COMMENT ON RUBEN AND BLOCHE: TOO DAMN MANY CASES, AND AN ABSENT SUPREME COURT

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Professors Ruben and Blocher should be commended for their fascinating survey of the roughly 1000 cases that were litigated in state and federal courts between the Supreme Court’s decision in District of Columbia v. Heller1 and February 1, 2016, the cut-off date for their inquiry.2 Heller itself was obviously a highly controversial decision, exemplified not only in the 5-4 vote of the justices, but also in the acerbic tones of both Justice Scalia’s majority opinion and the dissenting opinions authored by Justices Stevens and Breyer. It has been the subject of vitriolic criticism, some of it perhaps unexpectedly coming from judges ordinarily viewed as conservative,3 as well as high praise, almost all of it generated by those who support the protection

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2. See Eric Ruben & Joseph Blocher, From Theory To Doctrine: An Empirical Analysis of the Right To Keep and Bear Arms after Heller, 67 DUKE L.J. 1433, 1439 (2018) (noting that “the decade since Heller has seen more than one thousand lower court challenges testing the boundaries and strength of the [Second Amendment] right” enunciated in that case).

of “gun rights” to a greater or lesser extent (though still far more than most of the decision’s critics).  

For what it is worth, I am in what is probably a small subset of the legal academy that both views *Heller* as having been rightly decided and believes at the same time that Justice Scalia’s opinion and approach to the “original understanding” of the Second Amendment are really quite indefensible. Even if one is more disposed to “originalism” than I am, one should recognize that he runs together the barely discussed “civic republican” background of the Amendment, which emphasizes a collective right to rise up against a tyrannical state, with a far more “liberal” understanding of the Amendment that focuses on a right to “self-defense” against criminals. He shamelessly cites Charles Sumner’s 1856 “Bleeding Kansas” speech as relevant to the original public meaning of the 1791 Amendment, but fails to mention the very significant argument for his position provided by Chief Justice Taney the next year in *Dred Scott*. Taney provided powerful support for the proposition that a basic right of American citizens, by the mid-19th century, was to keep and bear firearms quite outside the context of an organized militia. One might well believe that a central reason that even “free” blacks were denied the status of American citizens is because that would have entailed the right to possess firearms, which Taney no doubt found unthinkable.

Had the *Heller* opinion been assigned to a justice other than Scalia (or Thomas), one might have been spared the motivated distortions of the historical record, in favor of a forthright recognition that by the mid-nineteenth century at least there was a broad consensus, ranging from Chief Justice Roger Brooke Taney to Massachusetts Senator Charles Sumner, that a basic right of American citizenship was the

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8. See Dred Scott v. Sandford, 60 U.S. 393 (1857) (implying that those not deemed citizens could not be said to have “assumed the powers of Government to defend their rights by force of arms”).
9. *Id.* at 407 (stating that those under the Constitution’s protection “assumed the powers of Government to defend their rights by force of arms”) (emphasis added).
right to possess arms for purposes of self-defense. This might have required recognition of the Ninth Amendment and, just as importantly, for the fact that constitutional understandings are dynamic and not mired in the specific history of 1791, both of which were anathema to Scalia. Why Chief Justice Roberts assigned the opinion to Scalia is known only to himself, but it is quite plausible that an opinion written by himself or by Justice Kennedy would have been less dogmatic and less question-begging.

Moreover, and highly relevant to the Ruben-Blocher project, is Scalia’s complete refusal to specify what kinds of scrutiny, if any, judges should apply to the panoply of existing regulations of firearms. Scalia’s almost cavalier affirmation—presumed among the cognoscenti to be the price of gaining Kennedy’s all-important fifth vote—that *Heller* did not endanger any existing federal regulations certainly did not help matters. Admitting that “we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment,” he told readers that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”

“Nothing”? Really?

As with certain other cases decided by the Supreme Court, analysts were left free to wonder if *Heller* was a case full of sound and fury ultimately signifying, if not exactly “nothing,” then, as a matter of fact, relatively little. Anthony Amsterdam suggested many years ago that the Supreme Court often acts as the equivalent of the Delphic Oracle, issuing opaque pronouncements behind impressive smoke and ritual incantations while leaving it up to the institutional priests serving on what the Constitution labels “inferior” courts to provide genuine content to what has been said. This seems especially true of *Heller*

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10. See *Heller*, 554 U.S. at 626–27 (emphasis added).
12. See WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5, (“Life . . . is a tale Told by an idiot, full of sound and fury, Signifying nothing.”).
13. I am referring, of course, to the Constitution’s own description of the judicial hierarchy. See U.S. CONST., Art. III, § 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).
and the general subject of “Second Amendment rights.” The oracular Court has maintained a resolute silence now for nearly a decade, while the notionally “inferior” priesthood has been charged with providing answers to a plethora of concrete cases. At the very least, no serious person could believe that *Heller* clarified very much at all beyond saying (properly in my view) that the District of Columbia lacked the power in effect to prohibit the possession of handguns by law-abiding persons within their homes. As Third Circuit Judge Fuentes put it, in a powerful opinion dealing with the prohibition of felons from owning firearms to be discussed at greater length below, “federal judges face an almost complete absence of guidance from the Supreme Court about the scope of the Second Amendment right.”

The question undergirding the Ruben-Blocher examination is especially interesting. Given that *Heller* in effect establishes a new area of American constitutional law about an unusually hot-button subject—the control of firearms—what in fact has been the response of judges, hapless or not, who must give concrete content to *Heller*? Justice Robert Jackson once referred to both “majestic generalities” and “cryptic words” of the Fourteenth Amendment. *Heller* certainly qualifies for a similar description, even if some of its critics might be reluctant to concede the presence of “majestic” generalities. I have in my own work distinguished between what I call the “Constitution of Settlement” and the “Constitution of Conversation.” The former refers to those parts of the Constitution that the legal academy in fact is almost completely uninterested in, because there are really no interesting controversies over what the particular words or clauses mean. Consider in this context the 20th Amendment, which establishes noon on January 20 as the unambiguous moment that an incumbent president leaves office and a successor takes over, or the clause in Article I, Section 3, which just as clearly assigns to each state in the Union the same number of senators. I am extremely critical of both of these features of the U.S. Constitution, but that criticism is based on the *wisdom* of the provisions, not at all on what they “mean.” In contrast, the Constitution of Conversation, which is the basically exclusive focus of legal academics (and, for that matter, judges), concerns those parts of the Constitution that in no plausible sense offer

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unequivocal guidance as to their meaning. Instead, we have endless, often acrimonious conversations about the meanings, almost inevitably smuggling into those conversations our views, implicit or explicit, about the wisdom of any given resolution to our interpretive disputes. Ruben and Blocher have contributed an important analysis of one aspect of the public conversation, which happens to be taking place within the judiciary.

One should be aware, though, that this basically exclusive focus on the institutionalized judiciary (or judiciaries, given that there may be interesting differences between federal and state courts, not to mention variations among the federal circuit courts themselves), might lead us to ignore the very important reality of the “Constitution outside the courts.” Just as one cannot possibly understand the background of *Heller* without paying close attention to the success of the National Rifle Association and other “gun rights” organizations in molding important sectors of American public opinion (and, even more significantly, basically capturing control of the Republican Party), one should be attentive 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.

When Justice Thomas, for example, denounces his colleagues for treating the Second Amendment as an “orphan” being abandoned to the tender mercies of hostile judges unwilling to follow the purported guidance of the Supreme Court, it should be clear that his most important audience is almost certainly non-professional, i.e., those lay citizens who share Thomas’s views that gun rights are indeed extraordinarily important and deserving of more militant protection than they are receiving from vacillating liberal judges. One can be

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18. See, e.g., ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 45–46 (2013); Reva Siegel, Dead or Alive: Originalism as Populak Constitutionalism in *Heller*, 122 HARV. L. REV. 191, 215 (2009) (noting that the NRA and the Gun Owners of America “helped transform the Republican Party platform on so-called ‘social issues,’ including gun control and the Second Amendment”). It is worth noting, though, that the NRA was distinctly ambivalent about the merits of litigating *Heller* at the time, fearing that there might in fact not be the five votes necessary to assure victory at the Supreme Court. Thus the actual lawyers behind *Heller* were mavericks from the libertarian Cato Institute.

19. See, e.g., Silvestre v. Becerra, 138 S. Ct. 945, 952 (2018) (mem) (Thomas, J., dissenting from denial of certiorari) (“The right to keep and bear arms is apparently this Court’s constitutional orphan.”). Thomas’s disparaging references to the unwillingness of his colleagues to take the Second Amendment seriously are collected in Ruben & Blocher, *supra* note 2, at 1448 n.73. Apparently, taking the Second Amendment “seriously” requires that one agree with Justice Thomas’s views.
certain that this belief provided support for the refusal by Senate Republicans even to hold hearings on President Obama’s nomination of Judge Merrick Garland to the Supreme Court, who was almost certainly (and perhaps justifiably) perceived to be a relatively weak supporter of *Heller*. It was therefore worth rolling the dice that a Republican president would support someone thoroughly acceptable to the National Rifle Association. There is a reason that the President and his supporters constantly trumpet the importance of Neil Gorsuch’s being on the Court instead of Judge Garland, and it is not that millions of the vaunted GOP base care about overruling *Chevron*. Whatever their impact on his fellow judges, Thomas’s criticisms (especially when coupled with extravagant encomia to the Second Amendment that have become part of the Republican playbook) may have implications for the debates that take place in the majority of states that elect their judges or, for that matter, the promises that national candidates make with regard to the persons they will nominate or confirm to join the federal judiciary.

Still, no one should deny that what judges say, whether they are on the Supreme Court or not, is both interesting and important, which is true as well of Ruben and Blocher’s comprehensive survey. Alas, however, even if I possess a Ph.D. in political science, I lack the professional competence to assess the methodologies underlying their article. They are admirably candid about some of the problems they faced and the decisions they made with regard to structuring their analysis. I will leave it to others to assess those specific decisions. Instead, I will use the remainder of the space assigned me to offer some reflections on what I learned.

As Ruben and Blocher note, perhaps the most important question generated by *Heller* is exactly who is protected by the Court’s reading of the Second Amendment. After all, one might regard the “money sentence,” as it were, of Scalia’s opinion as his affirmation of the “right of law-abiding, responsible citizens to use arms in defense of hearth and

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20. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (establishing eponymous doctrine of judicial deference to agencies’ reasonable interpretations of statute). One might suggest that at least some of the enthusiasm for the nomination of Brett Kavanaugh to the Supreme Court also derives from his apparent willingness to read *Heller* more strongly than do his colleagues on the Circuit Court for the District of Columbia. See *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (upholding a D.C. ban on “assault rifles”). Interestingly enough, the majority opinion from which Judge Kavanaugh dissented, *see 670 F.3d* at 1269, was written by Douglas Ginsburg, joined by Karen Henderson, neither remotely regarded as part of the “liberal” cohort on the Circuit Court.
home.”21 As a result of the decision, we know that Dick Heller, a thoroughly law-abiding citizen of the United States who lives in the District of Columbia, is protected. But what about (at least) two other groups? The first is convicted felons, who by definition have manifested a willingness on at least one occasion to violate a presumptively significant law. The second is non-citizens, especially undocumented aliens who either arrived in the United States illegally or remain in the United States without legal warrant (if they are part of the numerous group of visa-overstayers whose entrance was completely legal). Given recent spates of mass shootings, there is also much to warrant discussion of the ability of those described as “mentally ill” to possess firearms, a topic that I will not discuss in this brief comment. I will focus instead only on convicted felons and undocumented aliens, both of whom present genuine theoretical difficulties, especially if one accepts the “liberal,” self-defense-oriented reading of the Second Amendment proffered by Justice Scalia for the Court (which in turn seems based at least in part on a theory of a “natural right” to defend oneself against dangers posed by criminals).22

Not surprisingly, one will find among the 1000 or so cases challenges to the deprivation of a right to bear arms visited upon convicted felons or non-U.S. nationals, including undocumented aliens. It would not take much effort to demonstrate that there are important differences among the circuits, particularly with regard to the former category. One overwhelming takeaway created by reading Ruben and Blocher is that the Supreme Court has behaved thoroughly irresponsibly by remaining silent about the actual implications of Heller, in spite of the now literally hundreds of cases generated by its cryptic decision. I will confess that the article has forced me to reconsider the merits of the degree of near-absolute discretion now given the Supreme Court to control its docket and, therefore, simply to maintain a Sphinx-like inscrutability with regard to important constitutional dilemmas. Whatever one’s substantive views about the Second Amendment and the issues surrounding firearms, it is basically impossible, I believe, to view the Court as behaving in a genuinely defensible manner. As my colleague Scot Powe suggested in a recent luncheon conversation about the Court’s post-Heller (or McDonald) silence, the most likely explanation for its failure to grant certiorari in

21. District of Columbia v. Heller, 554 U.S. 570, 635 (emphasis added). Were I interested in where one had a Second Amendment right to possess firearms, I would surely have emphasized “hearth and home” (as distinguished, say, from workplaces or national parks).

22. See id. at 592.
any of the cases brought before it is an inability of particular justices to “count to five” with regard to the likelihood of the Court’s adopting their own favorite view, coupled, perhaps, with a belief that the Court might be protecting its own institutional interests by remaining uninvolved. Is there really any other plausible explanation?

Jack Balkin has suggested comparing the Court’s display of inaction—or sheer cowardice—to its behavior following the much-publicized decision in *Boumediene v. Bush* (decided very shortly before *Heller*), in which the Court, in a fractious decision eliciting bitter dissent from Justice Scalia, held that Boumediene, an alien held at Guantanamo Bay, possessed a constitutional right to challenge his detention.23 Much was said about the Court’s recognition, through Justice Kennedy, that the “rule of law” applied even to an alien caught up in the maw of what the Bush Administration proclaimed to be the “global war on terror.” That is almost literally the last discussion by the Court of the scope of habeas corpus in the war on terror. It basically delegated to the District and Circuit Courts for the District of Columbia the actual implementation of the purported right, and those judges have basically eviscerated any kind of robust right to legal protection, in at least some cases going beyond even what the United States was arguing to be within its authority.24 One might well describe the Court as AWOL from one of the most important legal battles of the 21st century.

As with the Court’s silence after *Heller* and *McDonald*, Balkin has offered some explanations. Perhaps the Court is simply trying to protect itself from the attacks that would inevitably come, whether from the right or left, following any further decisions either limiting executive power or writing (as does the D.C. Circuit) what is basically a blank check. Conservatives who dissented in *Boumediene* are undoubtedly delighted with the hawkish posture of the D.C. Circuit, while liberals, who could invoke jurisdiction by casting four votes, may have been sufficiently fearful of the mercurial Anthony Kennedy to prefer *Boumediene* as the Court’s “last word” on the subject, even if, as a practical matter, it is of little consequence given subsequent decisions by the purportedly “inferior” Court. The economic analysis


24. See, e.g., Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1455 (2011) (noting that “some judges who read the Supreme Court’s work in this field for as little as it is worth—if not less”). Nothing in the past seven years would change Vladeck’s dour diagnosis. See also Owen Fiss, *Imprisonment without Trial*, 47 TULSA L. REV. 347 (2013), for a similarly dismayed overview of the Court’s retreat from any genuine confrontation with the assault on the “rule of law” instantiated in the Guantanamo detentions.
of employment law often focuses on incentives provided to lackluster employees simply to “shirk” their duties when they are potentially uncomfortable. The Court’s near-plenary control over its docket creates just such an incentive, and the Supreme Court is indeed comparable, in its own way, to the iconic Wally in the comic strip Dilbert, whose forte is avoiding any genuine work while collecting his salary.

If, on the other hand, we had a special “certiorari court” (consisting, say, of the chief judges of the twelve federal circuits, joined by a group of state supreme court chief justices), one might well imagine that the Court would have been forced to confront the issues well described by Ruben and Blocher, or those left open now for a full decade by Boumediene. Would we really be worse off, with regard to “rule of law” values, with such a “cert court,” given the demonstrated failures of the contemporary Court to address a variety of important issues, almost always without any real explanation for the judges’ failures to do so?

One might well believe that it is at the very least implausible to expect any actual lawyers (or even law professors and their students) to read more than a fraction of the 1000 cases that a phalanx of student assistants read and coded. Several decades ago, the late Grant Gilmore suggested that the origins of American legal realism lay in the West Reporting System, which for the first time, late in the 19th century, provided lawyers with the ostensible ability to read most cases decided by federal and higher state courts.25 Among other things, it became quickly obvious that judges differed quite substantially in their approach to many subjects. It became ever harder to believe that the law in some mystical way was working itself pure. Instead, West compelled the realization that the legal system consisted less of the law working itself pure than of one damned case after another that often exhibited little uniformity or coherence. This meant, among other things, that lawyers were educated in the practicality of forum shopping, by which they could try to bring their cases before predictably sympathetic judges. Modern search engines make this almost unimaginably easier.

To take doctrinalism seriously—which I’m not sure I do—requires a manageable number of cases that truly address the problems set out

25. See Grant Gilmore, The Ages of American Law 53 (1977) (noting that “[a] precedent-based, largely non-statutory system could not long continue to operate” without a consistent reporting system, when cases were becoming more numerous and the law ever harder to sift from the “vast majority of worthless ones”).
and provide relatively clear and administrable answers, even if one does not like some of the specific conclusions. The Court, having opened a potential Pandora’s Box in *Heller*, has thereafter decided to take a holiday. There is no legal bar to this, given that Congress has acquiesced, beginning with the legislation in 1925 establishing the discretionary writ of certiorari, in giving the Supreme Court near-plenary control over its docket, which has notably shrunken in recent years. We now have a Court that seems to have fully incorporated, at least when it wishes to, Alexander Bickel’s notion of passivity as a virtue.\(^{26}\) Still, as Mark Graber reminded us more than two decades ago, it might be more accurate, when describing the Court, to think of “the passive-aggressive virtues.”\(^{27}\) As many have noted, there is no one on the Court today who can genuinely be described as an apostle of what used to be called “judicial restraint.” The current Court, when it wishes to, can be quite aggressive indeed, as demonstrated in *Shelby County, Sibellius, and Obergefell*,\(^{28}\) to name only three obvious examples. The justices of the Supreme Court have clearly chosen, for their own individual and unexpressed reasons, to withdraw from molding Second Amendment doctrine.

Perhaps this mixture of passivity and aggression helps at least a bit in explaining why even the Court no longer enjoys the warm support of a majority of the public, even if its “disapproval” ratings are nowhere near those of Congress or the President. The most recent Gallup Poll, in September 2017, showed that only 49% of the public “approved” of the way the Court is handling its job.\(^{29}\) Not since September 2010 has the Court been “approved of” by even 51 percent of the public. Also telling is the fact that the same 2017 poll showed that only 16 percent


\(^{27}\) Mark A. Graber, *The Passive-Aggressive Virtues: Cohen v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67, 68 (1995) (noting that the Marshall Court “frequently expounded on the constitutional controversies that divided the new nation, even when such expositions were not strictly relevant to the ultimate outcome of the case they were adjudicating”).


\(^{29}\) *Supreme Court, Gallup*, http://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/JJM4-M2XN] (last visited July 15, 2018) [asking respondents, “Do you approve or disapprove of the way the Supreme Court is handling its job??”].
of the respondents stated that they had a “great deal” of “trust and confidence” in the Court; to be sure, 52 percent indicated a “fair amount” of such confidence, while nearly a third (31 percent) indicated “not very much” (24 percent) or “none at all (7 percent). 30 Nothing in the Ruben-Blocher article enhanced my own “trust and confidence” in the Court, and I would be genuinely surprised if my reaction were idiosyncratic, even if it is surely the case that falling confidence in the Court is related to many other factors as well.

As already suggested, my own primary examples of dereliction of the Court’s judicial duty involve the criminalization of possession of firearms by convicted felons31 and undocumented aliens.32 If one takes seriously Heller’s insistence on the fundamental nature of an individual right to protect oneself against physical harm by the potential (or actual) use of firearms, then it is at least open to question why this right is lost simply by having been convicted of a crime, or by entering or remaining in the country illegally. After all, the protections of the Bill of Rights are generally extended to all “persons,” not merely to “law-abiding citizens.” Deprivation of a right to possess firearms in one’s home for self-defense is almost to brand the person so deprived as an “outlaw” who cannot protect him- or her-self as can others. This does not mean, of course, that felons cannot be deprived of certain rights, and the same is true, no doubt, of undocumented aliens. The point is whether such denials can be based on sheer membership in the categories set out, or whether any more evidence must be proffered by the government with regard to particular claimants.

The Court suggested almost a half-century ago a doctrine by which “irrebuttable presumptions” would be constitutionally suspect.33 Perhaps wisely, it abandoned the doctrine quite quickly once it realized that to take it seriously would turn every case involving a state-mandated classification into a constitutional case, where one would have to prove not only that the general categories made sense, but that the rationale applied in the specific instance as well. It might generally be defensible to prohibit dogs from restaurants, but my particularly well-behaved pooch should surely be an exception! Still, to allow “as

30. Id.
31. See 18 U.S.C. § 922(g)(1) (2012) (“It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm or ammunition”).
32. Id. at § 922(g)(5) (“It shall be unlawful for any person . . . being an alien . . . illegally or unlawfully in the United States . . . to . . . possess . . . any firearm or ammunition”).
applied” challenges in lieu of challenging the facial constitutionality of statutes is just to reject a one-size-fits-all approach to statutes that will inevitably have elements of both overbreadth and underbreadth in the actual relationship of their means to what may be altogether legitimate ends.

I am not the only person who wonders, for example, why Martha Stewart, who served time in federal prison for lying to an F.B.I. agent seeking information about insider stock trading, is ineligible to possess a firearm to protect herself against a potential invader of her domestic castle.34 She has not been pardoned,35 though by all accounts she seems fully to have re-entered polite society in all respects following her release. She is not, however, eligible to purchase or possess a firearm. Why not? It is wildly implausible that her crime manifested a disposition to engage in violent actions against those who cross her. And it is surely the case that her crime—including its categorization as a “felony” generating a prison term for violation—counts as a malum prohibitum, i.e., a crime labeled as such because of a legislative statute, instead of a malum in se, the kind of activity that we recognize as a “self-evident” evil that will be prohibited by any decent state.36

It is worth noting in this context that 18 U.S.C. § 921(a)(20)(A) explicitly excludes from the category of affected felons those whose “Federal or State offenses pertain[] to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices.”37 Is lying to the F.B.I. about insider trading really more of a threat to the republic than the “business practices” exempted from coverage by § 921(a)(20)(A)? If one takes seriously the position that all members of the American political community have not only a constitutional right, but perhaps even a

“natural right” to defend themselves against potential sources of physical harm, then Martha Stewart—and millions of other non-violent criminals—have done nothing that should lead us to strip them of their right. We would—and could—not strip all convicted felons of their standard-form First Amendment rights to participate in public debate or enjoy their religious freedoms, at least following their release.

Within the 1000 cases trying to give concrete meaning to the Second Amendment is almost literally a handful (at most) that genuinely address the potential rights of convicted felons. But most felon-in-possession cases, Ruben and Blocher suggest, are treated as near toss-offs, not least, of course, because of Justice Scalia’s almost insouciant endorsement of the existing federal law on this point and the undoubted lack of sympathy engendered by most actual felons demanding restoration of their right to possess firearms. However, even if one believes that most convicted felons do present enough of a potential threat to public order to justify deprivation of a right to possess firearms, “most” does not mean “all.” It is certainly a legitimate question if Heller should be interpreted in such a wooden fashion, especially if one agrees with Scalia that a “fundamental right” is at stake.

As a matter of fact, the Third Circuit, in a truly impressive set of en banc opinions totaling well over 100 pages of typescript, canvassed the issues raised. Against vigorous dissent, a majority (though unable to agree on a single rationale) held that two claimants convicted long ago of “misdemeanors” under Maryland law, one of “corrupting a minor” (a 17-year-old employee with whom a 41-year-old manager had a purportedly consensual sexual relationship), the other of illegal possession of a handgun, were entitled to the restoration of their Second Amendment rights to possess a firearm. They were estopped from such possession because the federal statute in question defines a “felon” in effect as anyone convicted of a crime, whether labeled a “felony” or “misdemeanor,” for which the punishment could be more than two years imprisonment, whatever the actual sentence.

As one might imagine, the two opinions upholding such a right engaged in a complex particularistic analysis of the claimants before them. The dissent by Judge Fuentes not only deferred to the plain language of 18 U.S.C. § 922(g)(1), but also protested that acceptance of the majority’s opening of the door to such particularism would create an unmanageable administrative burden, not to mention the

potential for doctrinal chaos with regard to forcing federal judges to demonstrate with precision why one person is deserving while another is not. Recall the quick retreat of the “irrebuttable presumption” doctrine, which seemed to invite “as applied” challenges to every application of general law. “As applied” challenges inevitably lead to de-facto balancing tests. I have no personal objection to judicial balancing, but it is a special irony that Justice Scalia himself professed to detest balancing and would presumably have been chagrined to discover that his legacy created a broad new area of legal doctrine requiring such balancing.

There is not space available to set out the conflicting arguments. All the reader really need know is that Binderup constituted a truly impressive performance by the members of the Third Circuit. If one takes seriously the notion that the Supreme Court should rely on such courts to identify and then offer thoughtful ruminations on the complexities of issues presented prior to intervention by the apex court, then it is unimaginable that (almost literally) any court could do a better collective job than did the Third Circuit. Moreover, the judges demonstrate that different circuits have taken quite different approaches to the question of the ability of a felon to challenge the bar against possessing a weapon, though it is the first circuit that has in fact upheld such a challenge. It is hard to envision a more cert-worthy case. That, of course, proved to be irrelevant, as the Court denied certiorari over the dissent of Justices Ginsburg and Sotomayor. One might be tempted to wonder why it was these justices who dissented. Where was Justice Thomas, who has complained about the Court’s neglect of the Second Amendment? Or was he afraid that Justice Kennedy might join the “liberals” and reverse the Third Circuit by upholding the blanket ban on felons possessing firearms? There is obviously no way of knowing for sure.

An excellent student note by D. McNair Nichols, Jr. canvasses the issues raised by excluding undocumented aliens from being able to enjoy any rights under the Second Amendment. The central “contradiction” at the heart of the analysis is the refusal by courts to treat undocumented aliens as “persons” or “people” entitled to constitutional protection, at least where the Second Amendment is concerned. This is especially problematic, Nichols notes, with regard to those brought by their parents to the United States, who were functionally raised, even if not born in the country. Is it really adequate

to say, as have the Fourth and Fifth Circuits, that “[i]llegal aliens do not belong to the class of law-abiding members of the political community to whom the Second Amendment gives protection”\(^{40}\) or that undocumented persons are simply not “members of the political community” covered by the Second Amendment because they committed the “crime of illegal entry?”\(^{41}\) As a matter of fact, though, Nichols demonstrates that “[a] circuit split has developed over the meaning of ‘the people’ in the Second Amendment.”\(^{42}\) Those of us who are properly critical of Congress for failing adequately to address the issues posed by “Dreamers”—who are in all relevant respects members of the American social community—should not be so understanding of similar abdication by the Supreme Court.

To be sure, one might believe that there are important differences between convicted felons and aliens, especially if the latter are undocumented, but the degree of importance very much depends on the overall theory one adopts of the Second Amendment. If, for example, one views it as protecting the civic-republican rights of sufficiently virtuous members of the political community to take up arms against a state infringing their liberties, then one might exclude aliens, documented or not, by reference to the fact that their failure to be citizens is dispositive about their not possessing the requisite degree of civic virtue. But once one adopts a more liberal, individualistic, view of the Amendment, as Scalia professed to do, then one has to ask why aliens are not entitled to protect themselves, especially in their own homes, against those who might wish them harm. Even if one might believe that convicted felons, as a group, are more likely to engage in future violent crime, there is no reliable evidence at all that this is true of members of the category of undocumented aliens, who have an extremely high incentive to avoid coming to the attention of the police at all. It is simply one more illustration of anti-immigrant bigotry to believe that aliens present a greater threat of untoward action than full citizens of the United States. One wonders if the distinction could even pass the serious application of “minimal rationality.”

So, one important lesson presented us by Ruben and Blocher is that there is indeed a plethora of cases, and at least some of them


\(^{41}\) United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011). This reasoning was adopted by the Eighth Circuit in a perfunctory per curiam opinion in United States v. Flores, 663 F.3d 1022 (8th Cir. 2011).

\(^{42}\) Nichols, supra note 39, at 2101.
feature well-written and reasoned opinions, that take seriously the task of “inferior” judges in giving meaning to the Delphic pronouncements of their notional superiors who sit in Washington. One might become aware of this by careful scrutiny of the cases, but, of course, the Supreme Court seems entirely uninterested in offering their own wisdom about the issues presented, even as we approach a full decade of trying to wrestle with the meaning of Heller. The presence of what may well turn into thousands of cases augurs legal chaos more than careful doctrinal development. Depending on one’s own personal politics, of course, this might be for the best. Perhaps all of us are ultimately motivated by Justice Brennan’s emphasis on the importance of being able to count to five, and therefore accept the desirability of silence if one is not confident of gaining the result one would wish. One doubts, though, that that is the primary lesson Ruben and Blocher are trying to teach, given their own commitment to the importance of doctrinal development in the law.

43. Seth Stern and Stephen Wermeil explain:

Brennan liked to greet his new clerks each fall by asking them what they thought was the most important thing they needed to know as they began their work in his chambers. The pair of stumped novices would watch quizzically as Brennan held up five fingers. Brennan then explained that with five votes, you could accomplish anything.