

## **YOU CAN LEAD A HORSE TO WATER: HELLER AND THE FUTURE OF SECOND AMENDMENT SCHOLARSHIP**

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When the Supreme Court decided *District of Columbia v. Heller*,<sup>1</sup> it not only inaugurated a new era of constitutional doctrine, but also helped create a burgeoning new field of legal scholarship.

Ten years after *Heller*, and despite a relative lack of further guidance from the Justices, the doctrinal revolution has started to stabilize into a doctrinal framework. In “From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after *Heller*,”<sup>2</sup> we report the results of a comprehensive case-coding project involving more than 1,000 Second Amendment challenges. The data show the contours of the evolving doctrine, illustrating areas of substantive and methodological settlement, uncertainty, and divergence.

The scholarly revolution, meanwhile, is still very much underway. Observers have noted that legal scholarship played a prominent role in *Heller*’s recognition of the “individual” right to keep and bear arms.<sup>3</sup> Now, on the tenth anniversary of the decision, the *Duke Law Journal* has assembled a rich, diverse, and thoughtful set of perspectives about the Second Amendment, constitutional interpretation, politics, and the

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1. 554 U.S. 570 (2008).

2. 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).

3. ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 95–96 (2011) (describing scholarship in the decades leading up to *Heller*); see also JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 63 (2018) (same).

role of the courts.<sup>4</sup> Each of the articles in this symposium suggests important ways in which our empirical analysis can be elaborated, refined, or clarified—some of which we hope to accomplish in new empirical projects. We are immensely grateful to each of the authors for their engagement and insight.

But the contributions to this symposium are even more significant for what they say (and show) about the future of Second Amendment scholarship more generally. Perhaps the most important fact in that regard is that we are entering, as Sandy Levinson notes, “a new area of American constitutional law about an unusually hot-button subject.”<sup>5</sup> In their contribution, Ronald Wright and Mark Hall emphasize the ways in which content analysis of the kind we pursue in our article could contribute to scholarly collaboration in “the development of an important new field of legal doctrine.”<sup>6</sup>

Whether and how a field of scholarship will coalesce around this new field of doctrine is the question that most interests us here. There can be little doubt about the practical importance of weapon rights and regulation—with 100,000 Americans shot every year,<sup>7</sup> the stakes are high—or the novelty of the problems that accompany the implementation of what is essentially a new constitutional right. But Second Amendment law might nonetheless be “the law of the horse,” as Frank Easterbrook memorably suggested of cyber law in the mid-1990s: a subject best learned through the study of general rules.<sup>8</sup>

As far as we are aware, there is no accepted definition for what

4. Michael C. Dorf, *The Constitutional Politics Heller Launched*, 68 DUKE L.J. ONLINE 8 (2018); David Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE (forthcoming 2018); Sanford Levinson, *Comment on Ruben and Blocher: Too Damn Many Cases, and an Absent Supreme Court*, 68 DUKE L.J. ONLINE 17 (2018); Darrell A. H. Miller, *Romanticism Meets Realism in Second Amendment Adjudication*, 68 DUKE L.J. ONLINE 34 (2018); George A. Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 DUKE L.J. ONLINE 41 (2018); Adam M. Samaha & Roy Germano, *Is the Second Amendment A Second-Class Right?*, 68 DUKE L.J. ONLINE 57 (2018); Ronald F. Wright & Mark A. Hall, *Collaborate Construction of a New Legal Field*, 68 DUKE L.J. ONLINE 70 (2018).

5. Levinson, *supra* note 4, at 20.

6. Wright and Hall, *supra* note 4, at 76.

7. CENTERS FOR DISEASE CONTROL, WEB-BASED INJURY STATISTICS QUERY AND REPORTING SYSTEM, RETRIEVED, <https://www.cdc.gov/injury/wisqars/index.html> (last visited May 3, 2018) [<https://perma.cc/3EFN-SC4G>].

8. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. L. FORUM 207, 207 (“[T]he best way to learn the law applicable to specialized endeavors is to study general rules. Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on ‘The Law of the Horse’ is doomed to be shallow and to miss unifying principles.”).

constitutes a “field” of legal study, and it is far beyond the scope of this short response (or the ambitions of its authors) to attempt such a thing. But we do think—as responses to Easterbrook suggested<sup>9</sup>—that there is something to be gained from the particularized consideration of Second Amendment law. And, for much the same reason, we think that it has many characteristics that one would associate with a standalone field of legal study. As we see it, in order to have a legitimate claim to that label, an issue must have a distinct set of important, interesting and unanswered legal *questions*, rich and reliable *resources* with which to answer them, and a critical mass of *scholars*.

Second Amendment scholarship satisfies this rough and imperfect tripartite test. By establishing a new constitutional right, and identifying (but doing little to explain) a set of permissible regulations of that right, *Heller* generated as many fundamental and unanswered doctrinal and theoretical questions as any other area of constitutional law. These include not only specific questions about which arms, activities, and people are covered by the right to keep and bear arms, but more foundational questions about the *purpose* of the right<sup>10</sup> and how Second Amendment doctrine does or should protect its own announced “core” value of self-defense.<sup>11</sup> Especially since the Justices themselves have been generally “absent” from the doctrinal field,<sup>12</sup> scholars have played an unusually prominent role in characterizing and helping to shape the contours of the right to keep and bear arms.

While there is still much room in the conversation, and a serious need for greater diversity, the increasing number of scholarly voices has enriched the discourse immeasurably. After all, the “Constitution of Conversation,” as Levinson puts it,<sup>13</sup> requires interlocutors. Few scholars list the Second Amendment or firearms as a primary research interest, but that, too, is changing. And as this symposium demonstrates, scholars whose primary interests lie elsewhere—in constitutional theory, empirics, history, institutional analysis, and so on—can usefully bring their tools to bear.

Those scholars have an increasingly rich set of resources on which

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9. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) (arguing that “there is an important general point that comes from thinking in particular about how law and cyberspace connect”).

10. BLOCHER & MILLER, *supra* note 3, at 148–72 (considering three different possible theories of the Second Amendment in light of *Heller*).

11. Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment* (work-in-progress on file with authors).

12. Levinson, *supra* note 4, at 17.

13. *Id.* at 20.

to draw. By “resources” we simply mean the basic materials of scholarly inquiry—the grist for the scholarly mill. That of course includes the standard materials of legal reasoning: constitutional text, cases, statutes, and the like, as well as efforts to synthesize them.<sup>14</sup> In Second Amendment scholarship, it also includes insights drawn from history,<sup>15</sup> sociology,<sup>16</sup> psychiatry,<sup>17</sup> political science,<sup>18</sup> philosophy,<sup>19</sup> and other disciplines and methodologies, including (as with our article) empirical legal studies.

This new field of scholarship, like others that have preceded it, will face fundamental questions about its own scope and ambition—questions that are, almost by definition, far beyond our ability to answer here. The scope and strength of the right to keep and bear arms, its relationship to other constitutional rights and values, and the proper role of courts in enforcing it are the kinds of inquiries that should animate scholarship for decades to come. Nevertheless, we can hazard a few guesses about common themes that are likely to emerge, and

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14. At one time, the creation of a field might have been achieved through the writing of a treatise or casebook; Hart & Wechsler's *Federal Courts* is perhaps the best-known example within public law. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953); see also James E. Pfander, *Fifty Years (More or Less) of "Federal Courts": An Anniversary Review*, 77 NOTRE DAME L. REV. 1083 (2002). We are aware of two firearms law casebooks, each with significant virtues, though neither has yet had the same catalyzing effect. See NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* (2012); ANDREW MCCLURG & BRANNON DENNING, *GUNS AND THE LAW: CASES, PROBLEMS, AND EXPLANATION* (2017).

15. See, e.g., PATRICK CHARLES, *ARMED AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* (2018); AKINYELE UMOJA, *WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT* (2013) (detailing use of firearms to fight local oppression during the civil rights movement); Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11 (2017) (arguing that *Heller* erred in its emphasis on a “static” rather than a “dynamic” history of firearms in early American history).

16. See, e.g., JENNIFER CARLSON, *CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE* (2015) (analyzing how men embrace gun culture in response to socioeconomic decline); ANGELA STROUD, *GOOD GUYS WITH GUNS: THE APPEAL AND CONSEQUENCES OF CONCEALED CARRY* (2016) (examining how perceptions about conceal carry vary by race, gender, and socioeconomic status).

17. See, e.g., Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?*, 80 LAW & CONTEMP. PROBS. 179 (2017) (exploring the impact of gun regulations on suicide rates); Fredrick E. Vars, *Self-Defense Against Gun Suicide*, 56 B.C. L. REV. 1465 (2015) (same).

18. See, e.g., ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* (2014); KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* (2008) (examining political constraints on gun-regulation advocates).

19. See, e.g., FIRMIN DEBRABANDER, *DO GUNS MAKE US FREE? DEMOCRACY AND THE ARMED SOCIETY* (2015) (arguing that an armed citizenry leads to a less free society).

which the contributions to this symposium illustrate.

First, and perhaps most obviously (since it most closely echoes the political version of the gun debate), is the question of how robust the right to keep and bear arms is or should be. *Heller* did not settle that question; fundamental normative and descriptive baselines have yet to be established. Even an empirical study like ours, which is primarily descriptive and analytic, inevitably intersects with normative questions.<sup>20</sup> Perhaps the most prominent such question with regard to the Second Amendment is whether it is being treated, as Justice Thomas and others have put it, as a “second class right.”<sup>21</sup>

The symposium contributions from David Kopel, George Mocsary, and Adam Samaha and Roy Germano all engage that question, and they do so with a variety of methodologies, including alternative empirical measurements,<sup>22</sup> a more qualitative evaluation of the cases,<sup>23</sup> and suggestions for future work.<sup>24</sup> We particularly appreciate Mocsary’s observation that empirical projects could “afford scholars on different sides of this issue an opportunity to work together on mutual projects, which would have its own benefits for the area of study.”<sup>25</sup> Wright and Hall similarly note that “[f]uture courts and scholars can build on this work, making possible consensus—on the descriptive level—in this constitutional field where scholarly

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20. Ruben & Blocher, *supra* note 2, at 1438.

21. *Voisine v. United States*, 136 S. Ct. 2272, 2292 (2016) (Thomas, J., dissenting) (“In construing the statute before us expansively so that causing a single minor reckless injury or offensive touching can lead someone to lose his right to bear arms forever, the Court continues to ‘relegat[e] the Second Amendment to a second-class right.’” (quoting *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from denial of certiorari))).

22. Samaha & Germano, *supra* note 4, at 61; *see also* Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 WM. & MARY BILL RTS. J. 827, 829 (2017).

23. In particular, our data does not “weigh” challenges—one result counts as much as another, regardless of which court decided it or whether the decision was interlocutory or final. We emphasized this point in our article, Ruben & Blocher, *supra* note 2, at 1468, and we appreciate Kopel’s elaboration of its importance. His work with Greenlee, which we cited, provides the kind of qualitative analysis we envisioned.

But in one particularly important way, Kopel mischaracterizes our coding in his critique. He says that we would code two Second Amendment wins for a case in which a court upholds, on alternative grounds, a gun law at trial and on appeal. This is simply incorrect—such a case would be coded as two *losses*. Ruben & Blocher, *supra* note 2, at 1462–63. As we explain in the article, our unit of analysis with regard to losses is the *challenge*, not the grounds therefor. If a court accepts ten arguments in favor of striking down a gun law but nonetheless upholds it on the basis of another (deference to the political branches, for example, as in Kopel’s hypothetical), that counts as one Second Amendment loss and no Second Amendment wins. *See* Kopel, *supra* note 4.

24. Mocsary, *supra* note 4, at 52–55.

25. *Id.* at 55.

collaboration once seemed too much to ask.”<sup>26</sup>

That leads to the second theme we hope and expect to see in Second Amendment scholarship: an increasingly broad and diverse set of scholarly tools and methodologies. Because the “individual” right to keep and bear arms is such a recent arrival in federal constitutional law, its future development has the benefit of a wealth of scholarship about constitutional theory and doctrine more generally.<sup>27</sup> As a point of contrast, First Amendment doctrine largely took shape before the major debates in constitutional theory over the past few decades, and *stare decisis* insulates that framework from change. Second Amendment scholars have a comparatively rich toolkit to use, and on problems that are not yet governed by case law.

Naturally, the Court’s decision in *Heller* will remain central to the scholarly discussion. One goal of our study is to show its impact, and thereby to enable a deeper and more accurate analysis of its doctrinal legacy a decade after it was decided. Formally speaking, that doctrinal development will continue to proceed within contours derived from *Heller*, but precisely what those contours are remains to be determined. And the fact that *Heller* will remain on the books does not mean that critiques of it are no longer important or legitimate. As Dorf demonstrates, they are deeply relevant to the constitutional politics of gun rights and regulation.<sup>28</sup>

Perhaps even more fundamental than the doctrinal debates—as Levinson and Dorf in particular emphasize—are extra-judicial and even extra-legal understandings of the Second Amendment. Levinson draws attention to the “peculiar role that the ‘Second Amendment’ plays as a myth and symbol in non-professional discussions about the Constitution and its protection of individual rights.”<sup>29</sup> Our focus on doctrine in “From Theory to Doctrine” should not be taken as a suggestion otherwise. Popular understandings and invocations of the Second Amendment remain a far more important barrier to gun regulation than the courts.<sup>30</sup> As Dorf notes, “No matter how many state, lower federal, or even Supreme Court rulings uphold firearms regulations, the Second Amendment stands as a potent symbol and rallying cry for those who wish to exercise political power and eliminate

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26. Wright & Hall, *supra* note 4, at 76.

27. Many thanks to Darrell Miller for this point.

28. Dorf, *supra* note 4, at 13–14.

29. Levinson, *supra* note 4, at 21.

30. Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 832 (2014)

such regulations.”<sup>31</sup>

Recognizing the limited reach of constitutional doctrine does not mean resorting to shallow politics. One can study and even engage in the gun debate without adopting its bitter partisanship, instead using it as a lens through which to evaluate broader legal phenomena. The right to keep and bear arms provides an unusually and perhaps uniquely useful means to analyze more general questions regarding the role of courts (as Levinson does) or constitutional politics (as Dorf does). One might, for example, define the right to keep and bear arms *functionally* rather than formally, considering not only the constitutional law of the Second Amendment, but the myriad legal materials and practices that together insulate gun possession and use from legal regulation.<sup>32</sup>

In “From Theory to Doctrine,” we attempt to characterize the early years of a new field of constitutional doctrine. This symposium demonstrates the concomitant growth of new *scholarship* surrounding the right to keep and bear arms. Ten years ago, there was reason to believe that Second Amendment doctrine would—following elements of *Heller*—become rigid and binary. Scholarship might have followed the same path; digging into the pre-*Heller* trenches and pitting “pro-gun” against “pro-regulation” views. Our empirical study shows that the doctrinal reality is far more nuanced and interesting. So, we hope and expect, is the scholarly future.

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31. Dorf, *supra* note 4, at 16.

32. Here we are borrowing from Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 410–11 (2007).