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## RESPONSE

## RIGHTS AS TRUMPS OF WHAT?†

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In the archetypal U.S. rights case, a litigant asks a court to block, invalidate, or remedy a government action on the basis that it violates a constitutional guarantee. The archetype emerges from three basic characteristics of the U.S. constitutional system: the power of judicial review, the state action requirement, and the enumeration of negative (rather than positive) guarantees. In such a case, constitutional rights are tied to certain kinds of government wrongs. But which wrongs? And how can, or should, rights respond to them?

In his important Foreword, *Rights As Trumps?*, Professor Jamal Greene explores “two competing frames [that] have emerged for adjudicating conflicts over rights.”<sup>1</sup> In the first, which corresponds with that of rights as trumps, “rights are absolute but for the exceptional circumstances in which they may be limited.”<sup>2</sup> In the second, which generally corresponds with proportionality review, “rights are limited but for the exceptional circumstances in which they are absolute.”<sup>3</sup> Greene argues that the first frame has been broadly employed by the Supreme Court in recent decades, but that it “has special pathologies that ill prepare its practitioners to referee the paradigmatic conflicts of a modern, pluralistic political order.”<sup>4</sup>

As Greene notes,<sup>5</sup> generalizations about the rights-as-trumps frame are hard to maintain because U.S. constitutional law itself is pluralistic and diverse, even within the context of a single constitutional guarantee.

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† Responding to Jamal Greene, *The Supreme Court, 2017 Term — Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28 (2018).

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<sup>1</sup> Jamal Greene, *The Supreme Court, 2017 Term — Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 30 (2018).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 43.

The First Amendment is sometimes treated as trump-like — when the Court perceives viewpoint discrimination, for example<sup>6</sup> — and often is not — as when the Court evaluates a restriction in a nonpublic forum.<sup>7</sup> The Equal Protection Clause is sometimes treated as trump-like — when the Court perceives a racial classification motivated by animus<sup>8</sup> — and often is not — as when the Court evaluates a nonsuspect classification.<sup>9</sup>

The underlying question in U.S. constitutional law, then, is usually not whether to embrace the rights-as-trumps frame, but when and why. And it is here that Greene makes an especially subtle and important contribution, by highlighting the ways in which reflexive resort to that frame can lead to an absolutist, corrosive characterization of constitutional conflicts.

For example, “[b]ecause the rights-as-trumps frame cannot accommodate conflicts of rights, it forces us to deny that our opponents have them.”<sup>10</sup> Such rights-versus-rights conflicts are exemplified in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>11</sup> the case with which Greene opens his Foreword.<sup>12</sup> Precisely because the conflicting rights and interests of the individuals are prominent on both sides in that case, it does not neatly fit the government-focused archetype described above — the State of Colorado is almost an intermediary. But in most cases, even in our pluralistic political order, the government action will usually be more central, raising a different kind of rights-versus-rights conflict: between the rights of an individual rights-holder and what Greene calls “a democratic people’s first-order *right* to govern itself.”<sup>13</sup>

The modest goal of this Response is to emphasize and extend that aspect of Greene’s contribution — not how rights-as-trumps function, but what kinds of government action trigger them. I focus here on two such triggers: first, “government bigotry, intolerance, or corruption,”<sup>14</sup> and, second, narrow but exceptional situations where even a well-meaning

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<sup>6</sup> See *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (Scalia, J., concurring in the judgment) (“Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.”).

<sup>7</sup> Regulations of speech in such nonpublic forums are acceptable so long as they are “reasonable in light of the purpose served by the forum and are viewpoint neutral.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).

<sup>8</sup> Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 888 (2012) (“The Court has held on numerous occasions that where a law is based on such animus, it will not survive even the most deferential level of scrutiny under the Equal Protection Clause.”).

<sup>9</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (applying rational basis review to laws discriminating against the intellectually disabled).

<sup>10</sup> Greene, *supra* note 1, at 34.

<sup>11</sup> 138 S. Ct. 1719 (2018).

<sup>12</sup> Greene, *supra* note 1, at 30.

<sup>13</sup> *Id.* at 128 (emphasis added).

<sup>14</sup> *Id.* at 127–28.

government has simply gone too far. The latter, which are not central to Greene's account, are defined not by government purpose but by the burden they place on a rights-holder — where a court perceives that burden to be a total deprivation of the right, it is more likely to bypass scrutiny entirely and to invoke the rights-as-trumps frame.<sup>15</sup> Put differently: just as proponents of the rights-as-trumps frame will sometimes avoid having to deploy the trump by going to great lengths to deny that a constitutional interest has been burdened,<sup>16</sup> they might also tack in the other direction and attempt to justify trumps by characterizing the burden as total.

Focusing on the triggers for trumps might seem like nothing more than a way of restating the rules: since trumps are outcome-determinative rules, to say that *X* triggers a rule is just to say that the rule prohibits *X*.<sup>17</sup> But that shift matters, because the application of a doctrinal rule can too often cover an outcome-determinative “sleight of hand” that set the rule in motion.<sup>18</sup> By focusing more intently on the *specific* kinds of government wrongs that tend to trigger rules — improper government purpose, total deprivations of a constitutional entitlement, or something else — we might better understand not only the jurisprudential preferences at play, but the underlying views of government. When courts employ the rights-as-trumps frame, they are singling out particular kinds of government wrongs. What kinds? And why?

The first Part of this Response argues that trumps can be triggered not only by the pathological frames that Greene identifies, but also by scenarios where particular laws — even if well-intentioned — go too far in terms of the burdens they impose on rights-holders. Part II explores how these twin frames (Greene's, and my minor addition) have been deployed in Second Amendment litigation. And Part III takes the occasion of the recent grant of certiorari in *New York State Rifle & Pistol Ass'n v. City of New York*<sup>19</sup> to argue (consistent with Greene) that the Court should avoid endorsing a broad pathological frame in Second Amendment cases, and should instead resolve the case either using some form of proportionality review or the burden-focused trump approach described in this Response.

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<sup>15</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 50 (1976) (per curiam) (“[N]o test of reasonableness can save [such] a state law from invalidation as a violation of the First Amendment.” (second alteration in original) (quoting *Mills v. Alabama*, 384 U.S. 214, 220 (1966))).

<sup>16</sup> See William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 114 n.15 (1982) (collecting cases where Justice Black upheld laws “believed to be unconstitutional . . . even by more conservative colleagues not sharing his ‘absolute’ commitment to the first amendment”).

<sup>17</sup> See Greene, *supra* note 1, at 60 (noting correspondence between trumps and rules).

<sup>18</sup> *Id.* at 76.

<sup>19</sup> 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).

## I. BURDEN-BASED TRIGGERS FOR TRUMPS

Greene explains that the rights-as-trumps frame results not only from preferences for rules over standards, but also from one's understanding of the relevant rights regime.<sup>20</sup> In particular, he argues that "a constitutional court's frame for rights adjudication should fit its paradigm rights cases."<sup>21</sup> And despite his general skepticism of the rights-as-trumps frame, he notes that it might be suitable where the paradigm cases are "pathological" and "courts must defend the very existence of individual rights against government bigotry, intolerance, or corruption."<sup>22</sup>

This account sits comfortably with many standard arguments in favor of rules in constitutional rights adjudication. In the words of the standard-bearer (so to speak) of this view, Justice Black, the absolutist approach to constitutional rights holds that the purpose of the Bill of Rights "was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence."<sup>23</sup>

It is impossible to give a general account of governmental motive vis-à-vis constitutional entitlements.<sup>24</sup> Even rights that are especially sensitive to "government bigotry, intolerance, or corruption" — equal protection and free speech are examples — also deal with many cases where government purpose is not the sole or even the main issue. The paradigm cases of government intolerance may be limited to certain doctrinal subcategories such as viewpoint discrimination and racial animus.

Conversely, some rights are not particularly sensitive to government motive and yet have developed their own trump-like rules. This suggests that the rights-as-trumps frame can be triggered by factors other than a diagnosis of pathology. Takings is an example. While there is a nominal motive inquiry in takings cases (that is, the taking must be for a "public use"), its relaxed enforcement by courts suggests that they are not particularly concerned with protecting property rights against bigotry, intolerance, or corruption.<sup>25</sup> (Whether they *should* be is of course

<sup>20</sup> Greene, *supra* note 1, at 35. Because of the appropriately broad sweep of the Foreword, Greene's account is largely a general one. *See id.* at 96–119 (describing "contingent origins" of the rights-as-trumps frame in U.S. constitutional law).

<sup>21</sup> *Id.* at 127.

<sup>22</sup> *Id.* at 127–28.

<sup>23</sup> *Konigsberg v. State Bar*, 366 U.S. 36, 61 (1961) (Black, J., dissenting); *see id.* at 61–65.

<sup>24</sup> Driven partly by developments in case law, *see, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–21 (2018) (considering the constitutionality of President Trump's proclamation limiting entry to the United States for nationals of certain countries), recent scholarship has demonstrated a renewed focus on the relevance of animus. *See* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 65–75, 163–72 (2017); Leslie Kendrick & Micah Schwartzman, *The Supreme Court, 2017 Term — Comment: The Etiquette of Animus*, 132 HARV. L. REV. 133, 134–36 (2018).

<sup>25</sup> *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 479–80 (2005).

a matter of debate.<sup>26</sup>) Regulatory takings law — the basic goal of which is to determine whether a regulation has gone “too far”<sup>27</sup> — is usually governed by the kind of multi-factor balancing test that typifies proportionality review.<sup>28</sup>

And yet takings doctrine also contains trump-type rules. A permanent physical occupation of land, for example, constitutes a taking no matter how minimal and regardless of the government’s motivation.<sup>29</sup> Or consider the rule in *Lucas v. South Carolina Coastal Council*,<sup>30</sup> which treats as a per se taking anything that denies all economically beneficial uses of land.<sup>31</sup>

The rule in *Lucas* and others like it trigger the rights-as-trumps frame based not on government intolerance or bigotry, but on the *impact* of a law or regulation. Where that impact constitutes a total deprivation of some aspect of the right — a “ban,” as it were — then courts will resort to a trump. One sees the same phenomenon in other areas of constitutional law, including the First Amendment, where the Court has by its own account “voiced particular concern with laws that foreclose an entire medium of expression,”<sup>32</sup> and in the nascent law of the Second Amendment, where some judges have identified a per se rule of invalidity against laws that ban classes of weapons,<sup>33</sup> or means of carrying them.<sup>34</sup>

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<sup>26</sup> See *id.* at 505 (O’Connor, J., dissenting) (“Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.”).

<sup>27</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.).

<sup>28</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124–25 (1978) (describing an “essentially ad hoc, factual inquir[y]” that takes into account the “character of the government action,” the regulation’s “economic impact . . . on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” and the nature of the public purposes or interests).

<sup>29</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982). I mean “minimal” in the physical sense — in *Loretto*, it was a cable and cable box that together covered about one-eighth of one cubic foot of space atop an apartment building. *Id.* at 443 (Blackmun, J., dissenting). In conceptual terms, the Court saw the intrusion as significant: “[T]he government does not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand.” *Id.* at 435 (majority opinion) (quoting *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)). *Loretto* can therefore be understood as a trump driven by the Court’s characterization of the burden on the rights-holder.

<sup>30</sup> 505 U.S. 1003 (1992).

<sup>31</sup> *Id.* at 1019.

<sup>32</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); cf. *Citizens United v. FEC*, 558 U.S. 310, 337 (2010) (characterizing restrictions on corporate campaign spending as “an outright ban [on speech from a particular class of speakers], backed by criminal sanctions,” en route to holding that restriction unconstitutional).

<sup>33</sup> See *infra* notes 52–56 and accompanying text; see also *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (describing D.C.’s prohibition as reaching “an entire class of ‘arms’ that is overwhelmingly chosen by American society for [a] lawful purpose”).

<sup>34</sup> *Wrenn v. District of Columbia*, 864 F.3d 650, 666–68 (D.C. Cir. 2017) (striking down D.C.’s good-cause concealed-carry licensing standard under a “categorical approach” upon finding that the law denied “the typical citizen” the freedom to carry a gun).

The justification for applying trumps in these contexts could potentially be explained as a subset of the pathological approach (that is, total deprivations are proxies for government intolerance), but that is not typically how courts have explained it — they focus on the burden to the rights-holder, not the motive of the government.<sup>35</sup> As Greene notes, Professor Ronald Dworkin’s own commitment to the rights-as-trumps frame arose from his preoccupation with “wholesale denials of citizenship.”<sup>36</sup> And Greene demonstrates that by designing rights to resolve such extreme warnings, Dworkin also ended up drawing some questionable lines — denying, for example, that racial discrimination against a white student implicated any constitutional interest whatsoever.<sup>37</sup>

The preceding is meant simply to be descriptive — to show the existence of an alternative road to trumps. But this alternative road also raises significant complications, some of which it shares with Greene’s approach and some of which are distinct. First, applying rights as trumps in the context of total deprivations presents basically the inverse of the scenario that Greene describes, albeit with the same underlying risk of distorting constitutional principles. Rather than avoiding proportionality by characterizing the constitutional burden as zero, it does so by characterizing the burden as total. Rather than minimizing valid constitutional interests, it potentially exaggerates government interference.

Again, *Lucas* is a prime example. The application of a bright-line rule in that case did not depend on a conclusion that South Carolina harbored discriminatory or corrupt intent toward property owners in general, but that it had denied all economically productive uses to Mr. Lucas in particular.<sup>38</sup> The conclusion was not forward-looking and general, but backward-looking and specific. Lucas’s case was in no way paradigmatic, but the burden he faced was significant enough — total, according to the (dubious) lower court finding<sup>39</sup> — that it demanded a trump in response. To the dissenters, this was the equivalent of “launch[ing] a missile to kill a mouse.”<sup>40</sup>

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<sup>35</sup> See, e.g., *Gilleo*, 512 U.S. at 55 (“Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent — by eliminating a common means of speaking, such measures can suppress too much speech.”); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1458 (2009) (“[T]he ‘entire medium’ and ‘entire class’ formulations should be seen as shorthand proxies for an inquiry into the functional magnitude of the restriction: whether the measures ‘significantly impair the ability of individuals to communicate their views to others,’ or whether they significantly impair the ability of people to protect themselves.” (quoting *Gilleo*, 512 U.S. at 55 & n.13)).

<sup>36</sup> Greene, *supra* note 1, at 32.

<sup>37</sup> *Id.* at 67–68.

<sup>38</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>39</sup> *Id.* at 1044–45 (Blackmun, J., dissenting).

<sup>40</sup> *Id.* at 1036.

Greene's Foreword is mostly about the missiles; this Response is more about the mice — the targets of the rules. And that raises a problem of burden-characterization, which is far more significant for the kinds of triggers I describe than for Greene's framework.<sup>41</sup> To call a law a "ban," for example, is usually not a result of any particular form of doctrinal analysis, but rather an *ex ante* trigger for rule-like doctrines. Where such a characterization is made — whether the object of the ban is a medium of expression, a class of arms, or a religious group — a court is much more likely to employ the rights-as-trump frame. But the identification of bans is not *itself* totally governed by rules, nor for that matter is it clearly governed by text, history, tradition, or even precedent. Nothing in the First Amendment clearly tells us what a "medium of expression" is, nor why that should matter.

That is not to say that the problem is insurmountable, nor that law can provide no guidance. Ever since Justice Holmes's opinion in *Pennsylvania Coal Company v. Mahon*<sup>42</sup> established that government regulation can sometimes go "too far" and constitute a taking,<sup>43</sup> courts and scholars have worked to resolve the "denominator" problem, which Professor Frank Michelman identified in 1967 (in the pages of this *Review*, no less).<sup>44</sup> The Court's most recent pronouncement came just two years ago in *Murr v. Wisconsin*,<sup>45</sup> which held that, in identifying the parcel against which a regulation's impact should be measured, judges must consider "the treatment of the land under state and local law," "the physical characteristics of the land," and "the prospective value of the regulated land."<sup>46</sup> Ultimately, the question is "whether reasonable expectations . . . would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."<sup>47</sup> This inquiry is substantially empirical in the sense that, to adopt Greene's locution, it "requires reliable access to social facts."<sup>48</sup> For present purposes, though, what is particularly notable about the *Murr* test is that it is itself a multifactor "reasonable expectations" approach that operates as a *predicate* to a potential bright-line rule (that is, a finding of total takings).

Although one could illustrate the challenge in virtually any area of constitutional law, such questions are especially prominent in the context of the Second Amendment. A decade after the Supreme Court's

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<sup>41</sup> I explore this problem more thoroughly in Joseph Blocher, *Bans*, 129 YALE L.J. (forthcoming 2019).

<sup>42</sup> 260 U.S. 393 (1922).

<sup>43</sup> *Id.* at 415.

<sup>44</sup> Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967).

<sup>45</sup> 137 S. Ct. 1933 (2017).

<sup>46</sup> *Id.* at 1945.

<sup>47</sup> *Id.*

<sup>48</sup> Greene, *supra* note 1, at 63.

decision in *District of Columbia v. Heller*,<sup>49</sup> the law and theory of the right to keep and bear arms are starting to take shape,<sup>50</sup> even as important questions remain unanswered.<sup>51</sup> The Second Amendment therefore provides an extremely useful lens into the development of constitutional doctrine and the characterization of legal burdens.

In the course of striking down the District of Columbia's handgun regulation,<sup>52</sup> Justice Scalia's majority opinion noted that the law prohibited "an *entire class* of 'arms' that is overwhelmingly chosen by American society for [a] lawful purpose,"<sup>53</sup> and was, largely for that reason, unconstitutional.<sup>54</sup> Some judges, including most prominently then-Judge Kavanaugh, have read this to mean that the Second Amendment's scope should be determined on a categorical basis, as imposing bans on, for instance, certain categories of weapons<sup>55</sup> — a *per se* rule different in kind even from strict scrutiny.<sup>56</sup>

In short, there are at least two triggers for the rights-as-trumps frame: the pathological approach that Greene emphasizes, and a burden-based analysis exemplified by a finding of "total" deprivation. There may well be others. But these triggers are not themselves governed by traditional doctrinal machinery or constitutional interpretation. No amount of interpretive work can separate situations in which the government is exhibiting intolerance and bigotry (thus demanding a trump) from those in which it is merely incompetent (in which case proportionality might be favored).<sup>57</sup> Likewise, labeling a law a "ban" on some aspect of a right (thus subject to a trump) is not clearly governed by text, history, tradition, or even precedent.<sup>58</sup> Nothing in the First Amendment tells us what a "medium of expression" is, nor why that

<sup>49</sup> 554 U.S. 570 (2007).

<sup>50</sup> See generally 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 (2018).

<sup>51</sup> See generally JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER 100–17 (2018).

<sup>52</sup> The law was and is generally referred to as a "ban," though — illustrating the central challenge of this Response — it actually was not a complete prohibition. D.C. Code §§ 7-2502.01(b) (2001) (enumerating exceptions for law enforcement officers, dealers, and others); *Heller*, 554 U.S. at 575 n.1 (dismissing exceptions as irrelevant to the challenge, which involved none of those categories).

<sup>53</sup> *Heller*, 554 U.S. at 628 (emphasis added).

<sup>54</sup> *Id.* at 628–29.

<sup>55</sup> See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1270 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("It follows from *Heller's* protection of semi-automatic handguns that semi-automatic rifles are also constitutionally protected and that D.C.'s ban on them is unconstitutional.").

<sup>56</sup> *Id.* at 1271 (contrasting a test based on "text, history, and tradition" with a "balancing test such as strict or intermediate scrutiny"); see also *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 702–07 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment); *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting), *withdrawn and superseded on reh'g*, 682 F.3d 361 (5th Cir. 2012).

<sup>57</sup> Greene, *supra* note 1, at 127–28.

<sup>58</sup> See Blocher, *supra* note 41.

should matter. Those determinations can trigger nondiscretionary, categorical rules, but the determinations themselves will almost inevitably involve the kinds of empirical questions that are more suited to proportionality review.<sup>59</sup>

## II. THE PATHOLOGICAL SECOND AMENDMENT?

Greene suggests that the choice of the rights-as-trumps frame might be defensible “where courts must defend the very existence of individual rights against government bigotry, intolerance, or corruption.”<sup>60</sup> By contrast, when “the paradigm cases arise from the potential overreach or clumsiness of a government acting in good faith to solve actual social problems, rights adjudication must be sensitive to a democratic people’s first-order right to govern itself.”<sup>61</sup>

This division of doctrinal labor is attractive. But in many areas, the debate is less about the descriptive or even normative case for the distinction and more about how it applies to particular rights. The root disagreement often has more to do with whether particular cases or rights regimes qualify as paradigmatic or not, and specifically whether particular cases or regimes are really threatened or not. The division between rights-as-trumps and proportionality is the terrain for the conflict — the battlefield, rather than the battle.

Again, the Second Amendment is painfully exemplary. On some prominent accounts, within the right itself — and not just the doctrinal frame — “rests a darker portrait, a legal *Guernica* cluttered with slippery slopes, law school hypotheticals, and assorted horrors on parade.”<sup>62</sup> As Judge Kozinski once remarked in a dissenting opinion: “The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed . . . . However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.”<sup>63</sup> *Masterpiece Cakeshop* merely adopted the “polemical” style;<sup>64</sup> *Heller* was born in it.<sup>65</sup>

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<sup>59</sup> Greene, *supra* note 1, at 63.

<sup>60</sup> *Id.* at 127–28.

<sup>61</sup> *Id.* at 128.

<sup>62</sup> *Id.* at 31 (describing the rights-as-trumps frame).

<sup>63</sup> *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc); see also Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (a Call to Historians)*, 73 *FORDHAM L. REV.* 653, 653–59 (2004) (exploring the longstanding argument made by gun rights advocates that gun control led to the Holocaust).

<sup>64</sup> Greene, *supra* note 1, at 80.

<sup>65</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 598 (2007) (venerating the idea that “when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny”).

In the Second Amendment context, then, the dispute is not about Greene's conclusion that proportionality review is appropriate where the "paradigm" cases "arise from the potential overreach or clumsiness of a government acting in good faith to solve actual social problems."<sup>66</sup> Instead, the dispute is about whether the Second Amendment's paradigm cases fit that mold — whether, in other words, Greene is correct that "'tyranny' is simply not at stake in assessing . . . a measure requiring a trigger lock on long arms held within the sixty-one square miles of the nation's capital."<sup>67</sup>

For some gun rights advocates, disagreement with the latter proposition is fundamental. They believe that, at least when it comes to guns, "the government is a bad actor and not just a clumsy one,"<sup>68</sup> and that support for gun regulation is motivated by anti-gun bias.<sup>69</sup> Among the more extreme, this is something of an article of faith. When the Senate considered expansion of background checks in the wake of the Newtown massacre<sup>70</sup> — a proposal that was overwhelmingly popular, even among gun owners<sup>71</sup> — National Rifle Association leadership described it as part of "an anti-gun agenda that seeks to restrict firearm ownership in America — as much as they can, however they can, and as soon as they can."<sup>72</sup>

Justice Scalia gestured in this direction in the dramatic closing lines of *Heller*: "Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct."<sup>73</sup> The suggestion was that an ominous "some" were requesting judicial extinction of the right to keep and bear arms. Viewed through that lens, the resort to rights-as-trumps makes sense, even on Greene's account.

Greene's account also sheds new light on the significance of the fact that some gun rights advocates invoke the constitutional struggle for racial equality, explicitly comparing *Heller* to *Brown v. Board of*

<sup>66</sup> Greene, *supra* note 1, at 128.

<sup>67</sup> *Id.* at 91.

<sup>68</sup> *Id.* at 65.

<sup>69</sup> See, e.g., JOHN R. LOTT, JR., THE BIAS AGAINST GUNS: WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG 225–26 (2003).

<sup>70</sup> Michael D. Shear, *Background Checks Are Still Stumbling Block in Gun Law Overhaul*, N.Y. TIMES (Apr. 2, 2018), <https://nyti.ms/2TzgmQ9> [<https://perma.cc/C7BX-QAAV>].

<sup>71</sup> See Mark Glaze, *Americans, Even NRA Members, Want Gun Reforms*, CNN (Feb. 1, 2013, 7:42 AM), <http://www.cnn.com/2013/01/31/opinion/glaze-gun-control> [<https://perma.cc/EZH8-HJ8U>] (stating that "74% of NRA members" support background checks).

<sup>72</sup> *Senate to Take Up Anti-Gun Legislation Soon!*, NRA INST. FOR LEGIS. ACTION (Apr. 5, 2013), <https://www.nraila.org/articles/20130405/senate-to-take-up-anti-gun-legislation-soon> [<https://perma.cc/7B87-P5Q9>].

<sup>73</sup> *District of Columbia v. Heller*, 554 U.S. 570, 636 (2007).

*Education*<sup>74</sup> and lower courts who reject gun rights claims to the segregationists who engaged in “massive resistance” to *Brown*.<sup>75</sup> As Greene explains, the turn to rights-as-trumps in American constitutional rights law was “a way of reconciling the post-*Lochner* regime of deference to government actors with the unique place of race in the American constitutional order.”<sup>76</sup> Claiming the mantle of *Brown* not only ennobles the struggle for gun rights, but might also be a bid to import the rights-as-trumps frame from equal protection law. At the very least, invoking *Brown* helps summon the Elysian notion that judicial review may be justified where the political process has failed.<sup>77</sup>

This makes it particularly notable that the judiciary is regularly accused of treating the Second Amendment as a “second-class right.”<sup>78</sup> Justice Thomas, for example, has repeatedly claimed that the Second Amendment is being given second-class treatment.<sup>79</sup>

### III. NEW YORK STATE RIFLE & PISTOL ASS'N V. CITY OF NEW YORK

What do these arguments portend for the future of gun rights and regulation? As a doctrinal matter, the Supreme Court has given even less guidance on the Second Amendment than on any of the three areas

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<sup>74</sup> See Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223, 224 (2014); David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. F. 230, 230 (2014).

<sup>75</sup> Editorial, *Massive Gun Resistance*, WALL ST. J. (Apr. 12, 2013, 6:38 PM) <https://www.wsj.com/articles/SB10001424127887324600704578402760760473582> [<https://perma.cc/HLZ2-CXAA>]. Briefs and scholarship have also discussed lower courts' resistance. See, e.g., *Petition for Writ of Certiorari at 24*, *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (No. 15-133); *Petition for a Writ of Certiorari at 3*, *Drake v. Jerejian*, 134 S. Ct. 2134 (2014) (No. 13-827); Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court's Second Amendment Decisions*, 81 TENN. L. REV. 673, 673 (2014).

<sup>76</sup> Greene, *supra* note 1, at 35 (footnote omitted).

<sup>77</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75-77 (1980).

<sup>78</sup> Ruben & Blocher, *supra* note 50, at 1447-50 (providing examples from cases and briefs); see also 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)); Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57 (2018) (concluding that there are plausible alternative explanations for the data other than the “second-class” argument). For a broader argument against the second-class thesis, see Timothy Zick, *The Second Amendment as a Fundamental Right*, HASTINGS CON. L.Q. (forthcoming 2019).

<sup>79</sup> *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from the denial of certiorari) (“The right to keep and bear arms is apparently this Court’s constitutional orphan.”); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from the denial of certiorari); *Voisine v. United States*, 136 S. Ct. 2272, 2291-92 (2016) (Thomas, J., dissenting); *Friedman*, 136 S. Ct. at 450 (Thomas, J., dissenting from the denial of certiorari); Transcript of Oral Argument at 35-39, *Voisine*, 136 S. Ct. 2272 (No. 14-10154); see also Josh Blackman, *Justice Thomas Speaks Truth to Power: Second Amendment Is Not a Second-Class Right*, JOSH BLACKMAN’S BLOG (Mar. 1, 2016), <http://joshblackman.com/blog/2016/03/01/justice-thomas-speaks-truth-to-power-second-amendment-is-not-a-second-class-right/> [<https://perma.cc/M4XK-CQAX>].

Greene discusses in the “Forward” section of his Foreword.<sup>80</sup> (Gerrymandering is the closest competitor.) But while this Response was being prepared for publication, the Court granted certiorari in *New York State Rifle & Pistol Ass’n v. City of New York*, a challenge to the constitutionality of New York City’s licensing scheme limiting the transportation of locked and unloaded handguns to within city limits.<sup>81</sup>

The case presents a near-perfect test of the arguments that Greene makes at length, and which this Response has attempted marginally to amplify. Picking up the “second-class rights” theme discussed above, the petitioners have cast their case as one involving the kind of government bigotry, intolerance, or corruption that, in Greene’s framework, demands a trump. Merits briefing has not been scheduled as of this writing, but even in their reply brief at the certiorari stage, petitioners argued that “[t]he City betrays [in this law and in the litigation] its hostility to Second Amendment rights.”<sup>82</sup> To the degree that they can convince the Justices that, for example, contemporary gun owners face the same kinds of political or legal obstacles as black Americans did in the civil rights era,<sup>83</sup> *Heller*’s “romantic vision of doctrinal simplicity and coherence”<sup>84</sup> may present a safe haven, walled off by trumps.

But, speaking broadly, that is a hard argument to take seriously. The vast majority of Americans support the individual right to keep and bear arms recognized in *Heller*.<sup>85</sup> The Attorney General and a majority of Congress (joined by the Vice President) filed briefs in *Heller* supporting the right to keep and bear arms for private purposes, as did most state attorneys general.<sup>86</sup> The decision was rendered in the midst of a presidential election, and both major candidates (Barack Obama and John McCain) immediately expressed support for its central conclusion.<sup>87</sup>

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<sup>80</sup> Greene, *supra* note 1, at 119–31; see also Sanford Levinson, *Comment on Ruben and Blocher: Too Damn Many Cases, and an Absent Supreme Court*, 68 DUKE L.J. ONLINE 17, 19–20 (2018).

<sup>81</sup> *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45, 52–54 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).

<sup>82</sup> Reply Brief for Petitioners at 2, *N.Y. State Rifle & Pistol Ass’n*, No. 18-280 (Nov. 28, 2018).

<sup>83</sup> See BLOCHER & MILLER, *supra* note 51, at 187–91 (noting and rejecting this argument).

<sup>84</sup> Greene, *supra* note 1, at 56.

<sup>85</sup> Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), <http://www.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx> [https://perma.cc/8EGA-F7KL].

<sup>86</sup> See Brief for the United States as Amicus Curiae at 7, *District of Columbia v. Heller*, 554 U.S. 570 (2007) (No. 07-290); Brief for Amici Curiae 55 Members of United States Senate, the President of the United States Senate, and 250 Members of the United States House of Representatives in Support of Respondent at 2, *Heller*, 554 U.S. 570 (No. 07-290); Brief of the States of Texas et al. as Amici Curiae in Support of Respondent at 2, *Heller*, 554 U.S. 570 (No. 07-290) (signed by thirty-one states).

<sup>87</sup> See Dina Temple-Raston, *Supreme Court: Individuals Have Right to Bear Arms*, NPR (June 26, 2008, 10:31 AM), <http://www.npr.org/templates/story/story.php?storyId=91911807> [https://perma.cc/G9QV-6ALM].

These are not the hallmarks of a widespread anti-gun pathology calling for heightened scrutiny,<sup>88</sup> let alone a rights-as-trumps frame.

If instead the Justices see gun regulations as “workaday acts of governance from which individuals seek retail exemption,”<sup>89</sup> then the decision in *New York State Rifle & Pistol* could look quite different. Greene’s account would suggest the application of proportionality review, which would be consistent with the approach overwhelmingly taken by the federal courts of appeals in gun rights cases.<sup>90</sup> The law might well fail such review, but applying it would permit the Court to strike down this outlier law without disturbing the broad, settled doctrinal consensus in the lower courts — a result of precisely the kind of case-by-case doctrinal development that *Heller* invited those courts to perform.

The approach described here highlights a different possible resolution, however: per se invalidation of New York’s law on the basis that it goes “too far.” This would be the equivalent of *Heller*’s holding that a citywide ban on handguns — the “quintessential self-defense weapon” — is per se unconstitutional in light of the amendment’s “core” interest of self-defense.<sup>91</sup> As in *Heller*, the Court could avoid having to credit an allegation of bias on the part of city officials, who, after all, undoubtedly believe themselves to be saving lives and preventing harm. Such a narrow, bright-line rule would become part of the Second Amendment’s doctrinal machinery without displacing the overwhelming use of means-end scrutiny to evaluate regulations that impose less of a burden on the right’s core interests — just as *Lucas* exists alongside the default multi-factor balancing approach in regulatory takings.

Or perhaps the Court will take another route by opening the door more broadly to as-applied challenges. Although Greene does not discuss as-applied challenges in detail, greater reliance on them may provide a middle way between absolutism and proportionality — a way for courts to provide “retail exemption[s]”<sup>92</sup> without characterizing a rule as

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<sup>88</sup> See, e.g., Cass R. Sunstein, *The Supreme Court, 2007 Term — Comment: 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.”); see also J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 303 (2009).

<sup>89</sup> Greene, *supra* note 1, at 32.

<sup>90</sup> See *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (“A two-step inquiry has emerged as the prevailing approach . . . .”); see also *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (noting that the two-part test had been largely adopted by the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits).

<sup>91</sup> *Heller*, 554 U.S. at 629–30.

<sup>92</sup> Greene, *supra* note 1, at 32.

facially unconstitutional. To employ one of the Chief Justice's metaphors,<sup>93</sup> as-applied challenges recognize that different batters have different strike zones.

In fact, as-applied challenges are among the most significant issues in Second Amendment litigation today, as some courts have begun to permit them against broad federal prohibitions on gun possession. The Third Circuit did so as applied to challengers with old state misdemeanors on their records.<sup>94</sup> The Sixth Circuit did so as applied to a challenger with a decades-old involuntary commitment for mental illness.<sup>95</sup> Such as-applied challenges raise difficult questions about court capacity and line-drawing, to be sure, but they also better fit the needs of "constitutional adjudication in a mature democracy whose citizens experience themselves as rights-bearers but who nonetheless must cohabit a working ecosystem."<sup>96</sup>

No right behaves like a trump all the time. Nearly all of them do sometimes. When and why they do so is the underlying challenge presented by Greene's Foreword: to identify the triggers for the rights-as-trumps frame, not simply in general terms, but in the contexts of particular cases and particular rights regimes.

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<sup>93</sup> *Chief Justice Roberts Statement — Nomination Process*, U.S. COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> [<https://perma.cc/E63D-AYTG>].

<sup>94</sup> *Binderup v. Att'y Gen.*, 836 F.3d 336, 340, 345–47 (3d Cir. 2016) (en banc).

<sup>95</sup> *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 681, 687–88 (6th Cir. 2016) (en banc).

<sup>96</sup> Greene, *supra* note 1, at 131.