ROMANTICISM MEETS REALISM IN SECOND AMENDMENT ADJUDICATION

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Eric Ruben and Joseph Blocher have done a tremendous service to constitutional scholarship with this empirical study of lower court cases in the ten-year wake of District of Columbia v. Heller. In a charged political atmosphere concerning guns and the Second Amendment, where claims abound but proof is scarce, the project is welcome. The late Jerome Frank hoped law would develop in such a way as to reject conjecture and romanticism and evaluate legal claims based “on moderately accurate knowledge of what has happened and is happening, and on informed guesses as to what can be made to happen.” Working in the best tradition of the legal realists, Ruben and Blocher offer a resource that does just that.

I offer three observations about this splendid study. First, it empirically confirms my sense that originalism, as a method of constitutional interpretation, is a game that only the nine judges at the top of the federal hierarchy routinely play. Second, it cements my belief that empirical analysis of decisions can inform, but never really answer, the essential normative questions about “first class” versus “second class” rights. Third, it reminds me yet again that our system of constitutional law does have institutions, including Congress and the states, empowered to assess and administer public preferences concerning rights enforcement.

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2. Jerome Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 CORNELL L.Q. 568, 587 (1932).
I. ORIGINALISM IS A GAME WITH NINE PLAYERS

I have suggested elsewhere that originalism is a method of reasoning that only the nine Justices of the Supreme Court can apply with any regularity.\(^3\) As many others have noted, not only are lower federal court judges (and particularly state court judges) resource-constrained, they are also institutionally-constrained by their subordinate place in the judicial hierarchy.\(^4\) Even if lower courts embarked on a full-employment program for historians of the Early Republic (and occasionally Reconstruction), we simply cannot have a stable hierarchical system of judicial review if every judge gets to disregard precedent and freelance every case as a matter of first impression.\(^5\) If this means that lower courts are reneging on their oath to uphold the Constitution (as some have argued\(^6\)), so be it.\(^7\)

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3. Darrell A. H. Miller, Peruta, the Home-Bound Second Amendment, and Fractal Originalism, 127 HARV. L. REV. F. 238, 242 (2014) (“The judicial hierarchy] stands as a serious institutional constraint on originalism as a methodology for anyone other than the nine Justices at the top of the pyramid.”). In speaking of “originalism” I speak of the most current version of the method, original public meaning originalism, which requires judicial evaluation of historical materials to discern the original public understanding of certain terms in the Constitution.

4. See, e.g., William Baude, Is Originalism Our Law?, 115 COLUM. L. REV. 2349, 2370 (2015) (“Nonexclusive originalists . . . generally accept that lower courts should rely on higher-court precedents rather than reasoning from first principles, and that is indeed what lower courts generally do.”); Aaron-Andrew P. Bruhl, Following Lower-Court Precedent, 81 U. CHI. L. REV. 851, 888-89 (2014) (observing that “judicial decisionmaking in constitutional cases looks quite different at different levels of the hierarchy,” and that “[o]riginalism is an interpretive method that . . . is especially difficult in resource-constrained lower courts”); Lawrence Rosenthal, Originalism in Practice, 87 IND. L.J. 1183, 1244 (2012) (“[A]uthentically originalist adjudication is something like the Loch Ness Monster—much discussed, but rarely encountered.”).

5. Lower federal court judges are, by the terms of Article I and II, “inferior courts” and state court judges, to the extent they adjudicate federal constitutional claims and adhere to their oath, are bound by decisions of the Supreme Court of the United States. See U.S. CONST. arts. I, II; Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816).

6. This practice would be untenable with just about any judicial method, not just originalism. See Baude, supra note 4, at 2370 (“[T]here is a shared consensus under almost every theory (including originalism) that lower courts are bound by “vertical precedent.””).

7. Edward J. Melvin, Judicial Activism—The Violation of an Oath, 27 CATH. LAW. 283, 284 (1982) (“[W]hen a judge takes his oath to uphold the Constitution he promises to carry out the intention of its framers.”)

7. Compare Antonin Scalia, Response, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (Amy Gutmann ed., 1997) (suggesting that precedent “make[s] us say that what is false . . . must nonetheless be held to be true, all in the interest of stability”) with Richard M. Re, Promising the Constitution, 110 NW. U. L. REV. 299, 346-48 (2016) (arguing that following precedent can be in conformity with one’s oath to uphold the constitution), and Randy E. Barnett, The Gravitational Force of Originalism, 82 FORDHAM L. REV. 411, 420 (2013) (“Devising doctrine to effectuate what this Constitution says does not violate a judge’s oath—it fulfills it.”). These discussions are largely addressed to stare decisis in the Supreme Court, although they seem just as applicable to lower courts.
To date, I have operated on the bare assumption that lower courts are disinclined to conduct the kind of thorough, history-centric investigation of Second Amendment cases that the more adamant sections of *Heller* seem to require. Ruben and Blocher’s research appears to confirm my assumption. As they write, “[o]ur data provides support for the proposition—occasionally phrased as a complaint—that original historical analysis is not the sole driving force in Second Amendment cases.” They note, surprisingly, that lower courts have not substituted historical materials with precedent in their opinions (although there is some methodological ambiguity on this point), but are instead, unsurprisingly, relying on more familiar nonoriginalist tools—like tiers of scrutiny—to adjudicate Second Amendment cases.

Ruben and Blocher’s conclusions about actual applied judicial methodology post-*Heller* casts further doubt on originalism’s suitability as a comprehensive method of constitutional reasoning. Originalism, it must be remembered, was sold as a form of restraint on *all* judges. But this promise continually runs into the problem of judicial administration. As everyone understands, the need to get to five votes on the Supreme Court means that thoroughgoing originalist opinions are going to be rare. So, until there are actually five votes to consistently and regularly engage in originalist opinion making, the trickle down of originalist precedent will be the aberration, not the norm.

Furthermore, this research suggests that the demands of managerial judging does and likely will continue to displace historical methods as state and federal judges turn to other, less cumbersome tools to clear their dockets, form panel coalitions, or get through the next election cycle. The *Heller* Court gave lower courts a broad license to experiment with historical methodologies, relatively unconstrained by binding precedent, and they (for the most part) have turned down the opportunity. It is possible that there may be ideological reasons for this move, but, as *Heller* itself shows, and as further historical research reveals, there’s nothing necessarily pro-right or pro-regulation about historical sources concerning firearms. There is plenty of historical material on both sides of this political issue.

8. Ruben & Blocher, supra note 1, at 1491.
9. Id. at 1494–96.
10. Allen Rostron, Justice Breyer’s Triumph in the Third Battle over the Second Amendment, 80 GEO. WASH. L. REV. 703, 756–57 (2012) (noting that “[]lower court judges have run into the reality that historical inquiries are extremely difficult and do not produce determinate answers,” and that lower court judges have “pulled toward an intermediate scrutiny approach that gives them the comfort of applying familiar formulas”).
Hence, it may be that originalism as a practical decision making device is simply too costly and unwieldy for your average lower court judge. It seems likely, then, that originalism as a method of adjudication will remain a matter of intense debate among The Nine, the professoriate, and perhaps the Senate Judiciary Committee, but will continue to mean very little for the work-a-day decision making of the average jurist.11

II. THE INESCAPABLE NORMATIVITY OF GUN RIGHTS ENFORCEMENT

What may surprise many is the success rate of Second Amendment claims. For all the hostility and indignation that is directed at the judiciary, particular circuits, or even particular judges who hear Second Amendment cases, it appears that, depending on the claim asserted, who asserts it, and in what court (all important caveats), an individual with a Second Amendment case has a decent shot at winning.12

I have a prediction: future briefs opposing certiorari in Second Amendment cases will cite the Ruben/Blocher analysis as incontrovertible evidence that lower courts are enforcing the Constitution, and the rhetoric of “second-class right,”13 “constitutional orphan,”14 anti-gun “bigotry”15 and “massive resistance”16 in Second Amendment cert petitions will continue apace. That’s because the question of the adequacy of constitutional enforcement can only be answered at the margins by the kind of empirical work Ruben and Blocher have produced. Inescapably, whether you think the Second

11. See 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) (“[T]he 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.”) (citing Anthony G. Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U.L. REV. 785, 786–87 (1970)).

12. Overall, the success rates are low, but increase when one takes out criminal cases and pro-se litigation. See Ruben & Blocher, supra note 1, at 1473, 1477–79.


Amendment is being over- or under-enforced, or optimally-enforced, is a normative judgment dependent on other factors.

The authors’ data is valuable empirical information, but it can answer only a limited set of questions of normative significance. Is the right not being enforced or is it being universally enforced? Is the success rate zero percent or a hundred percent? At those two extremes, for any constitutional provision that has judicially enforceable legal content, we could make a normative claim like “the right is under-enforced” or “the right is over-enforced”—because we expect constitutional litigation to have some success and failure. But once we move past that binary, there is very little else the data can tell us normatively. The data can confirm or falsify empirical claims about success rates, it can inform how we may think about the consequences of more or less rights enforcement, but it cannot answer the prior question of what the baseline rate of success should be.

But what of comparisons across constitutional rights? Certainly, as Justice Thomas recently argued, we can say something about “first class” and “second class” rights by reference to how the courts treat other claims. But that presumes that variation in constitutional rights litigation can be controlled, so that the rights are rendered interchangeable, and thus one can make meaningful statements about the success rates of gun rights claims versus abortion rights claims. I do not have the expertise to evaluate such a statistical maneuver, but as a consumer of empirical data, I’m skeptical.

Comparative data across rights could suggest that judges apply special tests to implement the right to keep and bear arms that they typically don’t use for other rights. For example, the data could show that a court that rejects tiers of scrutiny for a strict “text, history, and tradition” approach to Second Amendment claims places the right to keep and bear arms in a minority vis-à-vis most other rights. But that would be a descriptive assertion; it could not answer the normative

17. Of course, there may be some kinds of constitutional claims where we expect zero success because the constitutional terms no longer have legal content. The Fugitive Slave Clause is one such example. See U.S. CONST. art. IV, § 2, cl. 3.
19. Adam Samaha and Roy Germaino in their piece attempt to do just that, but are careful to note that it depends on a comfort with “switch[ing] the constitutional clause cited and leav[ing] everything else about a case the same.” See Adam M. Samaha & Roy Germaino, Is the Second Amendment a Second-Class Right? 68 DUKE L. J. ONLINE 57, 58 (2018).
20. This conclusion presumes that the features of “intermediate scrutiny” for one right are functionally equivalent to “intermediate scrutiny” for another right, a proposition that may not be descriptively accurate. See Jamal Greene, The Age of Scalia, 130 HARV. L. REV. 144, 167 (2016) (suggesting that different rights are getting their own “bespoke doctrinal formula”).
question of whether text, history and tradition should be the only method to adjudicate Second Amendment claims.\textsuperscript{21}

Further, as a casual observer, it seems apparent that people do not think of constitutional rights as fungible, and neither do judges. Indeed, as I’ve written elsewhere, it is fairly clear that both citizens and judges prioritize rights.\textsuperscript{22} There’s no outpouring of public outrage because \textit{Colgrove v. Battin} permits six members of a federal civil jury rather than twelve.\textsuperscript{23} I’m also aware of no judges who insist on imposing the grand jury requirement on the states, because of fidelity to the Constitution. If both the public and the judiciary tend to prioritize rights, and if success rates reflect the kinds of rights individuals tend to care enough about to litigate, then I’m not certain what to make of cross-right comparisons either descriptively or normatively.

Finally, the normative question of rights enforcement is in some sense inextricable from the purpose of the right.\textsuperscript{24} For example, if one believes the Second Amendment right is a right to keep and bear arms for the purpose of deterring despotic government, then all the cases in which one party loses a Second Amendment challenge to taking a firearm into a government building is evidence of under-enforcement. By contrast, if one believes that such a purpose has little or no legal (as opposed to moral or political) content, then such a challenge would not count as under-enforcement, but proper enforcement. Again, Ruben and Blocher have done us all a service by making some kinds of descriptive claims about doctrine falsifiable, but we cannot expect (and they do not to claim) that their research will answer these fraught normative issues.

\textsuperscript{21} For arguments that \textit{Heller} requires such an exclusive approach, see \textit{Heller v. Dist. of Columbia}, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).


III. THE MODERATED VOICE OF THE PEOPLE

Forty years ago, Lawrence Sager wrote his influential *Fair Measure: The Legal Status of Underenforced Constitutional Norms*. His basic thesis was that there are a number of passages in the Constitution, the Equal Protection Clause being the most obvious, that contain more normative content than the Supreme Court is willing to enforce. Since that time, scholars have referenced Sager in analyzing Second Amendment claims, both before and after *Heller*.

Sager’s analysis relates to the normative question of enforcement in this respect: Congress and the states can and often do legislate in ways that fill the gap between a community’s taste for rights enforcement and actual judicial enforcement of rights. This does not necessarily mean that these legislative products are, or should be, considered “constitutional law.” That is, many states and even Congress may want to protect concealed carry as a Second Amendment imperative, but nothing about those innovations makes concealed carry Second Amendment law. In the same way that nothing about the Civil Rights Act of 1964 makes Title II part of the Fourteenth Amendment, but the Civil Rights Act does express certain values concerning freedom, citizenship, and equal protection; so too can sub-constitutional legislation express political sentiment about

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26. His argument was far more sophisticated than this one observation. For example, Sager made a distinction between declining to enforce rights for “institutional” reasons having to do with judicial competence and ability, and “analytical” reasons, having to do with their understanding of what the right actually prohibits or permits. See id. at 1239-40. For an excellent treatment of this distinction, and the complexities of Congressional enforcement of Second Amendment rights, see William D. Araiza, *Arming the Second Amendment—And Enforcing the Fourteenth*, 74 WASH. & LEEL. REV. 1801 (2017).


29. See Blocher & Miller, supra note 24, at 189, 194.
constitutional values concerning the right to keep and bear arms, without itself becoming judicially enforceable constitutional law.

The advantage of such an approach is that it channels the fractious issues surrounding whether gun rights are adequately enforced into the kinds of institutions that our post-Reconstruction Constitution often places them: Congress and the states. Scholarship like the Ruben/Blocher study then can have a significant impact in framing and informing these normative policy discussions about whether, how, and to what extent the courts are enforcing the right to keep and bear arms and whether such sub-constitutional legislative innovations are necessary or desirable.30

30. Of course, such innovations may come into conflict with other kinds of constitutional values housed in other kinds of institutions, which courts may then have to adjudicate. See Wollschaeger v. Governor of Fla., 848 F.3d 1293 (11th Cir. 2017) (striking down gun protective legislation on First Amendment free speech grounds).