.* 437, 437–39 (1963).

7. ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 21 (Northeastern Univ. Press 1986) (1974).

8. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 *ANN. REV. SOC.* 611, 629 (2000).

9. David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 *AM. SOC. REV.* 464, 481 (1986); Mayer N. Zald, *Culture, Ideology, and Strategic Framing*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS*, 261, 265–67 (Doug McAdam et al. eds., 1996).

10. Benford & Snow, *supra* note 8, at 624.

11. Snow et al., *supra* note 9, at 467.

12. *Id.* at 469.

“encompass interests or points of view that are incidental” to their own goals, but popular among their target audience.<sup>13</sup> Finally, movement actors who take on a subject that has very little support at all, say same-sex marriage in the 1980s, might have to completely transform popular opinion in what is called “frame transformation.”<sup>14</sup>

While the various strategies of frame alignment can help effect social change, they by no means guarantee that activists will be able to overcome, or for that matter transform the collective “stock of meanings, beliefs, ideologies, practices, values,” and “myths,” shared by average people, or what socio-legal scholars call culture.<sup>15</sup> Interest in the cultural boundaries of reform has led some scholars to conclude that reform is ultimately contingent on either appealing to or changing prevailing cultural norms, or what Mayer Zald has called “cultural stock.”<sup>16</sup> While movement campaigns that reject cultural stock fail, argues Zald, movement efforts that draw from existing stock, or reveal “contradictions” in that stock, i.e., between prevailing prejudice and popular ideals, tend to succeed.<sup>17</sup> So do movements that successfully transform cultural stock, either by altering popular opinions, beliefs, or practices (frame transformation), for example, or by linking movement claims to larger majority values (frame bridging), both processes that fall under the larger theoretical umbrella of “cultural framing.”<sup>18</sup>

To show how cultural framing might be applied to better understanding, and teaching, constitutional law, it is helpful to look at a case study in which activists worked diligently to align their reform agendas with cultural frames. This was the case with the Second Amendment, a constitutional right that did not get incorporated to the states until 2010, after a period of active frame alignment by gun rights lobbies and lawyers. Telling the Second Amendment story provides an example of how the language of cultural frames can help show students why

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13. *Id.* at 472.

14. *Id.* at 473.

15. This definition of culture is taken from *Framing Processes and Social Movements*. Benford & Snow, *supra* note 8, at 629. Benford and Snow were themselves influenced by Stuart Hall. See e.g., Stuart Hall, *Gramsci's Relevance for the Study of Race and Ethnicity*, J. COMM. INQUIRY 5–27 (1986), reprinted in STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 411, 439 (David Morley & Kuan-Hsing Chen eds., Taylor & Francis Group 2005) (1996). Other scholars interested in the limits that cultural frames place on reform include JAMES M. JASPER, *THE ART OF MORAL PROTEST: CULTURE, BIOGRAPHY AND CREATIVITY IN SOCIAL MOVEMENTS* 75 (1997) and Jeff Goodwin & James M. Jasper, *Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory*, 14 SOC. F. 27, 44 (1999).

16. Zald, *supra* note 9, at 270–71.

17. *Id.*

18. Sidney Tarrow, *Mentalities, Political Cultures, and Collective Action Frames: Constructing Meaning Through Action*, in FRONTIERS IN SOCIAL MOVEMENT THEORY 189 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

certain rights appear at certain times, and why context is occasionally necessary to explain constitutional law.

## II. THE RIGHT TO BEAR ARMS

Prior to the 1960s, organizations like the National Rifle Association (“NRA”) had little interest in lobbying for a constitutional right to bear arms. Founded in 1871, the NRA began its career primarily interested in recreation, target shooting, and training, not defending the Second Amendment. In fact, from 1871 to 1977 the organization’s main agenda was promoting marksmanship and safety.<sup>19</sup> Organized by Civil War veterans disgruntled with the Union Army’s lack of emphasis on “target practice,” a skill the military believed would instill a negative “sense of individualism among the soldiers,” the NRA built a “state-of-the-art rifle range” at Creedmoor, New York, to train soldiers, primarily National Guardsmen, in marksmanship.<sup>20</sup> The NRA also began holding shooting competitions, including an international competition that drew almost 8,000 spectators to Creedmoor in 1874.<sup>21</sup> From 1874 to 1977, “marksmanship training” and “firearms safety” remained the primary concerns of the NRA while lobbying formed only a “minor part” of its institutional mission.<sup>22</sup>

Evidence of the NRA’s initial lack of political interest in gun control emerged in 1934, when Congress enacted a sweeping National Firearms Act (“NFA”) regulating certain types of machine guns, short-barreled shotguns, and silencers.<sup>23</sup> While a strict textualist reading of the Second Amendment might have justified challenging such a law, the NRA remained silent.<sup>24</sup> Part of this had to do with the negative connotations of the guns themselves, all of which were identified by the federal government as “gangster weapons,”<sup>25</sup> made famous during a frightening wave of organized gang violence during the first half of the 1930s.<sup>26</sup>

By contrast, the NFA did not regulate “military-style” weapons, heavier arms that the National Guardsmen training at Creedmoor might use.<sup>27</sup> In a 1939 case challenging the Act, the Supreme Court of the United States declared,

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19. OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 20–36 (1998).

20. *Id.* at 21–22.

21. *Id.* at 23.

22. *Id.* at 29.

23. Pub. L. No. 73–474, 48 Stat. 1236 (1934) (codified at I.R.C. §§ 5803–5871 (2012)); Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & LIBERTY 48, 60 (2008).

24. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”)

25. Frye, *supra* note 23, at 66.

26. *Id.* at 53.

27. *Id.* at 62–63.

ironically, that the Second Amendment only protected military-style weapons from federal regulation, not “gangster weapons,” hunting rifles, or any other type of small arm that did not have an obvious military use.<sup>28</sup> To support this view, the Court cited the text of the Second Amendment itself, which rationalized limits on federal gun regulations because of the need for “well regulated” state militias to the “security of a free state.”<sup>29</sup>

Precisely because the NRA was in the business of training state militias, it did not rankle at regulations controlling non-militia, “gangster” style guns. This apolitical stance changed, however, when the federal government moved to control military-style weapons in 1968. That year, Congress enacted the sweeping Gun Control Act (“GCA”), spurred by outrage over the assassinations of Robert Kennedy and Martin Luther King Jr.<sup>30</sup> While older NRA leaders tended to support the legislation, which “recodified” the National Firearms Act of 1934, a younger cadre of activist-oriented “hard-liners” viewed the GCA to be the beginning of a larger, liberal assault on gun rights generally in the United States.<sup>31</sup> Led by a former Border Patrol officer named Harlon Carter, these “Young Turks” voted proponents of the GCA out of power in 1977 and quickly made lobbying against gun regulations one of the primary functions of the association.<sup>32</sup>

For constitutional scholar Reva Siegel, Harlon’s insurgents mounted a relatively straightforward campaign of “popular constitutionalism” aimed at upholding an individual, not collective right to bear arms.<sup>33</sup> To do this, they joined an “emergent New Right movement” that also sought “restoration of the Constitution in matters concerning criminal defendants’ rights, gun control, and other ‘social issues,’ including prayer, busing, and abortion.”<sup>34</sup> From a teaching standpoint, these moves reflected a type of frame bridging, an effort to link disparate issues together, boosting support for all of them and resulting in a larger transformation of “the Republican Party platform.”<sup>35</sup> A crucial part of this platform was the appointment of Republican judges willing to frame conservative legal causes, like the individual right to bear arms, in terms of

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28. *Id.* at 62–63, 67.

29. U.S. CONST. amend. II.

30. *Crisis in the Cities*, N.Y. TIMES, July 29, 1967, at 24; *Hruska Opposed on Violence Unit: Schlesinger Says Senator Fought New Gun Curbs*, N.Y. TIMES, June 10, 1968, at 29; James M. Naughton, *U.S. Panel Urges Handgun Seizure to Curb Violence*, N.Y. TIMES, July 29, 1969, at 1; *Transcript of Johnson’s TV Address on the Riots*, N.Y. TIMES, July 28, 1967, at 11.

31. *Registration Due on Certain Weapons*, N.Y. TIMES, Oct. 31, 1968, at 17; DAVIDSON, *supra* note 19, at 30, 34; *see also* Anders Walker, *From Ballots to Bullets: District of Columbia v. Heller and the New Civil Rights*, 69 LA. L. REV. 509, 531 (2009).

32. DAVIDSON, *supra* note 19, at 31, 36.

33. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192, 201–02 (2008).

34. *Id.* at 212.

35. *Id.* at 212, 215.

“original intent,” a skillful way of “changing” the Constitution by avoiding the amendment process and calling instead for the restoration of first principles.<sup>36</sup>

A not insignificant amount of strategy went into the NRA’s litigation campaigns. For example, despite the fact that the NRA vigorously pursued an individual right to bear arms, it never challenged the GCA in court.<sup>37</sup> In a manner that professors might find worth mentioning to students in class, NRA lawyers carefully aligned their legal claims with cultural positions that they believed most Americans would condone at the time, positions that did not include combat weapons. This meant that widespread, private ownership of military-style weapons, AK-47s, M-16s, and so on, never made it onto the NRA’s litigation agenda, even though past Supreme Court rulings like *Miller* indicated that these were precisely the type of weapons that the Second Amendment protected.<sup>38</sup>

Why did the NRA, a diligent if not aggressive lobbying group, not promote deregulating military style weapons through court cases?<sup>39</sup> Perhaps the best answer is that American attitudes toward military-style weapons, the cultural frame surrounding such weapons, if you will, evolved considerably from 1939 to 1968, moving away from images of responsible National Guardsmen keeping guns safely in their homes, to radical extremists assassinating leaders and plotting government overthrow. To take just a few examples, not long after the GCA’s passage in 1968, stories began to break of people arrested under the law, many with ties to right-wing extremism and organized crime. On June 5, 1969, for example, Alcohol, Tobacco, and Firearms agents arrested Arthur Needles, a supplier to right-wing groups and the mob in Suffolk County, New York, seizing “dynamite bombs, machine guns, and dozens of rifles, shotguns, and handguns.”<sup>40</sup> On July 19, 1969, federal agents arrested Robert Bolivar DePugh, founder of “the ultra-right Minutemen,” a covert organization dedicated to “stockpiling weapons” in preparation for a “Communist take-over of all

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36. *Id.* at 217, 220.

37. *Id.* at 216. Arguably the only challenge to the GCA, as Siegel notes, was the 1986 Firearm Owners Protection Act, which limited aspects of the earlier law. Pub. L. No. 99–308, 100 Stat. 449 (1986) (codified at 18 U.S.C. §§ 921–929 (2012)).

38. Siegel, *supra* note 33, at 228. A distinction must be made here between the NRA’s actual litigation strategy, and some of the rhetoric of its leaders. As Siegel notes, prominent NRA officials like Tanya Metaksa did voice opposition to regulations of automatic weapons, though they never dared bring a legal Second Amendment challenge to them in court. *Id.*

39. Some might argue that the NRA’s participation in *Printz v. United States* was part of a larger opposition to federal regulation of automatic weapons, but this over-reads the claim in *Printz*, which opposed background checks required by the Brady Act. 521 U.S. 898, 902 (1997).

40. *High Bail Imposed in L.I. Arms Case*, N.Y. TIMES, June 7, 1969, at 45; Robert D. McFadden, *Weapons Cache is Seized With 4 Suspects in Suffolk*, N.Y. TIMES, June 6, 1969, at 1, 21.

governmental machinery in the United States.”<sup>41</sup> More raids followed, of Nazis, the Ku Klux Klan, the Black Panthers, and other groups, none of whom enjoyed majority support.<sup>42</sup>

In July 1969, the Commission on the Causes and Prevention of Violence recommended “[f]ederal minimum standards under which the states would restrict ownership of handguns.”<sup>43</sup> Among these standards were requirements that handgun owners license their guns, or sell them back to the federal government.<sup>44</sup> “[S]elf-defense,” argued the Commission, was not a sufficient reason to limit regulation, and was actually more likely to result in gun owners shooting “family or friends,” than burglars.<sup>45</sup>

As the government moved to limit the rights of average individuals to defend themselves, gun proponents began to push back, laying the foundations for a more robust, individual-focused interpretation of the right to bear arms. According to Republican Senator Roman Hruska of Nebraska, for example, the question of regulating handguns in 1969 should be left to the states.<sup>46</sup> “[U]rban unrest” contributed to this sentiment, as riots across the country “spurred sales of guns” for use in self-defense.<sup>47</sup> When Chicago congressman Abner Mikva proposed a ban on handguns in Illinois in 1971, he confronted significant opposition in the Illinois House and Senate.<sup>48</sup> Indiana Senator Birch Bayh encountered similar problems in 1972 when he tried to increase regulation of handguns following an assassination attempt on Alabama Governor George Wallace.<sup>49</sup> Both senators Jacob K. Javits of New York and Charles H. Percy of Illinois confronted problems when they tried to introduce a federal ban on

41. Donald Janson, *Fugitive Minutemen Never Aroused Suspicion in New Mexico*, N.Y. TIMES, July 20, 1969, at 47; see also *2 Held in Seizure of Machine Guns in California Raid*, N.Y. TIMES, Dec. 1, 1969, at 51 (describing federal raid of weapons cache owned by “Nazi buff” James Gary Steuard).

42. *15 Are Arrested in Weapons Raids: U.S. Agents in Midwest Act on ‘Illicit Gun Dealing,’* N.Y. TIMES, July 25, 1971, at 38; *2 Held With Truck Carrying Dynamite*, N.Y. TIMES, Jan. 21, 1970, at 94; *6 Men and 1,151 Guns Seized in New York Area*, N.Y. TIMES, July 30, 1980, at B8 (suspects arrested for sale of “gangster guns” that looked like “ball point pens and fire one bullet”); *Rap Brown Resentenced in New Orleans*, N.Y. TIMES, June 3, 1972, at 18 (describing sentencing of black militant for violation of the GCA); Martin Waldon, *Militants Stockpile Illegal Guns Across the U.S.*, N.Y. TIMES, Dec. 28, 1969, at 42.

43. Naughton, *supra* note 30, at 1.

44. *Id.* at 1, 18.

45. *Id.* at 18.

46. *Id.*

47. *Id.*

48. *Gun Controls Too Hot for Most Politicians*, CHI. TRIB., June 29, 1972, at 1; Abner Mikva, *A Plea for Gun Control Legislation*, CHI. TRIB., Sept. 16, 1971, at 24.

49. Bayh recommended an amendment to the GCA banning “the sale or transfer of any handgun to anyone but a law enforcement officer” unless the gun was considered primarily aimed at “lawful sporting purposes.” Ben A. Franklin, *Shooting of Wallace Spurs a New Effort to Tighten Gun Controls*, N.Y. TIMES, May 17, 1972, at 29.

handguns in “areas where violent crime is 20 per cent or more above the national average.”<sup>50</sup> Though local urban populations tended to favor such bans, national majorities proved skeptical.<sup>51</sup>

Opponents of gun bans gained allies among sportsmen. In October 1969, Massachusetts Senator Edward M. Kennedy failed to block an exception to the GCA exempting certain types of shotgun shells popular among hunters from licensing requirements.<sup>52</sup> Taking this as a sign that sportsmen should be exempted, Indiana Senator Birch Bayh attempted to push through a more restrictive federal gun control law, making sure to exempt weapons used for “sporting purposes,” but failed.<sup>53</sup> Such political trends sent clear signals to the NRA. Regardless of the Second Amendment’s text and the Supreme Court’s ruling in *United States v. Miller*, frame alignment placed the greatest chance of success on hunting weapons and handguns—not military style weapons.<sup>54</sup>

By the 1990s, arguments in favor of an individual right to bear arms in self-defense surged. Specifically, NRA advocates fleshed out the dual position that not only was the right to bear arms an individual constitutional right, but the right to bear arms in self-defense was an even greater, absolute right worthy of constitutional protection independent of the Second Amendment.<sup>55</sup> For example, NRA official Wayne LaPierre argued in 1994 that the “use of arms for self-defense” was a right that derived from natural law itself, pre-dating the founding.<sup>56</sup> One year later, Tanya Metaksa, executive director for the NRA’s

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50. Nancy Hicks, *Javits and Percy Ask Handgun Curb*, N.Y. TIMES, July 22, 1975, at 37.

51. William E. Farrell, *Majority at Hearing in Chicago Urges Congress to Ban Pistols*, N.Y. TIMES, Apr. 16, 1975, at 24; Wayne King, *Efforts to Curb Cheap Pistols Called Failure*, N.Y. TIMES, June 20, 1975, at 32; Robert Pear, *Crime Bill Challenged by Conservative Republicans*, N.Y. TIMES, Sept. 15, 1980, at A17 (describing opposition to federal criminal code restricting firearms by the conservative Senate Steering Committee). National opposition to gun control led to a more localized approach, focusing on municipal bans. See, e.g., Joanna Dember, *Trying a New Tactic in Handgun Control*, N.Y. TIMES, Dec. 2, 1979, at 32.

52. *Kennedy Plea Fails to Retain Gun Curb*, N.Y. TIMES, Oct. 10, 1969, at 13.

53. *Gun Controls Too Hot for Most Politicians*, *supra* note 48, at 4.

54. John Hinckley’s attempted assassination of Ronald Reagan created a surge of popular support for gun regulation, culminating in the Brady Handgun Violence Prevention Act. Pub. L. No. 103–159, 107 Stat. 1596 (1993) (codified at 18 U.S.C. §§ 921–922 (2012)). A provision of the law, U.S.C. § 922(s)(2), was invalidated by the Supreme Court in 1997. *Printz v. United States*, 521 U.S. 898, 936 (1997). The Public Safety and Recreational Firearms Use Protection Act, a ten-year ban of assault weapons, was enacted by Congress in September 1994 and signed into law by President Clinton. Pub. L. No. 103–322, 108 Stat. 1996 (1994) (codified as amended at 18 U.S.C. § 922 (2012)). The Act banning assault weapons was a subtitle of the Violent Crime Control and Law Enforcement Act of 1994. For a discussion of the attempted assassination of President Reagan and the positions of proponents and opponents of gun control, see Michael Norman, *The American Duel over Guns*, N.Y. TIMES, May 3, 1981, at 37.

55. WAYNE LAPIERRE, *Self-Defense: The Right and the Deterrent*, in GUNS, CRIME, AND FREEDOM (1994), reprinted in GUNS IN AMERICA: A READER 174 (Jan E. Dizard et al. eds., 1999).

56. See *id.*

Institute for Legislative Action, maintained that self-defense was nothing less than “a primary civil right” without which “there are no rights.”<sup>57</sup>

Metaksa and Pierre’s attempt to frame self-defense as an individual right proved a deft effort to realign the cultural frames of the right to bear arms away from communal ownership, i.e., militias, and towards individual ownership, a move that proved strategically sound after a disgruntled ex-soldier with militia ties named Timothy McVeigh bombed an Oklahoma City federal building in 1995.<sup>58</sup> Cognizant of the popular outrage that surged over McVeigh, the NRA took an overtly public stand against militias, even hiring Hollywood celebrity Charlton Heston—famous for playing Moses in the film *The Ten Commandments*—to soften the organization’s image, meanwhile embarking on a new frame alignment campaign, this time associating the right to bear arms with civil rights.<sup>59</sup>

Declaring itself “America’s oldest civil rights organization,” the NRA worked diligently to link the cause of gun owners to the longstanding struggle for racial equality in the United States. In 2008, for example, just as Barack Obama vaulted to the forefront of American politics, the NRA joined other social movement actors interested in gun rights, including the Congress of Racial Equality (“CORE”) to argue for an individual right to bear arms—free from any ties to militias.<sup>60</sup> The case targeted a handgun ban in Washington, D.C., but strummed civil rights chords that went as far back as 1942, the year CORE was founded as an organization dedicated to non-violent resistance against racial segregation in the American South.<sup>61</sup> In 1947, CORE targeted segregation on interstate carriers by staging an integrated bus ride through Virginia, North Carolina, Tennessee, and Kentucky, something it called the “Journey of Reconciliation.”<sup>62</sup> In 1961, under the leadership of James Farmer, CORE orchestrated a similar protest by sponsoring integrated buses filled with “freedom riders” through Deep South states like Alabama where white mobs set fire to one bus and brutalized the occupants of another.<sup>63</sup>

Precisely because CORE activists found themselves confronting relentless instances of white violence, the organization gradually grew weary of non-violence as a political strategy, particularly non-violent refusals to engage in armed self-defense.<sup>64</sup> Indeed, by the close of 1966, CORE president Floyd

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57. Tanya K. Metaksa, *Self-Defense: A Primary Civil Right*, in AM. RIFLEMAN, Nov. 1995, at 74 reprinted in GUNS IN AMERICA: A READER 194 (Jan E. Dizard et al. eds., 1999).

58. Todd S. Purdam, *Clinton Assails the Preachings of the ‘Militias,’* N.Y. TIMES, May 6, 1995, at 1, 9.

59. Siegel, *supra* note 33, at 232.

60. Walker, *supra* note 31, at 527.

61. *Id.* at 509–10.

62. *Id.* at 516.

63. *Id.*

64. Walker, *supra* note 31, at 517–18.

McKissick joined Stokely Carmichael, a coordinator for the Student Non-Violent Coordinating Committee (“SNCC”), in calling for armed self-defense and “black power.”<sup>65</sup> By the time of CORE’s 1966 convention in Baltimore, McKissick had begun to publicly declare non-violence a “dying philosophy.”<sup>66</sup>

Convinced that non-violence had become ineffectual and that black equality hinged on gun ownership and armed self-defense, CORE focused its brief in the D.C. case, styled *District of Columbia v. Heller*, on the Fourteenth Amendment, arguing that many of the Amendment’s framers intended that the Due Process and Privileges and Immunities Clauses be used to protect the rights of freed slaves to own guns.<sup>67</sup> Though the NRA resisted such an argument, Second Amendment expert Alan Gura, the Institute for Justice, and a majority of United States senators and congressmen agreed, marking a significant effort to align the legal frame of private gun ownership with the cultural frame of black rights.<sup>68</sup>

The Supreme Court, perhaps surprisingly, sanctioned this reasoning, adopting the originalist claim that the Fourteenth Amendment was designed to protect black gun ownership, even though the Amendment itself did not technically apply to the District of Columbia.<sup>69</sup> Why the Court cited such evidence was not clear as a matter of law.<sup>70</sup> However, the Court’s decision to cite the Fourteenth Amendment argument may ultimately have had less to do with legal doctrine than frame alignment. Precisely because CORE had linked gun ownership to black rights, the citation of black history might have appealed to the Court as a progressive way of framing gun rights, particularly at a moment when an African American was positioning himself for the presidency. Whether Obama’s bid for the White House was on the minds of the Supreme Court or not, his frame aligned with the effort to pitch self-defense as a civil right, a convergence that became clear when Obama himself publicly endorsed the Supreme Court’s opinion in *Heller* not long after it was decided.<sup>71</sup>

Immediately following the Supreme Court’s ruling in *Heller*, Second Amendment activist Alan Gura filed a complaint in the Northern District of Illinois, arguing that Chicago’s handgun ban, in place since 1982, violated the Second Amendment. Parallel suits followed, including two suits by the NRA,

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65. AUGUST MEIER & ELLIOT M. RUDWICK, *CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 1942–1968*, at 412 (Univ. of Ill. Press 1975) (1973).

66. *Id.* at 414.

67. Walker, *supra* note 31, at 515–27.

68. *Id.*

69. *Id.*

70. See Siegel, *supra* note 33, at 232.

71. Robert Barnes, *Justices Reject D.C. Ban on Handgun Ownership*, WASH. POST, June 27, 2008, at A1.

one against the Village of Oak Park, Illinois, and the other against the City of Chicago.<sup>72</sup>

Both the NRA and Gura argued, as in *Heller*, that the Fourteenth Amendment was intended to protect freed people of color in the post-Civil War South by protecting their right to bear arms against confiscation by Klan-governed southern states.<sup>73</sup> However, the NRA stressed the Amendment's Due Process Clause, while Gura dedicated a majority of his brief to the Amendment's Privileges and Immunities Clause.<sup>74</sup> This divergence, though subtle, represented its own form of cultural frame alignment. By aligning his brief with the Privileges and Immunities Clause, Gura hoped to gain the support of legal academics and liberals who opposed the Supreme Court's narrow curtailment of the Clause in a Reconstruction-era ruling styled the *Slaughter-House Cases*.<sup>75</sup> Gura's decision to focus on privileges and immunities, in other words, represented a classic case of frame bridging—he connected the cause of gun owners to a larger panoply of liberal positions.

Conversely, the NRA pursued a more conservative, less liberal line of argument, pushing the Court to incorporate the Second Amendment through the Due Process Clause of the Fourteenth Amendment.<sup>76</sup> This represented its own form of frame alignment, a bid to keep conservative support for gun rights high, including conservative support on the Supreme Court, without appearing to pander to liberals. During oral argument, for example, Justice Scalia endorsed the idea of incorporating the Second Amendment to the states through the Due Process Clause of the Fourteenth Amendment, but objected to the Privileges and Immunities Clause argument as the “darling of the professoriate.”<sup>77</sup> Justice Alito agreed, making it clear in the Court's majority opinion that the Privileges and Immunities Clause would be untouched, while holding that the Second Amendment should in fact be incorporated to the states on account of the fact

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72. The district court judge joined the two NRA actions and ruled in favor of the bans in *National Rifle Ass'n v. Village of Oak Park*, 617 F. Supp. 2d 752 (N.D. Ill. 2008). The court simultaneously dismissed Gura's action. Gura and the NRA both appealed and the Seventh Circuit consolidated the appeals into *McDonald v. City of Chicago*.

73. Brief for Petitioner at 6, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

74. Robert Barnes, *NRA Avoids Getting Shut Out of Gun Case*, WASH. POST, Feb. 8, 2010, at A13.

75. Tony Mauro, *Liberals Use Supreme Court Gun Ban to Bolster Other Rights*, LAW.COM (Feb. 24, 2009, 12:00 AM), <https://www.law.com/almID/1202428529045>; Adam Liptak, *Justices Will Weigh Challenges to Gun Laws*, N.Y. TIMES, Oct. 1, 2009, at A17.

76. For the dispute between Gura and the NRA over litigation strategy, see Barnes, *supra* note 74, at A13.

77. Adam Liptak, *Justices Seem to Lean Toward Extending Individual Right to Own Guns*, N.Y. TIMES, Mar. 3, 2010, at A14.

that “the right to keep and bear arms was highly valued for purposes of self-defense.”<sup>78</sup>

#### CONCLUSION

The Court’s emphasis on self-defense in *McDonald* was revealing, an indication that the gun lobby’s frame alignment strategies had worked. Despite differences in litigation strategy, in other words, both the NRA and Alan Gura had agreed on one thing: litigating against handgun bans as infringements on the right to self-defense represented a more strategic alignment of legal and cultural frames than trying to overturn more stringent regulations, like the GCA’s limits on military-style weapons. Though the Supreme Court had once maintained that military-style weapons were the only weapons protected by the Second Amendment, the NRA and other proponents of gun rights like Gura realized that such a position had become politically and culturally untenable by the close of the twentieth century. Indeed, while the NRA did indicate support for a bill tightening the definition of machine guns in 2007, its litigation team steered clear of an outright challenge, indicating that the lobby had learned the value of cultural frame alignment.<sup>79</sup> That both the NRA and Gura made black rights a cornerstone of their Second Amendment arguments in *Heller* and *McDonald* leaves us with perhaps the most compelling example of frame alignment, an effort to align a constitutional position with the ascendance of America’s first African-American president. To students interested in knowing why the Second Amendment became activated when it did, and in the way it did, the language of cultural frames provides a helpful analytic.<sup>80</sup>

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78. *McDonald*, 561 U.S. at 758–59, 770.

79. Gary Emerling & David C. Lipscomb, *Gun Control Still in Force, Chief Says: Semiautomatics Banned*, WASH. TIMES, June 28, 2008, at A1.

80. Popular support for gun control dwindled during the first decade of the twentieth century, increasing the Legal Opportunity Structure for federal cases like *Heller* and *McDonald*. To take just a few examples, a 2008 Gallup poll indicated that only twenty-eight percent of Americans favored an absolute ban on handguns, significantly lower from the time the poll was first taken in 1959, when sixty percent of the population favored a total ban. Jeffrey M. Jones, *In U.S., Record-Low Support for Stricter Gun Laws*, GALLUP (Oct. 9, 2009), <http://news.gallup.com/poll/123596/in-u.s.-record-low-support-stricter-gun-laws.aspx>. According to a CNN/Opinion Research Corporation poll conducted in 2009, only thirty-nine percent of Americans favored stricter gun laws of any kind, much less outright bans. Bill Schneider, *Poll: Fewer Americans Support Stricter Gun Control Laws*, CNN (Apr. 8, 2009), <http://www.cnn.com/2009/POLITICS/04/08/gun.control.poll/> [<https://perma.cc/2JNP-7Z4G>].