

HELLER'S FUTURE IN THE LOWER COURTS[†]

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INTRODUCTION

The Supreme Court has released its long-awaited opinion in *District of Columbia v. Heller*,¹ and the buzz has been considerable. Though much has been made of the majority's historic ruling and of the narrowness of that majority, many commentators have missed an important point. What *Heller* is most notable for is its complete and unanimous rejection of the "collective rights" interpretation that for nearly seventy years held sway with pundits, academics, and—most significantly—lower courts.

The repudiation of this extensive body of case law² suggests that the real test of *Heller* will occur once the lower courts, traditionally hostile to an individual rights interpretation of the Second Amendment, face the inevitable follow-up cases challenging other restrictive gun laws. Experience with other seemingly groundbreaking Supreme Court decisions in recent years, such as *United States v. Lopez*,³ suggests that lower-court foot-dragging may limit *Heller*'s reach, though this time around there will likely be considerably more scrutiny and more vigorous litigation efforts.

If the lower courts present a challenge to the implementation of *Heller*, they also provide litigants with an opportunity. Given the fact that the *Heller* majority declined to give a detailed accounting of the proper standard of review to be used in subsequent Second Amendment cases, litigants have a rare opportunity to write on a *tabula* much more *rasa* than is ordinarily the case in constitutional litigation, while making use of recent scholarship on the crafting of constitutional decision rules that implement constitutional provisions.

In the pages that follow, we take a look at these aspects of *Heller*. The triumph of the Standard Model of the Second Amendment is examined in

[†] This Essay was previously published in the *Northwestern University Law Review Colloquy* on July 17, 2008, as Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. COLLOQUY 406 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/23/>.

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¹ 128 S. Ct. 2783 (2008).

² See Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996) (criticizing the caselaw citing *United States v. Miller* as authority for rejecting an individual rights interpretation).

³ 514 U.S. 549 (1995).

Part I. Part II asks whether *Heller* is merely the opening volley in the coming judicialization of the gun control debate or whether, like the Court's attempt to rein in congressional power under the Commerce Clause, *Heller* will ultimately be seen as largely symbolic. Finally, in Part III, we discuss the possibility that recent scholarship on constitutional doctrine might play a role in separating permissible from impermissible gun controls post-*Heller*.

I. INDIVIDUAL AND COLLECTIVE RIGHTS

Pre-*Heller* discussions of the Second Amendment noted the conflict between an individual rights model in which the Amendment confers a right to arms on individual citizens, who are entitled to use the courts to resist infringements in the same fashion as other constitutional rights such as free speech or privacy, and a collective rights model in which it does not confer such a right. Under the formulation of this individual right arrived at by a large number of Second Amendment scholars (often referred to as the "Standard Model" of Second Amendment individual rights interpretation), the right is not absolute but is extensive: "The purpose of the right to bear arms is twofold: to allow individuals to protect themselves and their families, and to ensure a body of armed citizenry from which a militia could be drawn, whether that militia's role was to protect the nation, or to protect the people from a tyrannical government."⁴

Set against this individual rights view was the so-called collective rights interpretation, under which the Second Amendment protects only the right of states to maintain an organized militia (often characterized as the modern-day National Guard) and gives rise to no judicially enforceable right to keep and bear arms on the part of individuals. This theory characterized virtually all writing on the subject from the federal courts of appeals after the Supreme Court's 1939 opinion in *United States v. Miller*,⁵ though the *Miller* opinion itself did not adopt a collective rights approach.⁶ Under the collective rights theory, the Second Amendment, if it were susceptible to judicial enforcement at all, could only be invoked by a state government whose state militia was impaired by federal action. Individuals, even those

⁴ Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 475 (1995) (footnote omitted).

⁵ 307 U.S. 174 (1939); see, e.g., *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942) (stating that the Second Amendment was designed to foster "the efficiency of the well regulated militia . . . as necessary to the security of a free state"); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (stating that the Second Amendment "was not adopted with individual rights in mind").

⁶ See Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, LAW & CONTEMP. PROBS., Spring 2002, at 113 (discussing the holding in *Miller* in light of the briefs and arguments).

claiming membership in a state's "unorganized" militia, could not challenge federal gun laws.⁷

Shortly after *Miller* was decided, federal courts of appeals began to overread it and to cite it for the proposition that only arms borne with the intent of participating in or contributing to the efficacy of a militia were protected.⁸ These courts essentially equated the *Miller* Court's refusal to hold that a sawed-off shotgun was protected by the Second Amendment with a refusal to recognize any individual right under the Amendment that was not, first and foremost, concerned with the maintenance of an organized and government-regulated military body.⁹

Subsequent courts went further, stating that *Miller* held that the Second Amendment did not guarantee an individual right.¹⁰ Reading those opinions closely, however, it is clear that many simply relied on what *other* courts had said about *Miller*, and some judicial characterizations of *Miller*'s facts are so inaccurate that it is difficult to believe that the judge writing the opinion could have actually read the *Miller* decision itself.¹¹ Lower court discussions of *Miller* resembled a game of judicial Telephone, with the actual holding of *Miller* becoming less and less recognizable as the years progressed. Prior to *Heller*, only the Fifth Circuit in *United States v. Emerson*¹² held that the Second Amendment guarantees an individual right, although it found the right was not violated by the facts at hand.

⁷ An "unorganized" militia, by statute, designates able-bodied males within a certain age range as members. Unorganized militia are contrasted with the "select" militia of a state, which correspond roughly to the state's National Guard. See, e.g., 10 U.S.C. § 311 (2000) (classifying the able-bodied male population aged seventeen to forty-five as the unorganized militia of the United States). State rules are similar, except that many states include women. See, e.g., OHIO CONST. art. IX, § 1 (1994) (authorizing "all citizens" to serve); KAN. STAT. ANN. § 48-904(e) (1983) ("[U]norganized militia" means all able-bodied male and female persons between the ages of 16 and 50 years."); OR. REV. STAT. § 396.105(3) (1994) ("The unorganized militia shall consist of all able-bodied residents of the state between the ages of 18 and 45 who are not serving in any force of the organized militia or who are not on the state retired list and who are or who have declared their intention to become citizens of the United States; subject, however, to such exemptions from military duty as are created by the laws of the United States.").

⁸ See Denning, *supra* note 2, at 981–87 (discussing early cases applying *Miller*).

⁹ See, e.g., *Cases*, 131 F.2d at 923; *Tot*, 131 F.2d at 266; Denning, *supra* note 2, at 981–87 (discussing *Cases* and *Tot*). But see *District of Columbia v. Heller*, 128 S. Ct. 2783, 2814 (2008) ("It is entirely clear that the [*Miller*] Court's basis for saying that the Second Amendment did not apply was *not* that the defendants were 'bear[ing] arms' not 'for . . . military purposes' but for 'nonmilitary use' Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection Beyond that, the opinion provided no explanation of the content of the right." (citations omitted)).

¹⁰ See Denning, *supra* note 2, at 988–98 (discussing lower court cases).

¹¹ See *id.* at 997–98 (discussing *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996)).

¹² 270 F.3d 203 (5th Cir. 2001).

II. THE LOWER COURTS AND THE *HELLER* DECISION

It is impossible to review the Second Amendment jurisprudence from the federal courts of appeals (excepting only *Parker v. District of Columbia*¹³—the lower-court version of *Heller*—and *United States v. Emerson*) without noting two things: a significant hostility toward individual rights arguments and a surprisingly deep investment in their own caselaw, despite its rather tenuous anchor in the Supreme Court’s decisions. This raises the question: what will the courts do when presented with gun rights cases post-*Heller*?

There is some reason to expect that the answer will be “not much.” The last constitutional revolution led by the Supreme Court—via its *Lopez* and *Morrison*¹⁴ decisions limiting congressional power under the Commerce Clause—essentially petered out in the face of lower-court resistance.¹⁵ In light of *Gonzales v. Raich*,¹⁶ which upheld the application of federal drug control laws to local, noncommercial medical marijuana, lower court reluctance to read *Lopez* and *Morrison* looked prescient. Will that happen again with the Second Amendment?

In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act as being in excess of Congress’s enumerated power to regulate commerce among the several states. In the years following *Lopez*, hundreds of cases flooded the lower courts, most brought by defendants convicted of violating various federal criminal statutes claiming that those laws also exceeded Congress’s commerce power.¹⁷ In the five years after *Lopez*, however, only one law—the civil suit provision eventually invalidated in *Morrison*—was struck down by a federal appellate court.¹⁸ Even after *Morrison*, when the Court not only reaffirmed *Lopez* but seemed to add, “and we mean it,” courts were still reluctant to rigorously analyze federal statutes using the *Lopez-Morrison* framework. Before *Raich* signaled a retreat,

¹³ 478 F.3d 370, 395 (D.C. Cir. 2007) (“[T]he Second Amendment protects an individual right to keep and bear arms.”), *aff’d sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

¹⁴ *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil-suit provision of the Violence Against Women Act as beyond Congress’s commerce power).

¹⁵ See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003) [hereinafter Denning & Reynolds, *Rulings and Resistance*] (discussing lower court cases following *Morrison*); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 [hereinafter Reynolds & Denning, *Constitutional Revolution*].

¹⁶ 545 U.S. 1 (2005) (upholding the application of the Controlled Substances Act to noncommercial marijuana grown and possessed for local, medicinal use under state law).

¹⁷ Several of these challenges are discussed in Reynolds & Denning, *Constitutional Revolution*, *supra* note 15.

¹⁸ *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff’d sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000).

though, lower courts were beginning to uphold as-applied challenges to particular federal statutes.¹⁹

Will *Heller* suffer *Lopez*'s fate, serving more as casebook fodder than as actual authority? On the surface, there are some analogies between the Commerce Clause and the Second Amendment that suggest that like *Lopez*, *Heller* itself may end up as so much sound and fury, signifying nothing—or at least nothing much.

First, there are the institutional prejudices of the courts of appeals, favoring the status quo and possessing a desk-clearing mentality. Like the bureaucrats they increasingly resemble, the members of the appellate judiciary do not like to rock the boat. In addition, the courts of appeals have a history of more or less open hostility to claims of a private right to arms. The vast majority of cases to date suggest that, to the extent they can, they will try to rule against such a right.

Second, as was true following *Lopez*, there are few federal firearms laws that are vulnerable under *Heller*. Indeed, Justice Scalia's opinion took some pains to make clear what the Court was not calling into question:

[N]othing 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.²⁰

Indeed, the very enumeration of “presumptively lawful regulatory measures” seemed calculated to reduce expectations among, for example, felons convicted of possessing firearms in violation of federal law, who may have otherwise thought that *Heller* represented a “Get Out of Jail Free” card.

Third, the *Heller* majority's refusal to be pinned down on a specific standard of review might also leave an opening for lower courts to confine *Heller* to its facts.²¹ For example, a court might read *Heller* as standing for the proposition that anything less than an absolute ban could pass muster. Even if a reviewing court adopts the kind of intermediate standard of review urged by the Solicitor General,²² it might simply apply the standard in a way that defers to governmental judgments about the necessity of regulation. A

¹⁹ See Denning & Reynolds, *Rulings and Resistance*, *supra* note 15 (describing these as-applied challenges).

²⁰ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008). A footnote added, for good measure, that the Court's list of “these presumptively lawful regulatory measures . . . does not purport to be exhaustive.” *Id.* at 2817 n.26.

²¹ See *id.* at 2821 (“[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .”).

²² Brief of the United States as Amicus Curiae at 8–9, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/01/us-heller-brief-1-11-08.pdf> (recommending remand for analysis using intermediate scrutiny as the standard of review).

more explicit articulation of the standard to be employed could have discouraged lower court evasion of *Heller*, or at least made such evasion somewhat easier to detect if the Court was inclined to monitor lower courts for compliance, something that it did not do following *Lopez*.²³

Fourth, because the majority preemptively (perhaps “peremptorily” is a better word) signaled its view that a number of federal gun control laws would *not* be called into question by *Heller*,²⁴ the most promising targets—local gun bans similar to the District’s and restrictive state gun laws—lie beyond the immediate scope of *Heller* because the Second Amendment remains outside those provisions of the Bill of Rights that have been incorporated through the Fourteenth Amendment and applied to states.²⁵ Thus, the true test of *Heller*’s reach will turn on whether the Court will be willing to entertain one of the proliferating number of cases challenging these laws.²⁶ If the Court does not, then, like *Lopez*, *Heller* may end up having all the robustness of a “but see” cite.²⁷

On the other hand, there are several important differences that ought not be overlooked between the situation following *Lopez* and that likely to follow *Heller*. Perhaps most important is the fact that there was virtually no coordinated follow-up litigation to *Lopez* on the part of the public interest bar. Most of the litigation was opportunistic: *Lopez* was cited in just about every appeal on behalf of those convicted of federal criminal offenses, who, as a group, rarely present the most sympathetic face. By contrast, several lawsuits were filed challenging gun control laws in other communities within hours of the *Heller* opinion’s publication.²⁸ Given the stakes, interest groups challenging local laws have greater incentive than individual criminal defense attorneys to ensure that only the best cases with the cleanest facts are brought.

Moreover, there was relatively little public interest in *Lopez* or the Commerce Clause. The Second Amendment, on the other hand, is among

²³ Whatever one thinks of the substance of his test or how well that test implements the right guaranteed by the Second Amendment, Justice Breyer at least described in some detail the approach he would take. See *Heller*, 128 S. Ct. at 2850–53 (Breyer, J., dissenting) (describing the “interest-balancing” approach he would employ in Second Amendment cases).

²⁴ See *supra* note 20 and accompanying text.

²⁵ *United States v. Cruikshank*, 92 U.S. 542 (1875) (refusing to apply the First and Second Amendments to the states). For *Heller*’s discussion of *Cruikshank* and its continued significance in light of the Court’s incorporation of most provisions of the Bill of Rights to the states, see *Heller*, 128 S. Ct. at 2812–13 & nn.22–23.

²⁶ The majority did drop a pointed note that the case first declining to apply the Second Amendment to the states “also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.” *Heller*, 128 S. Ct. at 2813 n.23.

²⁷ Cf. John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 176 (1998) (“Whether *Lopez* marks a dramatic shift in Commerce Clause jurisprudence or is instead destined to be a ‘but see’ citation remains to be seen.”).

²⁸ See, e.g., Maura Dolan, *The 2nd Amendment: Reaction to the Court Ruling*, L.A. TIMES, June 27, 2008, at A19.

the most significant provisions of the Bill of Rights from the standpoint of public engagement.²⁹ The public interest groups sponsoring follow-up litigation will have every incentive to publicize lower court attempts to evade or blunt the effect of *Heller* and can try to choose cert-worthy cases from among those to be litigated. Given popular interest, the media and elected officials will have an incentive to monitor the implementation of *Heller* by lower courts.

It is also possible that the lower courts' hostility to an individual right to arms was largely a product of the zeitgeist of an earlier era, carried forward as much by habit and stare decisis as by any institutional interest. With the individual rights theory of the Second Amendment now not only endorsed by the Supreme Court, but also, thanks to extensive scholarship, academically respectable (and, of course, popular with a very large majority of citizens) it may be that today's federal judiciary will be less hostile to the right than past courts.

A related point is that lower court judges may perceive the stakes differently in *Heller* than they did in *Lopez*. Following *Lopez* to its logical conclusions suggested rethinking the foundations of the modern New Deal state, if not mandating its unwinding. At the very least, *Lopez* presented an opportunity for hundreds of criminal defendants to escape the consequences of their convictions. Neither was an appealing option for even the most ardent advocate for limiting federal power, so judges strenuously resisted following *Lopez* wherever it might lead—especially if it meant revisiting the constitutional legitimacy of statutes like the 1964 Civil Rights Act. By contrast, even reading *Heller* for all that it is worth, it is clear that significant regulations of private firearms ownership—including various licensing regimes—are not necessarily presumptively unconstitutional.

Finally, despite the unanimity of the Court in its conclusion that the Second Amendment protected *some* individual right, the alternative limiting implementations of that right were expressed as dissents, as opposed to partial concurrences.³⁰ Thus, there are not any narrow concurring opinions whose authors essentially control the outcome of future cases; the alternative approaches of the dissenters are, well, *dissents*. Imagine a situation, though, in which Justice Breyer's "interest-balancing" approach was a concurring opinion: lower courts seeking to limit *Heller* might choose Justice

²⁹ See Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP, Mar. 27, 2008, <http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-Own-Guns.aspx> ("A solid majority of the U.S. public, 73%, believes the Second Amendment to the Constitution guarantees the rights of Americans to own guns.").

³⁰ See, e.g., *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting); *id.* at 2847 (Breyer, J., dissenting). Justice Breyer seems to be feeling his way toward some sort of "undue burden" standard, though it is more of an "undue burden-lite" standard, as it is difficult to imagine him upholding a ban on abortion in the District of Columbia on the basis that one could reach a friendlier jurisdiction for the price of a subway ticket. See *id.* at 2862 ("The adjacent States do permit the use of handguns for target practice, and those States are only a brief subway ride away.").

Breyer's standard of review in the absence of anything definite in the majority opinion.³¹

In *Lopez*, for example, though the Court listed a number of factors bearing on whether or not a given local activity "substantially affected" interstate commerce, the Court did not make clear whether all factors had to be satisfied or just some, or whether some factors were indispensable to a finding that regulated activity had a substantial effect on interstate commerce. In response, many lower court judges interpreted the opinion narrowly. The presence of *any* factor distinguishing the statute under review from the Gun-Free School Zones Act was deemed sufficient to turn back the constitutional challenge.³²

Which set of forces will prevail? It's impossible to say for certain, so we'll equivocate and say, "it depends." Bureaucrats tend to take the path of least resistance and least controversy. Though some foot-dragging is likely, it's equally likely that the kind of resistance demonstrated in response to *Lopez* won't manifest itself in response to *Heller*, as such resistance would likely produce far more controversy.

III. *HELLER* AND DECISION RULES

Because of its reticence on the subject, *Heller* presents litigants with an opportunity to sell lower courts on a standard of review largely unencumbered by binding precedent. Subsequent litigation, then, might be a good test subject for examining the role that "decision rules" play in the "implementation" of constitutional rights.³³ Given the considerable discretion that courts have in fashioning rules to implement constitutional guarantees³⁴ and the variety of doctrinal tests the Court has employed over the years to enforce various constitutional provisions,³⁵ it is clear that older discussions framing the choice as between individual rights/strict scrutiny versus states' or collective rights/rational basis embodied a false choice.

As the Solicitor General's brief and scholars such as Adam Winkler have made clear, recognition of an individual right does not doom all gun

³¹ Likewise, Justice Stevens's primary dissent is, if anything, less clear than Justice Scalia's majority opinion on the appropriate standard of review. By contrast, Justice Breyer's dissent is quite detailed.

³² See Reynolds & Denning, *Constitutional Revolution*, *supra* note 15, at 385–91 (discussing several such cases).

³³ What one of us has elsewhere called the "new doctrinalism" is concerned with judicial generation of rules that implement or enforce constitutional meaning. See generally Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller*, 75 TENN. L. REV. (forthcoming 2008); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 76–101 (2001); KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 22–36 (2006); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

³⁴ See, e.g., ROOSEVELT, *supra* note 33, at 23–36; Berman, *supra* note 33, at 92–100 (describing factors influencing choices of decision rules).

³⁵ See FALLON, *supra* note 33, at 77–79 (listing "A Catalogue of Constitutional Tests").

control regulations to constitutional oblivion.³⁶ Subsequent litigation offers an opportunity for litigants to educate lower courts about the choices they have and to offer the guidance the Court declined to provide about crafting rules that implement the guarantee *Heller* recognized. Scholars, too, have an opportunity to enter into the sort of dialogue with courts that both academics and judges agree occurs far too seldom.

This will be especially true of cases involving state and local restrictions—laws whose constitutionality was not squarely presented in *Heller*. Litigants ought to study and develop responses to Justice Breyer's "interest-balancing" standard of review. Likewise, those defending existing or proposed gun controls—especially those that do not go as far as the District's did—have another opportunity to argue against categorical rules and presumptions of unconstitutionality. In truth, this is probably the debate that we *should* have been having all these years: which regulations of private firearms are the "reasonable" ones that most people—including most of those who support an individual rights reading of the Second Amendment—can support. At the very least, the Court's interring of the collective rights—or "military purpose"—interpretation of the Second Amendment has cleared the way for that debate to begin.

CONCLUSION

Though the civics book formulation provides that the Supreme Court establishes clear principles which lower courts should conscientiously apply, reality is considerably more complex and frequently less satisfying. Unfortunately, as many lawyers can attest, the Supreme Court often formulates principles that are not clear, and sometimes it fails to establish principles at all. Lower courts, meanwhile, are not always conscientious in following the Supreme Court's lead, whether for reasons of bureaucratic rigidity or because they have their own agendas. Given the Supreme Court's light caseload and the enormous number of cases in the lower courts, the path taken by the federal judiciary can diverge considerably from that established by the Supreme Court.³⁷

Will *Heller* be such a case? As we have noted before, this depends—upon the behavior of litigants, upon the predilections of lower court judges, and upon the degree and nature of scrutiny that the process receives. For us, at least, it offers an opportunity to continue our study of how Supreme

³⁶ See generally Brief for the United States as Amicus Curiae, *supra* note 22; Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007). But see Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and "Reasonable Regulation"*, 75 TENN. L. REV. 137 (2007) (comparing "reasonable regulation" in Second Amendment context to reasonable regulation in the context of the Supreme Court's unenumerated rights jurisprudence).

³⁷ See Glenn Harlan Reynolds, *Looking Ahead: October Term 2007*, 2007 CATO SUP. CT. REV. 335, 350–52 (describing the Supreme Court's reduced influence on federal courts of appeals).

Court precedent influences lower courts in an entirely new context, for which we are properly grateful.