

Another *Heller* Conundrum: Is It a Fourth Amendment “Exigent Circumstance” to Keep a Legal Firearm in Your Home?



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ABSTRACT

In *Heller* and *McDonald*, the Supreme Court recognized an individual’s constitutional right to possess a firearm in his home. This leads to an interesting question—doesn’t that right conflict with the common practice of police forcibly entering a home, without knocking and announcing their presence, when a reasonable suspicion exists that the occupant is armed? In other words, if one has a Second Amendment right to keep a gun in the home, should that limit one’s Fourth Amendment right to a knock on the door before police enter? This Article considers the question and offers courts a framework for future decisions.

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INTRODUCTION

In March, the Fifth Circuit Court of Appeals issued its decision in *Bishop v. Arcuri*,¹ a case brought pursuant to 28 U.S.C. § 1983 against the City of San Antonio and certain of its police officers. What happened to the plaintiffs in *Bishop* is altogether familiar. One night in April 2009, the plaintiffs—two women living outside San Antonio proper—were in their home, getting ready for bed. Suddenly, without warning, a team of San Antonio police officers used a battering ram to break down the women’s front door. One of the women was in a state of undress; the other was in the backyard. Earlier that day, the officers had purportedly received a tip that methamphetamine was being sold from the premises. Following a search of the home, including a search by a drug-sniffing dog, the police determined that there were no drugs in the home, or indeed any other evidence of criminality. The police made no arrests.²

The women brought claims against the officers alleging violations of the U.S. Constitution including, inter alia, violation of the Fourth Amendment, by virtue of the officers’ failure to knock and announce their presence before entering the premises.³ The two women also brought claims against the City of San Antonio, alleging that the no-knock search of their home resulted from the unconstitutional custom and practice of no-knock entries in connection with the execution of drug warrants.⁴ As alleged, the City had an unconstitutional practice of effecting forced entries without reasonable suspicion of exigent circumstances, which is necessary for such entries under the law.⁵ Predictably, the defendants argued that the allegedly heightened risk of evidence destruction justified their no-knock entry of the women’s home. The defendants claimed that the officers suspected small (that is, easily destroyable) amounts of drugs were being distributed from the premises and that a heightened risk of violence existed based on the purportedly unknown character of the occupants and the layout of the house.⁶ While the Magistrate Judge recommended denial of summary

1. 674 F.3d 456 (5th Cir. 2012).

2. *Id.* at 460.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 469 (quoting the allegedly offending officer: “If it’s unknown [whether the occupants of a house are dangerous], we do not knock and announce.” (alteration in original) (internal quotation marks omitted)).

judgment for the officers and the City, the District Court granted the defendants' motions on all counts and dismissed the case.⁷

I represented the plaintiffs as *pro bono* counsel on appeal, and argued the matter before the Fifth Circuit.⁸ At oral argument, a discussion was had whether any circumstances in fact existed that night suggesting a heightened risk of injury to the officers if they had knocked and announced their presence.⁹ Judge Stephen A. Higginson stumped me when he asked whether any dogs were present in the home at the time. As Judge Higginson explained, the presence of a dog could, in theory, create the reasonable suspicion of a heightened risk of violence needed to justify a no-knock entry. Admittedly, it had never occurred to me that this was even potentially an issue; neither party raised the issue of pets in briefing and the opinions below did not discuss it. I told Judge Higginson that I did not know whether a dog was in the house. Judge Higginson himself noted that he was “stretching the facts” with the question; he admitted that he was trying to suss out any possible basis for the presence of exigent circumstances. On rebuttal, after my co-counsel helpfully pointed me to the right place in the record, I noted to Judge Higginson that there were indeed dogs of unknown breed in the women's home. Satisfied, the judges and I quickly moved on.¹⁰

After the argument and a well-deserved ribbing from my colleagues, the issue stuck in my mind. Could the presence of a dog—a perfectly legal thing to keep in one's home—really form the basis of the heightened risk of violence needed to justify a no-knock entry? If so, wouldn't almost any circumstance that presents some scintilla of risk to an officer's physical safety justify a no-knock entry? Perfectly legal kitchen cutlery, firecrackers, or pet snakes come to mind. And if that really is the case, hasn't knock-and-announce jurisprudence become a mockery?

These are interesting—and only partially flip—questions. But there is a more serious issue lurking. The suspected presence of a firearm in a subject

7. *Id.* at 460. The two women, Ms. Bishop and Ms. Clark, originally brought additional claims against the officers, including for excessive force and for violation of due process rights. The court dismissed those claims. *Id.*

8. James Harrington of the Texas Civil Rights Project represented the plaintiffs below and as co-counsel on appeal.

9. An audio recording of the oral argument is available at http://www.ca5.uscourts.gov/OralArgRecordings/11/11-50010_12-5-2011.wma (last visited June 20, 2012). The Fifth Circuit does not publish written transcripts of oral arguments.

10. The unanimous panel ultimately overturned the District Court and remanded for trial on the underlying Fourth Amendment violation and unconstitutional custom claims. *Bishop*, 674 F.3d at 466–67. The panel also rejected the defendants' qualified immunity claim. *Id.* at 467.

premises often forms the basis for upholding no-knock entries.¹¹ In such circumstances, officers apply *ex ante* for a no-knock warrant or decide at the scene to effect a no-knock entry. Later invalidation of the forced entry (either via suppression of evidence or in a later civil suit under § 1983 or *Bivens*¹²) is rare when officers can point to the reasonable suspicion of the presence of firearm(s) in the subject premises. Often, those firearms are known to be illegally possessed by the individual(s) believed to be in the home. Often, the officers have no idea how whether they are legally possessed.

This has become a serious and unanalyzed issue in knock-and-announce jurisprudence in the wake of *District of Columbia v. Heller*¹³ and *McDonald v. City of Chicago*.¹⁴ Those cases held that a person generally has a constitutional right to possess some kind of firearm in his or her home.¹⁵ Nevertheless, under current Fourth Amendment jurisprudence, the presence of a firearm can be a factor (potentially determinative) in permitting government officials to enter the premises without knocking and announcing their presence, as they are otherwise obligated to do under the Fourth Amendment.¹⁶ This Article considers this seeming conundrum, and offers initial suggestions about how courts should approach the issue.

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11. See, e.g., *Whittier v. Kobayashi*, 581 F.3d 1304, 1309–10 (11th Cir. 2009) (holding that a no-knock entry was reasonable because the officer reasonably expected danger when executing a warrant on a drug dealer who had ready access to firearms); *United States v. Wardrick*, 350 F.3d 446, 452 (4th Cir. 2003) (holding that a no-knock entry was reasonable when knocking would have put officers in danger because the suspect had a criminal history and was suspected of illegally possessing firearms).
 12. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Hudson v. Michigan*, 547 U.S. 586 (2006), the Court held that knock-and-announce violations do not require suppression of evidence obtained in the ensuing search. See *id.* at 599. While most courts have interpreted *Hudson* as prohibiting exclusion of evidence for knock-and-announce violations, Justice Kennedy's fifth-vote concurrence leaves open the possibility that courts will reapply the exclusionary rule in appropriate circumstances. See *id.* at 604 (Kennedy, J., concurring) (clarifying that *Hudson* "does not address any demonstrated pattern of knock-and-announce violations," but evidence of such a pattern by law enforcement might warrant exclusion to deter such conduct).
 13. 554 U.S. 570 (2008) (recognizing a Second Amendment right to possess a firearm for lawful purposes in the home).
 14. 130 S. Ct. 3020 (2010) (incorporating the Second Amendment to the states). For ease of reference, I will refer to *Heller* as shorthand for the holdings of *Heller* and *McDonald*.
 15. See *infra* notes 32–34 and accompanying text.
 16. *Hudson*, 547 U.S. at 589 ("The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. Since 1917, when Congress passed the Espionage Act, this traditional protection has been part of federal statutory law, and is currently codified at 18 U.S.C. § 310. We applied that statute in *Miller v. United States*, and again in *Sabbath v. United States*. Finally, in *Wilson*, we were asked whether the rule was also a command of the Fourth Amendment. Tracing its origins in our English legal heritage, we concluded that it was." (citations omitted)).

I. A BRIEF KNOCK-AND-ANNOUNCE PRIMER

The interests protected by the knock-and-announce rule “are not inconsequential,”¹⁷ but rather “are central to the Fourth Amendment’s guarantees as explained in [U.S. Supreme Court] decisions and as understood since the beginnings of the Republic.”¹⁸ The contours of the rule are relatively simple. “[T]he Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry.”¹⁹ Doing so provides the individuals inside the premises the “opportunity to comply with the law and to avoid the destruction of property occasioned by forcible entry” by peaceably opening the door and allowing the officers inside.²⁰ Officers must allow occupants a reasonable amount of time to respond to the announcement and open the door before effecting a forced entry; while this amount of time is not set as a matter of law, it is clear that it must be more than a few seconds—certainly more than five seconds, but likely less than half a minute.²¹

The rule also “protect[s] against intrusions occasioned by law enforcement officers’ mistakes” and allows residents to gather themselves before strangers come into their home.²² Because “most search warrants are executed during the late night and early morning hours[, t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.”²³ Of course, there are exceptions to the general rule. Even after officers knock and announce, circumstances may arise that allow forced entry before the legally mandated waiting time for a response has elapsed—for instance, noises or actions consistent with impending violence, occupant flight or evidence destruction.²⁴ Indeed, the Supreme Court has stated “[t]he knock

17. *Hudson*, 547 U.S. at 621 (Breyer, J., dissenting) (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997)) (internal quotation marks omitted).

18. *Id.* at 603 (Kennedy, J., concurring); *see id.* (“It bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security must not be subject to erosion by indifference or contempt.”).

19. *Richards*, 520 U.S. at 387 (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

20. *Id.* at 393 n.5 (citing *Wilson*, 514 U.S. at 930–32).

21. *See Hudson*, 547 U.S. at 590 (noting that Michigan never contested that a wait of three to five seconds was a knock-and-announce violation); *United States v. Banks*, 540 U.S. 31, 40 (2003) (discussing variable timing based on circumstances at the subject premises).

22. *United States v. Cantu*, 230 F.3d 148, 152 (5th Cir. 2000).

23. *Richards*, 520 U.S. at 393 n.5 (citation omitted).

24. *Linbrugger v. Abrecia*, 363 F.3d 537, 543 (5th Cir. 2004) (holding that officers were justified in making forced entry after hearing sound that approximated that of a pump-action shotgun, and seeing suspect holding something over his head).

and announce requirement could give way under circumstances presenting a threat of physical violence, or where police officers have reason to believe that evidence would likely be destroyed if advance notice were given.”²⁵

There are two basic ways officers can properly execute a no-knock entry—either by securing a no-knock warrant *ex ante* or by determining at the scene that exigent circumstances exist.²⁶ Either way, officers must have “a particularized basis for any suspicion that would justify a no-knock entry.”²⁷ While the Supreme Court described this showing as “not high,” it has emphasized that “the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.”²⁸

The kinds of circumstances that support a no-knock entry based on a heightened risk of violence vary greatly, but can include the criminal history of the individuals suspected to be present, the suspected crimes underlying the search, previous threats made to officers or witnesses, and the layout of the premises.²⁹ Often, the suspected presence of a firearm in the subject premises is the most salient circumstance suggesting a risk of violence, and thus justifying a no-knock entry.³⁰ This makes sense—the presence of a firearm could pose an immediate, lethal danger to officers upon entry.

Knock-and-announce jurisprudence does not account for the nature of a firearm that officers suspect to be in the subject premises. Courts do not require police to inquire into the origin and legal status of a firearm, much less offer guidance as to what police must do with that information once they get it. There appears to be no indication that police nationwide determine the pedigree of a suspected firearm when evaluating whether to effectuate a no-knock entry.

25. *Richards*, 520 U.S. at 319 (quoting *Wilson*, 514 U.S. at 936) (internal quotation marks omitted).

26. *See Bellotte v. Edwards*, 629 F.3d 415, 420 (4th Cir. 2011) (stating that “no-knock entries may . . . be reasonable by virtue of exigent circumstances”); *see also Richards*, 520 U.S. at 394 (illustrating the “reasonable suspicion” requirement by reference to the “reasonable belief based on specific and articulable facts” that justified a protective sweep in *Maryland v. Buie*, 494 U.S. 325 (1990) (quoting *id.* at 327) (internal quotation marks omitted)).

27. *Bellotte*, 629 F.3d at 420.

28. *Richards*, 520 U.S. at 394–95.

29. *Banks*, 540 U.S. at 37–40 & nn.4–5. It is important to remember that it is the articulable *facts* suggesting the presence of a weapon that are important in the knock-and-announce analysis. While officers need not (and most often cannot) conclusively establish the presence of exigent circumstances (such as the presence of a firearm) in the home before entry, articulable facts suggesting such circumstances must actually exist.

30. *Hudson v. Michigan*, 547 U.S. 586, 603–04 (2006) (Kennedy, J., concurring); *see also id.* at 597–98 (majority opinion).

II. *HELLER* CHANGES THE LANDSCAPE OF SECOND AMENDMENT RIGHTS—SORT OF

Several hundred federal and state court opinions have applied or cited the *Heller* decision, and mountains of academic and popular literature have analyzed the various opinions of the justices.³¹ Although much of the scholarship and analysis on the case is important and worthwhile, this Article will not attempt to repeat that scholarship in the limited space available here.

One core aspect of *Heller* is important to consider. The Supreme Court ruled in *Heller* that, in simplest measure, the Second Amendment protects an individual's right to possess and carry operable firearms, subject to various "disqualifications" not immediately important here.³² Importantly, the Court considered this right as it applies in the home:

[W]e hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.³³

The scholarship has recognized the centrality of the home not only to *Heller's* holding as it relates to the inability of the federal government and the states to bar possession of an operable firearm, but to the broader rationale underlying the constitutional right to possess a weapon—that the Constitution contemplates and affirmatively endorses an individual's ability to possess a working firearm, specifically for personal or familial protection.³⁴

31. See, e.g., *Gun Regulation After Heller and McDonald*, ACSBLOG (Oct. 15, 2010), <http://www.acslaw.org/acsblog/gun-regulation-after-heller-and-mcdonald> (noting that as of October 2010, "[s]ome 200 federal court gun regulation decisions ha[d] come down since *Heller* and *McDonald* struck down gun bans in Washington, D.C. and Chicago, [although] not one ha[d] invalidated a law on the basis of the Second Amendment").

32. See generally Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009). *McDonald* incorporated the rights recognized in *Heller* to the states. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

33. *Heller*, 554 U.S. at 635.

34. See, e.g., Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 233 (2008) ("For whatever reason, the *Heller* majority thought that the argument for firearms possession and use was at its strongest in the home.").

Many scholars have argued that *Heller* and *McDonald* extend the right to carry a firearm *outside* the home.³⁵ Not all agree; in fact, many observers argue that the Court's ruling in *Heller* does not, in fact, do much to change the landscape of gun restrictions in the U.S.³⁶ Whatever its short- and medium-term impact, though, it seems safe to say that *Heller* has the strongest impact on the law's conception of individuals' ability to lawfully possess a weapon *within* the home.

III. THE CONFLICT BETWEEN *HELLER* AND KNOCK-AND-ANNOUNCE JURISPRUDENCE

The incongruity between the knock-and-announce rule and the rights recognized in *Heller* discussed in Part II is confusing. Under current knock-and-announce jurisprudence, the suspected presence of a firearm in the targeted premises is likely to support a finding of exigent circumstances. Thus, law enforcement officials can justify a no-knock entry in the face of articulable facts suggesting a heightened risk of violence, either by way of *ex ante* application for a no-knock warrant, or at the scene of the entry. And yet, the Supreme Court in *Heller* held squarely that Americans have a general constitutional right to keep

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35. See, e.g., Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms: (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 590, 609 (2012) (arguing that the principles of *Heller* extend beyond the home: "*Heller* and *McDonald* 'held'—the Supreme Court's word—that the Second Amendment protects the individual 'right to keep and bear arms' for the purpose of self-defense. . . . *Heller* adopted a view of the Second Amendment that places individual self-defense at the heart of the amendment's protection. This was a critical aspect of the *Heller* opinion, and it marked a fundamental difference between the Court's interpretation of the right to keep and bear arms and the dissenters' position. . . . The majority . . . held that the amendment protects a traditional right to own and use firearms for a variety of personal purposes, including self-defense." (footnotes omitted)).
36. See, e.g., Anna Stolley Persky, *Despite 2nd Amendment Cases, Firearms Codes Are Moving Targets*, A.B.A. J. MAG., Dec. 1, 2010, http://www.abajournal.com/magazine/article/an_unsteady_finger_on_gun_control_laws_second_amendment_firearms ("In fact, critics of the decisions say the cases have failed to provide a concrete framework to help lower courts determine the constitutionality of challenged gun control laws. 'It's a huge change in our understanding of the amendment, but not necessarily a huge change in what kinds of gun control laws are constitutional,' says Duke University assistant law professor Joseph Blocher."); Ilya Somin, *Assessing the Very Limited Impact of McDonald and Heller on Gun Regulations*, VOLOKH CONSPIRACY (Dec. 6, 2010, 6:36 PM), <http://www.volokh.com/2010/12/06/assessing-the-very-limited-impact-of-mcdonald-and-heller-on-gun-regulations> ("[I]t's certainly possible that the Supreme Court will hear more cases in this field and eventually impose tougher scrutiny on gun laws. However, any such move seems unlikely in the near future. With the four liberal justices categorically opposed to *Heller* and *McDonald* in the first place, whatever protection gun rights get will track the lowest common denominator of what the five conservatives can agree on.").

firearms in their homes.³⁷ It seems, then, that *Heller* and knock-and-announce jurisprudence stand at odds.³⁸ On the one hand, the lawful possession of firearms in the home (for self-protection or otherwise) is an ancient practice, and now a constitutionally protected right.³⁹ On the other hand, the exercise of that right could mean that an individual has effectively forfeited his or her right to be alerted to the government's presence before law enforcement forcibly enters the premises.⁴⁰

It is only a matter of time before a plaintiff seeking to challenge a forced entry through a civil suit (or in the rare case, a defendant seeking suppression of evidence) will argue that the presence of a lawfully possessed firearm in the home could not permissibly be a factor in overcoming the knock-and-announce requirement. At the time of this writing, there appear to be no reported cases in which this argument has been made. It will happen. At that point, the federal courts (and potentially the Supreme Court) will need to adopt a framework for deciding whether the presence of a suspected firearm can justify a no-knock entry.

I propose that there are four basic approaches to weighing the interests protected by the Second and Fourth Amendments in this context. Each focuses on whether the firearm is lawfully possessed under *Heller*.

Option One. The "lawfully possessed/unlawfully possessed" pedigree of a suspected firearm is immaterial. Because a theoretically heightened risk of danger to officers is present whenever a firearm is suspected in the subject premises, it does not matter whether an individual possesses the suspected firearm legally or not. Therefore, *Heller* and the pedigree of the weapon have no place in the knock-and-announce analysis, and *Heller* does not change anything.

37. Somin, *supra* note 36 ("The two decisions do ensure invalidation of laws that completely forbid gun possession in the home or come very close to doing so.").

38. Others have recognized how the principles of *Heller* do not fit comfortably within the broader Fourth Amendment jurisprudence. See, e.g., George M. Dery III, *Unintended Consequences: The Supreme Court's Interpretation of the Second Amendment in District of Columbia v. Heller Could Water-Down Fourth Amendment Rights*, 13 U. PA. J.L. & SOC. CHANGE 1, 32–35 (2009) (noting that, prior to *Heller*, the Supreme Court had circumscribed Fourth Amendment rights in an attempt to protect officer safety).

39. *Hudson v. Michigan*, 547 U.S. 586, 589 (2006) ("The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one.").

40. I say "effectively" because while it is not the law that the presence of a firearm necessarily means that a no-knock entry is justifiable, it is more likely than not that a court would not allow a section 1983 or *Bivens* claim to proceed past a motion to dismiss or summary judgment if officers could show that they reasonably suspected the presence of a weapon in the subject premises (which would almost always be combined with a showing, or at least an assertion, that something about the layout of the premises or occupants suggested a heightened risk).

Option Two. The pedigree of a suspected firearm is determinative. Given the rights recognized in *Heller*, a suspected firearm that is known to be possessed lawfully cannot form the basis of a heightened risk of violence when determining whether a no-knock entry is appropriate, lest an individual be punished, essentially, for exercising their constitutional rights under the Second Amendment.

Option Three. The pedigree of a suspected firearm is an optional consideration. It can be taken into account when determining whether a reasonable suspicion of a heightened risk of violence exists, but need not be. Officers may discount the risk posed to them by a lawfully possessed firearm, but failure to do so will not support invalidation of the no-knock entry.

Option Four. The pedigree of a suspected firearm is a mandatory consideration. It must be taken into account when determining whether a reasonable suspicion of a heightened risk of violence exists, but it does not end the exigency analysis. Officers must discount, to some degree, the perceived heightened risk of violence if they believe a firearm to be lawfully possessed.

Options One and Two are simple for officers and homeowners to understand and apply, although they stand in stark contrast. Option One (the status quo) is a rights-restricting approach, cabining the impact of both *Heller* and the knock-and-announce rule by allowing the government to forcibly enter a home based in part or in whole on a constitutionally protected activity—lawful possession of a firearm. Option Two is a rights-expanding approach, promoting the ability of homeowners to possess a weapon without compromising their knock-and-announce rights so long as they possess the weapon legally, thereby bolstering the integrity of both the Second and Fourth Amendments. Of course, care would need to be taken in crafting a jurisprudence around Option Two. For instance, could officers effect a forced entry if the occupant were standing behind the door with a legally possessed gun in his hand? What if he was pointing it at the officers? Courts would need to recognize, and account for, the potential for legitimate danger to officers posed by legally possessed firearms, taking care to ensure that the very fact of the firearm's existence does not de facto lead to a determination that a forced entry is proper.

Options Three and Four promote, to different degrees, officers' ability to make a case-by-case determination as to the dangerousness of a given situation. Indeed, fostering such circumstance-specific determinations has been a goal of Fourth Amendment jurisprudence.⁴¹ Option Three suggests that officers (or magistrates

41. See, e.g., *United States v. Banks*, 540 U.S. 31, 36 (2003) (“[N]o template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories

evaluating a no-knock warrant application) may, at their discretion, evaluate the risk a lawfully possessed weapon presents and factor that risk into whether exigency exists. Note, though, that Option Three may not be, practically, different from Option One (the status quo), in which officers may still consider the likelihood of violence if they believe a suspected firearm is legally possessed. Ultimately, though, Option Three elides the very issue by making officers responsible for balancing the deep constitutional interests discussed here, rather than courts or the legislature. It is also highly unlikely that officers would actually balance such constitutional interests in practice, as they have no incentive to discount the theoretical risk of violence they face.

Option Four, which provides that the lawful pedigree of a suspected firearm *must* be taken into account by officers (or a reviewing court), and that the risk posed thereby is discounted (relative to an illegally possessed firearm), seems like a healthy balance. Option Four accounts for the constitutional interests recognized in *Heller* while permitting officers and magistrates wide latitude to determine whether the presence of a weapon (even one lawfully possessed) truly presents a heightened risk of violence. One preliminary, but important, issue merits note: Option Four, while sensitive to the constitutional issues raised here, relies on what is essentially an empirical assumption that lawful gun owners are less likely to use their weapons in a manner dangerous to officers upon forced entry into the home. To my knowledge, no data exists on this question. Courts would be wise to question whether reliable empirical data exists before considering a regime akin to Option Four.⁴²

There are other questions a court may consider when confronted with this *Heller* conundrum. One is whether the type of lawfully possessed weapon that officers suspect is on the premises—for instance, whether it is a handgun, long arm, fully automatic, or semi-automatic with assault weapon features—should change the analysis. Another question is whether the suspected presence of multiple firearms on the subject premises matters. Common sense may suggest that

without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.”); *Richards v. Wisconsin*, 520 U.S. 385, 391–92 (1997) (describing “case-by-case” knock-and-announce analysis).

42. Option Four assumes that the lawfully possessed weapon will be in the control of the lawful purchaser/possessor and not someone else. Of course, this will not always be true. Option One, it bears noting, also relies on a subtle empirical assumption—that lawfully possessed firearms are no less likely to pose a danger to entering officers than illegally possessed firearms.

multiple firearms (even if legally possessed) at one location raises the theoretical risk of violence enough to justify a no-knock entry even considering *Heller*.⁴³

CONCLUSION

At first glance, the *Heller* conundrum seems something of a quirk—does one small piece of Fourth Amendment jurisprudence fit with a strain of law that, despite the hype, changes little about whether and how Americans may possess firearms?⁴⁴ There are important undercurrents here, though.

How courts approach this question depends on their understanding of Second and Fourth Amendment jurisprudence in the broadest sense. How robust are the rights recognized in *Heller*? How robust is the Fourth Amendment? Should courts protect the right to be warned before officers forcibly enter one's home from encumbrance by the exercise of other rights? While many constitutional rights are not always easily reconciled, it is the task of conscientious federal courts to interpret such rights in a way that promotes harmony and intellectual consistency, to the extent possible.

This is a crucial issue. Forced, raid-style entries by police are common and often occur during the execution of drug warrants, especially in socioeconomically disadvantaged communities.⁴⁵ Legal gun possession in those same communities

43. Courts should be cautious making such assumptions. Just because common sense suggests additional or more powerful weapons may heighten the theoretical risk of violence to an entering police officer, it is not necessarily true. Like so much in constitutional jurisprudence, courts should seek data before enshrining such common sense into the law for decades (or longer).

44. *See supra* note 29.

45. These raid-style entries have caused substantial collateral damage. *See, e.g.*, *Gould v. Davis*, 165 F.3d 265, 268 (4th Cir. 1998) (noting that officers executing a no-knock warrant shot the plaintiff, who had armed himself upon hearing intruders in his home); *Howell v. Polk*, No. 04-CV-2280-PHX-FJM, 2006 WL 463192, at *1 (D. Ariz. Feb. 24, 2006) (noting that a plaintiff shot at intruders attempting to breach his door before realizing the intruders were police officers); William K. Rashbaum, *Report by Police Outlines Mistakes in Ill-Fated Raid*, N.Y. TIMES, May 31, 2003, <http://www.nytimes.com/2003/05/31/nyregion/report-by-police-outlines-mistakes-in-ill-fated-raid.html> (reporting on a woman killed in a botched no-knock raid based on a false tip from an informant); *Relatives of Man Killed in Police Raid Get \$12.5 Million*, L.A. TIMES, Mar. 16, 1999, <http://articles.latimes.com/1999/mar/16/news/mn-17846> (reporting on a man killed during a raid based on a false tip from an informant); Ernie Suggs, *City to Pay Slain Woman's Family \$4.9 Million*, ATL. J.-CONST., Aug. 16, 2010, <http://www.ajc.com/news/atlanta/city-to-pay-slain-592892.html> (reporting on a woman killed in a botched no-knock raid); Jonathan Turley, *Utah Police Execute No-Knock Warrant on Home and Shoot and Kill Man Holding Golf Club*, JONATHAN TURLEY (Jan. 1, 2011), <http://jonathanturley.org/2011/01/20/utah-police-execute-no-knock-warrant-on-home-and-shot-and-kill-man-holding-golf-club/> ("The result has been a number of incidents where homeowners have either been shot or have shot police by mistake. . . . According to Professor Peter Kraska, a criminologist at Eastern Kentucky University, no-knock warrant [sic] increased from 3,000 in 1981

(or any kind of community, for that matter) might be a rational choice for those concerned with individual self-defense—something the Supreme Court found was central to the right to keep and bear arms.⁴⁶ The question that courts should ask is whether individuals should have to choose between exercising their Second Amendment rights and compromising their Fourth Amendment rights.⁴⁷

to more than 50,000 in 2005.”); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 261 n.161 (“In recent years, there have been serious complaints concerning the manner in which drug raids are conducted. In documented cases, police ignore knock-and-announce requirements, storm houses in the early morning hours with heavily armed officers, terrorize the occupants, including those who are entirely innocent, and destroy property. Unfortunately, even in these situations, remedies are restricted. Even more troubling is the widespread acceptance of these tactics, a reaction that is molded by the ‘war theory’ and the fact that these raids occur almost exclusively in poor and minority communities.” (citations omitted)).

46. See Michael Nieto, *The Changing Landscape of Firearm Legislation in the Wake of McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), 34 HARV. J.L. & PUB. POL’Y 1117, 1117 (2011) (“In its decision, the Court correctly concluded that ‘individual self-defense is the central component of the Second Amendment right’ to keep and bear arms.” (quoting *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010)) (internal quotation marks omitted)).
47. Fourth Amendment knock-and-announce jurisprudence may also implicate other constitutional rights. For instance, does engaging in protected First Amendment activity that may suggest violent tendencies (such as advocating anarchy or violence against police officers) justify forcible no-knock entry?