THE GEOGRAPHY OF A CONSTITUTIONAL RIGHT: GUN RIGHTS OUTSIDE THE HOME

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I
INTRODUCTION

Over the past few decades, the right to keep and bear arms has been on the move. Most notably, it has stepped from the realm of pure politics into the world of positive law.[1] Where once the right to keep and bear arms operated primarily as a political slogan, it is now an operational, oft-litigated constitutional right—albeit one still facing important questions of scope and strength. In making its transformation, the right to keep and bear arms has presented courts and scholars with new questions about the constitutionality of gun regulation. The answers to those questions vary depending on *where* those regulations apply, including perhaps most importantly whether they restrict the keeping of arms to the home. Understanding the "geography" of the Second Amendment is therefore a central challenge for courts and scholars—a challenge that this symposium addresses.

As with so many other questions of gun rights and regulation, the starting point is the Supreme Court's 2008 decision in *District of Columbia v. Heller*.[2] It was *Heller* that effectuated the transition of the right to keep and bear arms from a powerful political and cultural force into a matter of constitutional doctrine. That of course did not end the political debate over gun rights and regulation. But after *Heller*, the debate is a matter for the courts as well. In the first decade after the Supreme Court's decision, they resolved more than 1,000 Second Amendment challenges.[3]

Those challenges involve many different dimensions of the right to keep and bear arms, including who can claim it, what weapons it covers, and how the government can regulate the people and weapons that are not categorically excluded. *Heller* tells us that "felons" are excluded from Second Amendment

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1. For an overview of that transformation and some thoughts on its implications going forward, see JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* (2018).

2. 554 U.S. 570 (2008).

3. *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, 1471–73 (2018).

coverage.[4] What about those who commit domestic violence misdemeanors?[5] *Heller* indicates that "dangerous and unusual" (or perhaps "dangerous or unusual"[6]) weapons can be prohibited, and equates that category with those that are not "in common use."[7] What does it mean for a weapon to be in "common use," and what constitutional significance should that have?[8] *Heller* notes that the right to carry a gun does not include a right to do so for any reason whatsoever.[9] What power do cities and states have to require that a person show reasons (or "good cause") to carry a gun in public?[10] These are central questions for Second Amendment litigation, and scholars have, in turn, provided doctrinal, historical, and empirical analysis.

But there is another way to think about the intersection between gun rights and regulation, which is by focusing on *where* they come into contact. Perhaps more so than most constitutional rights, Second Amendment questions are space-sensitive—the interests underlying the right, and the governmental interests in regulation, can both vary depending on location. Whether a particular law is constitutional depends in part on where it applies. Can the government prohibit guns in post offices and their adjoining parking lots?[11] In and around Capitol Hill?[12] On airplanes?[13] Methodologically, how are courts and scholars supposed to address such questions?

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4. *Heller*, 554 U.S. at 626–27.

5. *See, e.g.*, Stimmel v. Sessions, 879 F.3d 198, 212 (6th Cir. 2018) (upholding a federal ban on firearms possession by those who have committed misdemeanor crimes of domestic violence); United States v. Chovan, 735 F.3d 1127, 1140–41 (9th Cir. 2013) (same); United States v. White, 593 F.3d 1199, 1205–06 (11th Cir. 2010) (same); United States v. Skoien, 614 F.3d 638, 645 (7th Cir. 2010) (en banc) (same).

6. *Compare Heller*, 554 U.S. at 627 (referring to "dangerous and unusual" weapons), *with id.* at 623 (referring to "dangerous or unusual" weapons).

7. *Id.* at 624, 627.

8. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 135–36 (4th Cir. 2016) (en banc), *cert. denied*, 138 S. Ct. 469 (2017) (citations omitted); 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, 1480 (2009).

9. *Heller*, 554 U.S. at 626 (citations omitted) ("From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

10. *See infra* notes 27–28; Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218 (2014).

11. Bonidy v. U.S. Postal Serv., 790 F.3d 1121 (10th Cir. 2015). Notably, the panel in *Bonidy* divided, in part, based on the level of generality at which the place-based restriction should be evaluated. In his partial concurrence, Judge Tymkovich argued that "the government has not shown that successfully combating potential crime at this location—a run-of-the-mill post office parking lot in a Colorado ski town—hinges on restricting the Second Amendment rights of lawfully licensed firearms carriers." *Id.* at 1129 (Tymkovich, J., concurring in part). The majority rejected this as too much tailoring: "To require the USPS to tailor a separate gun policy for each of its properties or indeed for its many diverse customers would present an impossible burden not required by the intermediate scrutiny test." *Id.* at 1127.

12. United States v. Class, 930 F.3d 460 (D.C. Cir. 2019).

13. United States v. Davis, 304 F. App'x 473, 474 (9th Cir. 2008). The regulation of firearms on airplanes presents a particular difficulty for historically minded approaches to the Second Amendment, because Congress did not enact such a prohibition until the 1960s. *See* Act of Sept. 5, 1961, Pub. L. No. 87-197, 75 Stat. 466.

As a general matter, there is nothing unusual about tailoring constitutional rights based on location, such that a regulation which is unconstitutional in one location might be constitutional elsewhere.[14] Evaluation of time, place, and manner restrictions, to take one example, focuses on where those restrictions apply.[15] The constitutionality of a stop and frisk depends in part on where it is performed.[16] Fundamental constitutional rights—whether it is the right to vote, or to engage in consensual sexual activity—can be limited to particular places without so much as a whisper of constitutional objection.

Perhaps the most notable division is that between public and private. Most constitutional rights or interests are especially resistant to governmental regulation when exercised in the home. The First Amendment's treatment of obscenity is perhaps the obvious example here—such material can be possessed in the home, but prohibited elsewhere.[17] But the answer need not always be binary; sometimes the privacy of the home is simply one factor weighing against the constitutionality of a regulation.[18]

The right to keep and bear arms presents these questions about location-sensitivity in particularly complex but important ways. First, *Heller* makes it clear that location does matter—the constitutionality of a gun regulation depends in part on where it applies. This is implicit in the majority's holding that the Second Amendment does not extend to "sensitive places such as schools and government buildings . . . ."[19] But what exactly makes a place sensitive remains an issue of doctrinal and scholarly debate.[20]

The majority also says that the "core" interest protected by the Second Amendment—that of self-defense[21]—is "most acute" the home.[22] This tracks

14. This is true even if one zooms out to the jurisdictional level, as federal constitutional rights vary in their particulars—sometimes in surprising ways—depending on local facts. *See, e.g.*, Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, ILL. L. REV. (forthcoming 2020); Brandon L. Garrett, *Local Evidence in Constitutional Interpretation*, 104 CORNELL L. REV. 855 (2019).

15. Frisby v. Schultz, 487 U.S. 474, 480–81 (1988).

16. Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

17. *See generally* Stanley v. Georgia, 394 U.S. 557 (1969) (establishing constitutional protection for private possession of obscene materials). For an examination of how that doctrine could apply to the Second Amendment, see Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1280 (2009) (arguing for "a robust right in the home, subject to near-plenary restriction by elected government officials everywhere else").

18. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("In our tradition the State is not omnipresent in the home."); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

19. *Heller*, 554 U.S. at 626.

20. For two recent efforts to address that question, see David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205 (2018); Darrell A. H. Miller, *Sensitive Places and Constitutional Conflict*, 28 WM. & MARY BILL R. J. 459 (2019).

21. *Heller*, 554 U.S. at 630; *id.* at 599 ("central component").

22. *Id.* at 628 (noting that the D.C. handgun law "extends . . . to the home, where the need for defense of self, family, and property is most acute").

traditional principles of self-defense law, which treated the home as one's castle[23] and which (even after the expansion of self-defense rules in the United States over the past century) still accord heightened protection to self-defense in one's house.[24] On the other hand, the right to engage in self-defense is not *limited* to the home. After all, "the interest in self-protection is as great outside as inside the home[,]"[25] which might suggest that the right to bear arms in public is "on par" with the right to do so in the home.[26]

As a practical matter, these issues are central to litigation about public carry restrictions. As noted above, some jurisdictions require a person to show "good cause" (or some equivalent) before carrying a weapon in public. And while such restrictions have overwhelmingly been upheld,[27] Second Amendment challengers have seen more success in this area than any other.[28]

Furthermore, though most courts have either held or assumed that the right to keep and bear arms extends outside the home, they have not said much about *why* and *how* the right operates in public—nor has the Supreme Court weighed in on the matter. It is no exaggeration, then, to say that the single most important substantive debate in Second Amendment litigation and scholarship is whether and how the right to keep and bear arms extends outside the home.

Resolving that debate will require engagement with a wide range of doctrinal, empirical, and historical sources—precisely what the contributions to this symposium seek to provide.

One set of the articles addresses cases of constitutional conflict, of potential collisions more likely to arise outside the home than within it. Gregory Magarian, for example, argues that widespread rights to public carry can threaten robust free speech rights.[29] He suggests that in public "guns far more commonly impede

23. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *288 ("Every man's house is looked upon by the law to be his castle."); 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND *162 ("A man's house is his castle—for where shall a man be safe if it be not in his house?").

24. United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) (citations omitted) ("[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.").

25. Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012); *see* Volokh, *supra* note 8, at 1515 ("[S]elf-defense has to take place wherever the person happens to be. Nearly any prohibition on having arms for self-defense in a particular place . . . is a substantial burden on the right to bear arms for self-defense."). *But see Masciandaro*, 638 F.3d at 475 (4th Cir. 2011) ("The notion that 'self-defense has to take place wherever [a] person happens to be,' appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities. . . . The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.") (alteration in original) (citing Volokh, *supra* note 8, at 1515).

26. *See* Wrenn v. District of Columbia, 864 F.3d 650, 663 (D.C. Cir. 2017) ("[T]he rights to keep and bear arms are on equal footing— . . . the law must leave responsible, law-abiding citizens some reasonable means of exercising each.").

27. *See, e.g.*, Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018); Peruta v. San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012).

28. Ruben & Blocher, *supra* note 3, at 1484–85. *See, e.g.*, *Wrenn*, 864 F.3d at 666–67 (D.C. Cir. 2017) (striking down Washington, D.C.'s good-cause concealed carry licensing standard).

29. Gregory P. Magarian, *Conflicting Reports: When Gun Rights Threaten Free Speech*, 83 LAW &

and chill free speech than protect or promote it."[30] He describes the ways these conflicts occur in public protests, at public universities, and in debates over the privacy interests of gun owners. Ultimately, he suggests, when free speech rights and Second Amendment rights do come into conflict, the former ought to prevail.

Pursuing a similar theme, Josh Blackman describes the battle over 3D-printed firearms and the First Amendment interests at stake in government attempts to regulate the internet files that could be used to print these guns.[31] Describing a right "to code and share arms," Blackman chronicles his role as counsel for Defense Distributed, the company at the center of various governmental and private efforts to enjoin posting files for 3D-printed guns on the internet. Blackman challenges free-speech advocates to support Defense Distributed the same as they would any other individual or entity seeking to freely share legal material on the web.

Mary Anne Franks also raises questions about the interactions between the Second Amendment right and other rights and interests.[32] She argues that activists for a robust right to keep and bear arms seek the same kind of "safe spaces" and other protections for arms-bearing that they often criticize college students for seeking in debates over "triggering" speech. But, unlike the latter, the gun-rights activists' claims are not mostly benign; Franks argues, "[the gun rights movement's] demand for Second Amendment safe spaces poses a far graver threat to society than even the most intemperate demands of overly sensitive college students."[33]

A second set of articles focuses on regulating places, products, and people, and how these firearm regulations affect the Second Amendment right outside the home. Brannon Denning describes how a right to travel armed arises not just from the Second Amendment, but from the synergy of multiple constitutional guarantees.[34] These "hybrid rights"—here the right to keep and bear arms and the constitutional right to travel—should have resulted in the New York rule at issue in *New York State Rifle & Pistol Association v. City of New York* (*NYSRPA*)[35] "being subject to more searching scrutiny than that applied by the Second Circuit."[36] He concludes that a restriction so severe as to limit the right to travel armed except in narrow circumstances like those at issue in *NYSRPA* likely violates this hybrid right.

Robert Spitzer outlines the historical regulation of assault weapons,

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CONTEMP. PROBS., no. 3, 2020, at 169.

30. *Id.* at 169.

31. Josh Blackman, *The Right to Code and Share Arms*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 1.

32. Mary Anne Franks, *The Second Amendment's Safe Space, or The Constitutionalization of Fragility*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 137.

33. *Id.* at 155.

34. Brannon P. Denning, *Have Gun—Will Travel?*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 97.

35. 883 F.3d 45 (2d Cir. 2018), *vacated as moot*, 140 S. Ct. 1525 (2020) (per curiam).

36. Denning, *supra* note 34, at 98.

magazines, and silencers.[37] He observes that "[r]ecent analyses of the history of gun laws in America have excavated a surprisingly rich, diverse, and prolific number and variety of gun laws, extending back to the country's beginnings."[38] This rich history, Spitzer shows, included extensive regulation of weapon types and magazine capacity, as well as firearm accessories like silencers.

Jacob Charles discusses not whether guns can get outside the home, but who can bring them there, or indeed who can possess them at all.[39] Charles argues that, as some jurists have recently suggested, people should not be treated the same as arms or activities when considering Second Amendment coverage. Most groups of people should be considered within the scope of the right, with rights that are defeasible only if the government can satisfy some form of means-end scrutiny. But not all classes of persons are the same, and some—like children and (perhaps) undocumented immigrants—might fall outside the scope of the right altogether.

A third set of articles engages the empirical and theoretical debates regarding firearms outside the home. John Pepper and Megan Miller describe the methodological variation among studies of the effects of stand-your-ground laws on violent crime.[40] Pepper and Miller report their conclusions using both strong and weak assumptions, showing that these choices can lead to starkly different results. On their preferred model, they find that stand-your-ground laws increase violent crime and murder.

John Donohue argues that more guns in public leads to more crime.[41] He records the quick and comprehensive movement over the last several decades that has expanded public carry of firearms, often with little or no restriction. Marshalling recent empirical research, he contends that the evidence shows that expanded and loosened public carry laws have an undesirable social impact and that courts should take this data into account when adjudicating Second Amendment claims.

Nicholas Johnson describes the "defiance impulse" that will likely lead millions of otherwise law-abiding Americans to ignore or defy restrictive concealed-carry laws.[42] He argues that, given that widespread defiance is likely to occur, an enforcement regime against such a common practice is likely to result in racial disparities in implementation.

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37. Robert J. Spitzer, *Gun Accessories and the Second Amendment: Assault Weapons, Magazines, and Silencers*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 231.

38. *Id.* at 232.

39. Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossess Prohibited Persons*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 53.

40. Megan Miller & John Pepper, *Assessing the Effect of Firearms Regulations Using Partial Identification Methods: A Case Study of the Impact of Stand Your Ground Laws on Violent Crime*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 213.

41. John J. Donohue, *The Swerve to "Guns Everywhere": A Legal and Empirical Evaluation*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 117.

42. Nicholas J. Johnson, *Defiance, Concealed Carry, and Race*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 159.

Finally, the last compilation of articles discusses the history of a right to keep and bear arms outside the home. Saul Cornell excavates and explains the historical restrictions on traveling with firearms that existed both prior to and in the decades after the Second Amendment's ratification.[43] He argues that modern gun-rights advocates have read a libertarian right into a Founding-era culture that often erected strict barriers to travelling armed.

Joyce Lee Malcolm, on the other hand, reports a historical record that broadly permitted public carry, including traveling with firearms.[44] She argues that the English duty to be armed—which in many cases necessarily took place outside the home—is a crucial backdrop for the founding generation's understanding of the right to carry arms in public.

In his contribution, Jud Campbell approaches the issue from a different angle.[45] He describes the Founding-era conceptions of rights, which distinguished between natural and positive rights, and the impact that distinction should have on how we implement the Second Amendment right. He urges courts and commentators relying on early case law to be wary about imposing modern notions of rights and judicial review onto a wholly different legal culture. Some inter-generational translation, in short, is necessary to use historical guideposts to decipher the scope and limits of the Second Amendment right.

All of the articles in this symposium make original and important contributions to the still-developing field of firearms law. With the Supreme Court seemingly poised to reengage with the Second Amendment after nearly a decade of silence, this kind of scholarship will continue to make an impact on the direction of the law.

43. Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688–1868*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 73.

44. Joyce Lee Malcolm, *The Right to Carry Your Gun Outside: A Snapshot History*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 195.

45. Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 31.