

THE SECOND AMENDMENT AS POSITIVE LAW

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INTRODUCTION	103
WHAT WE MEAN BY “POSITIVE”	106
THE MODALITIES OF SECOND AMENDMENT	
ARGUMENT.....	112
1) Text.....	112
2) Precedent.....	114
3) History.....	115
4) Social Practice	117
5) Structure	119
6) Analogy.....	120
7) Prudence.....	121
CONCLUSION.....	122

INTRODUCTION

Thank you for the invitation to deliver this keynote and for the opportunity to talk about our book, *The Positive Second Amendment: Rights, Regulation and the Future of Heller*.¹ This book builds upon the hard work that many people in this room

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1. JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (2018).

have performed over the past few decades.² One result of that work was to transform the Second Amendment from a powerful political movement into an enforceable personal right, from a right focused on militia purposes to one concerned with personal purposes, from a moral argument into a legal one.

Ten years after the Supreme Court's decision in *Heller*, we *all* are part of an exciting and challenging moment in which judges, scholars and citizens are faced with the task of shaping what is essentially a new constitutional right. We are thrilled to be engaged in that project along with you.

It is fitting that we should have this discussion here, not far from where some of the most significant shots in United States history were fired. Of course, you all know the history of Fort Sumter well enough. But we would like to begin our remarks by speaking not of Major Anderson or General Beauregard, but of Daniel Sickles, the Union general who could later become Military Governor of the State of South Carolina.

To say that Sickles had a complicated relationship with firearms would be an understatement. In 1858, then-Representative Sickles, a sitting United States congressman, shot dead, in broad daylight, the United States Attorney for the District of Columbia, Philip Barton Key (son of "Star Spangled Banner" author Francis Scott Key). Key had been conducting a very public affair with Sickles's wife (whom Sickles himself had been cheating on). But, this being the nineteenth century, and honor among adulterers being what it was, Sickles ambushed the unarmed Key as he waited outside Sickles's home. Sickles claimed that Key's affair with his wife had driven him temporarily mad, and—in one of the first successful uses of the temporary insanity defense in U.S. history—the jury acquitted him.³

2. Dictionaries, treatises, books, collections, law review articles, online articles, and newspaper articles account for 100 of the 175 sources cited by the majority in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The remainder includes all federal and state cases, all state and federal statutes, state constitutions, and legislative history. Those 100 sources make up over half of the citations in the opinion. We are grateful to Alyssa Rutsch, Duke Law Class of 2015, for reviewing the citations.

3. WILLIAM BARCLAY NAPTON, *THE UNION ON TRIAL: THE POLITICAL*

But it is not Sickles's checkered background or personal use of firearms that makes him famous among Second Amendment scholars. Instead, it is his instruction issued in January 1866, while overseeing the military reconstruction of South Carolina after the civil war, General Order Number 1. That order read in part: "The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed."⁴

This order has been celebrated by many gun-rights supporters for its clear statement in support of a personal right to keep and bear arms. And yet the order is often truncated. Just after the semicolon, it states: "nevertheless this [order] shall not be construed to sanction the unlawful practice of carrying concealed weapons; nor to authorize any person to enter with arms on the premises of another against his consent. . . . And no disorderly person, vagrant, or disturber of the peace shall be allowed to bear arms."⁵

Later that same year, General Sickles further qualified his famous Order Number 1, stating in General Order Number 7 that "[o]rganizations of white or colored persons bearing arms, or intended to be armed" were prohibited, as were any attempt of such groups to "assemble, parade, patrol, drill, make arrests or exercise any authority."⁶

We have begun our remarks with Daniel Sickles because he is compelling, because of his connection to South Carolina, and because he and his orders capture, in microcosm, the conflicting impulses and beliefs Americans have with respect to firearms – conflicts that often find their way into constitutional law. By the time *Heller* was decided, a strong majority of Americans believed that the Second Amendment right to keep and bear arms extends beyond the organized militia. But an equally large majority favors what it sees as reasonable gun regulation. Collectively, we think

JOURNALS OF JUDGE WILLIAM BARCLAY NAPTON, 1829-1883 at 501 n.117 (Christopher Phillips & Jason L. Pendleton eds., 2005).

4. CONG. GLOBE, 39th Cong., 1st Sess. 908 (1866) (Rep. William Lawrence) (quoting Sickles's order).

5. *Id.* at 908-909.

6. 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 211 (1906) (reprinting sections I and III of General Order No. 7).

of guns as valuable tools, as devices for sport and entertainment, as emblems of freedom and citizenship. But we also recognize that they are instruments of violence, responsible for more than a hundred thousand injuries and deaths in the United States every year,⁷ including the murders just a few blocks from here at Mother Emanuel Church. To put it in perspective, more Americans die annually from gunshots (roughly 30,000)⁸ than the total number of South Carolina troops who died during the four years of the Civil War (no more than 22,000 by most estimates).⁹

Given this stark reality, and the complicated relationship our nation has, and has had, with firearms, one may legitimately ask: what is so positive about the Second Amendment? In the short 45 minutes we have, we will try to provide a justification for the title of our book and the theme of this address.

WHAT WE MEAN BY “POSITIVE”

By “positive,” we primarily mean three things.

First, we mean positive in the sense of healthy and constructive. The political conversation about guns is – to put it mildly—broken. There’s lots of epithets but not a lot of understanding. There’s lots of shouting, but not a lot of listening. One’s views of guns are all too frequently used as a shibboleth, as a way of choosing sides, of separating “us” from “them.”

The notion of a “positive” Second Amendment expresses our hope that an understanding of the law of the Second Amendment can help generate a more productive conversation about guns and gun policy, and that the law can be used to facilitate a discussion, rather than to shut one down.

Our optimism is partly due the fact that constitutional law consistently represents the position that most Americans hold:

7. CENTERS FOR DISEASE CONTROL AND PREVENTION, WEB-BASED INJURY STATISTICS QUERY AND REPORTING SYSTEM, Retrieved <https://www.cdc.gov/injury/wisqars/index.html> (last visited May 3, 2018) [<https://perma.cc/3EFN-SC4G>].

8. *Id.*

9. See, e.g., Cameron McWhirter, *The Numbers War Between the States*, WALL ST. J., March 26, 2011 (no more than 22,000); American Battlefield Trust, *Civil War Casualties*, <https://www.battlefields.org/learn/articles/civil-war-casualties> (less than 20,000).

support for a fundamental, individual right to keep and bear arms, and *also* for reasonable gun regulations. Partisans and interest groups often try to force a choice between those two: You are either for rights or you are for regulation.

But the Second Amendment, both before and after *Heller*, makes it clear that that's a false choice. We can have both, just as we always have. Call it the "constitutional alternative" to the partisan shouting. The constitutional alternative will not satisfy the small, vocal minorities who want to see all guns abolished or who oppose all gun regulations. But the Constitution is not with them; it is with the solid majority of Americans who believe that rights and regulation can and should co-exist.

Second, we mean positive in the sense that the Second Amendment is the law of the land after *Heller*. In his *Heller* opinion, Justice Scalia suggested that the Court simply confirmed a *status quo*: a pre-existing right that the Court was finally willing to recognize.¹⁰ But as a matter of doctrinal description, that is an extremely hard position to defend. Whatever one thinks about the correctness of *Heller*, it certainly represented a sea change in the law—otherwise we would not be talking about it here today. Prior to 2008, persons claiming a federal constitutional right to have a firearm for private purposes could not survive a motion to dismiss;¹¹ after 2008 (with some exceptions), they could.

In the ten years since *Heller*, lower courts have resolved more than 1,000 Second Amendment challenges. Even with minimal guidance from the Supreme Court, the law governing the right to keep and bear arms is taking shape. Professor Blocher, working with co-author Professor Eric Ruben, recently coded every available Second Amendment decision (state and federal, trial and appellate) from *Heller* through February 1, 2016.¹² For each individual Second Amendment challenge, they asked roughly 100

10. *Heller*, 554 U.S. at 593.

11. Clark Neily, *Revisiting the First, Second, and Fourth Amendments: District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2007-2008 CATO SUP. CT. REV. 127, 140 (noting that not a single federal case struck down a gun law on Second Amendment grounds prior to *Heller*).

12. 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 (2018).

questions about the content of the challenge, the result, and the court's methodology. They assembled more than 100,000 data points, painting a picture of where Second Amendment law stands today.

The image that results is one where, by and large, courts are treating the post-*Heller* Second Amendment like a “normal” part of constitutional law. As Justice Scalia observed in *Heller*, the right to keep and bear arms, just like any other right, is not absolute. It has exceptions, some of them derived from history.¹³ It is subject to regulation, which must typically conform to some sliding-scale examination of constitutionality, in which burdens on the “core” of the right are subject to strict scrutiny, and lesser burdens are subject to something less stringent.¹⁴ The failure rate for Second Amendment claims remains very high—more than 90%—but many of the challenges were weak to begin with. Hundreds were brought by felons, for example, who *Heller* recognize as being largely carved out from the Second Amendment's coverage.¹⁵

In short, in more than 1,000 cases since *Heller*, courts are using the basic tools of analysis familiar to constitutional lawyers. The right is “positive” in the sense of being a real legal entitlement, subject to standard legal analysis.

Third and finally, we mean positive in the technical, jurisprudential sense that the Second Amendment is not natural or God-given, it is not discovered or revealed, it is “posited”—it is *law*. And there are rules by which American society identifies when something is law and when it is not.

This notion of “positive” law is familiar to scholars of legal theory and jurisprudence. It is, ultimately, the set of questions that has motivated thinkers like Thomas Hobbes, John Austin, H.L.A. Hart, Joseph Raz, and Ronald Dworkin. But one does not have to be a philosopher to recognize that the Star Spangled

13. *Heller*, 554 U.S. at 626-27.

14. Nelson Lund, *Promise and Perils in the Nascent Jurisprudence of the Second Amendment*, 14 GEO. J.L. & PUB. POL'Y 207, 216 (2016) (noting that courts tend to use intermediate scrutiny for Second Amendment cases dealing with regulations that do not affect core rights).

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

Banner is not law, the Constitution is, and we know one from the other by the rules that define law from other sources of authority. Legal philosophers have devoted a great deal of time describing and justifying this “rule of recognition,”¹⁶ but one does not need a J.D. or Ph.D. to intuit that there is a line between legal and non-legal claims.

In the wake of *Heller*, we think it is crucial to recognize the existence of that line, even if we might disagree about its precise location. The gun rights advocates who prevailed in *Heller* did so because they thought that their view of the Second Amendment, one shared by the majority of Americans,¹⁷ should be protected by courts as well. Their victory means something. As we have already noted, it has been the center of more than 1,000 court challenges in the past ten years.

But that victory also carries with it a change. *Heller* is a constitutional decision of the Supreme Court, an act of law making. It is not—by its own account—an imposition of political philosophy by five of nine justices. And constitutional law demands and responds to different kinds of arguments than one might employ at a political rally or, for that matter, in a faculty lounge.

Our point is not that the line is obvious. We do not need to tell a room full of lawyers, let alone law and society scholars, that the distinction between law and other social practices can be hard to identify. In constitutional law in particular, there are very hard questions about how doctrine does or should account for or incorporate other sources of authority. Our goal is not to downplay the difficulty of the task, but to emphasize its importance.

Nor do we think that there is no interplay between “positive” law and other notions of “higher law,” basic rights, or morality. The right to keep and bear arms, like that to free speech or equal protection, can have a moral dimension to it. One might argue that self-defense is a basic “human right” that does not depend on the

16. See generally THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew Adler & Kenneth Einar Himma, eds. 2009)

17. Jeffrey M. Jones, *Americans in Agreement with Supreme Court on Gun Rights*, Gallup (June 26, 2008), <http://news.gallup.com/poll/108394/americans-agreement-supreme-court-gun-rights.aspx>.

Constitution for legitimacy. One often hears that point made as a matter of rhetoric. One reading of *Heller*'s remark about the right "pre-existing" could suggest as much.

But in a very real sense, Justice Scalia could not have meant that. The late Justice spent much of his career criticizing his colleagues for allegedly writing their preferred moral views into constitutional doctrine.¹⁸ Can it really be that, in his most significant majority opinion, his magnum opus, he did the same? And if the right of self-preservation is a natural right that pre-exists, indeed transcends the Constitution, why fuss over the text, history, and precedent of the Second Amendment? Why treat it as law at all?

We do not need to speculate about Justice Scalia's mindset, though—we need only look at what we wrote, and what courts have done, with Second Amendment claims. And what we see is an application of legal reason, not an appeal to transcendent principles or natural law.

We are all here for this conversation today because the Second Amendment has entered a new era. If it is to be treated as "normal" constitutional law, then it must also be subject to the tools of "normal" constitutional argument. And legal arguments have a different grammar, and a different truth value, than those derived from politics or morality alone. A moral claim like "undocumented immigrants have natural rights to keep and bear arms" cannot be proven true or false in the same way, using the same forms of argument as a legal claim that "undocumented immigrants have a right to keep and bear arms under the Second Amendment."

To say that a right to keep and bear arms derives from positive law rather than natural law is not necessarily to limit it. Consider moral rights to self-defense – the "central component" of the Second Amendment according to *Heller*.¹⁹ Most moral

18. Sam Baker, "Not My Job" to be "Moral Philosopher", THEHILL.COM, (Oct. 1, 2013, 1:01 AM), <https://thehill.com/blogs/blog-briefing-room/news/325677-justice-scalia-not-my-job-to-act-as-moral-philosopher> ("Supreme Court Justice Antonin Scalia on Monday criticized judges for acting as 'moral philosophers' in decisions on abortion and gay rights.").

19. *Heller*, 554 U.S. at 628.

philosophers in the Anglo-American tradition have specified that self-defense is justified, but only according to some limited circumstances: the force must be necessary to protect the person from an imminent harm and be proportional to the threat. Indeed, this is the common law baseline of self-defense in the American legal tradition.²⁰ But some states have expanded these bounds, permitting self-defense when not otherwise necessary or proportional as traditionally understood, for example through the adoption of stand your ground laws.²¹ And, more pointedly, the Second Amendment permits gun ownership even in circumstances where there is no necessity and where the force used could in fact be disproportionate.²²

In any event, our purpose in these remarks is not to advocate the appropriate balance or to argue for a broader or narrower understanding of gun rights. Our point is that to recognize gun rights as creatures of positive law, in the technical sense, demands an understanding of the rules of legal argument, which differ in important respects from the kinds of rhetoric that one often hears in the gun debate. Constitutional law has a grammar; a set of rules about how arguments are constructed.

We are hardly the first scholars to recognize this, of course. Thirty years ago, Philip Bobbitt identified what he called the “modalities” of constitutional argument—the legitimate methods of constitutional reasoning.²³ With some tweaks in emphasis, those same modalities can point the way to a more productive discussion of the Second Amendment, one that everyone can participate in.

20. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward A Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 377 (1996) (outlining elements of self-defense).

21. Elizabeth Elkin & Dakin Andone, *What You Need to Know about “Stand Your Ground” Laws*, CNN.com, July 29, 2018, <https://www.cnn.com/2018/07/29/us/stand-your-ground-law-explainer-trnd/index.html>.

22. Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, CALIF. L. REV. (forthcoming 2020).

23. See generally PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

THE MODALITIES OF SECOND AMENDMENT ARGUMENT

To be clear, our goal today is not to evaluate the constitutionality of any particular gun regulation. Nor is it to offer some single methodological approach to these questions – whether labeled “living constitutionalism” or “originalism,” intermediate scrutiny or “text, history, and tradition.” No other constitutional right is subject to such a one-size-fits-all approach, and it would be surprising if the Second Amendment were. Instead, we wish to show how Second Amendment questions are, and should be, analyzed—the kinds of tools that a judge, lawyer, scholar, or anyone else interested in constitutional law should employ when asked whether a gun regulation is consistent with the Constitution. In doing so – again inspired by Bobbitt – we want to describe seven modalities by which Second Amendment doctrine can, has, and will be created: text, precedent, history, social practice, structure, analogy, and prudence.²⁴

1) Text

We can start with the text of the Constitution, and in particular with the twenty- seven words that many of you probably know by heart: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”²⁵

Constitutional analysis tends to begin with the relevant text. But that text is often not determinative. The First Amendment begins “Congress shall make no law . . .,” but it applies equally to the President and to states.²⁶ That Amendment protects “speech,” but not all utterances are considered “speech” in the constitutional sense – perjury, libel, and securities fraud, for example, trigger no constitutional protection whatsoever.²⁷

24. *Id.*

25. U.S. CONST. amend. II.

26. U.S. CONST. amend. III.

27. *See generally* Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any

In the Second Amendment context, too, the text is not completely definitive. Not all bearable weapons are “Arms”—nuclear detonators and the like can be prohibited without a lot of constitutional fuss.²⁸ The Amendment protects “the right of the people”—but clearly it does not mean every person. Incarcerated felons don’t count; neither do persons committed to a state mental hospital.²⁹ Then there are the hard cases.

Consider Mariano Meza-Rodriguez.³⁰ He grew up in Milwaukee, attending public schools until his senior year of high school, when he dropped out so as to provide for his girlfriend and their daughter.³¹ Just before midnight on August 24, 2013, Milwaukee police responded to a complaint about a man with a gun at a bar.³² Eventually that man was identified as Meza-Rodriguez and, after a short foot chase, he was apprehended by the police.³³ They found a single 22 caliber cartridge in his pocket,³⁴ which would not be a problem for most Milwaukee residents, but for Meza-Rodriguez constituted a crime.

Meza-Rodriguez had lived almost his entire life in Milwaukee, but he was born in Mexico.³⁵ His parents had brought him into the United States illegally at age four, and he had never become an

Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words. . . .”); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–70 (2004).

28. *Heller*, 554 U.S. at 581.

29. *Id.* at 626.

30. See *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015). See also Bruce Vielmetti, *Unlawful Immigrants Can Have Gun Rights, Appeals Court Rules*, MILWAUKEE J. SENTINEL, Aug. 24, 2015, at A4; Ian Millhiser, *Gun Rights Win A Major Victory In Federal Court, And That’s Actually A Good Thing*, THINKPROGRESS (Aug. 21, 2015, 1:59 PM) <https://thinkprogress.org/gun-rights-win-a-major-victory-in-federal-court-and-thats-actually-a-good-thing-a25692714603#.jsj8zx1rw>; Defendant’s Brief at 3, *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015) (No. 14-3271).

31. Defendant’s Brief at 3, *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015) (No. 14-3271).

32. BLOCHER & MILLER, *supra* note 1, at 140.

33. *United States v. Meza-Rodriguez*, 798 F.3d 664, 666 (7th Cir. 2015).

34. *Id.*

35. *Id.*

American citizen or a permanent resident.³⁶ The question in his case, then, was whether undocumented aliens counted as “the people” for purposes of the right to keep and bear arms.

Breaking from three other courts of appeal, the U.S. Court of Appeals for the Seventh Circuit held that undocumented aliens like Meza-Rodriguez can be covered by the Second Amendment when they are part of, or have a connection with, our national community.³⁷ In other words, they fall within “the people” referred to in the Amendment’s text. And yet, the court also concluded the law banning them from possessing guns and ammunition is constitutional. Those conclusions were guided by the Amendment’s text, but not determined by them. The text is a focal point for constitutional interpretation, but the twenty-seven words of the Second Amendment cannot alone resolve the 1,000 cases that courts have faced, nor answer every question in the broader political debate about gun rights and regulation.

2) Precedent

Cases like Meza-Rodriguez’s generate a second modality of constitutional reasoning—precedent, the rules and principles set down by prior cases.³⁸ Precedent operates in at least three directions: vertical, horizontal, and diagonal.

Vertical precedent is binding—it’s what higher courts tell lower courts they must do. In the context of the Second Amendment, there’s not very much vertical precedent coming from the Supreme Court, since the Justices have declined dozens of opportunities to clarify the metes and bounds of what Nelson Lund has described as their “Delphic” decision in *Heller*.³⁹

36. *Id.*

37. *Id.* at 671-72.

38. See generally Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 59 (1989); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 73 (1991).

39. See Nelson Lund, *No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment*, 13 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 30, 32 (2012) (describing *Heller* as “Delphic”). David Kopel has identified remarks in several other Supreme Court decisions, but they are not detailed decisions based on the Second Amendment. See David

In that vacuum, lower courts are increasingly subject to horizontal precedent—prior cases decided by the same court. So, for example, nearly all the federal courts of appeal have officially adopted a two-part framework by which they first ask whether a particular law triggers Second Amendment scrutiny at all, and then ask whether it is constitutional in light of the government interests served, and the private interests burdened.

There is also a third option, which we might think of as diagonal precedent⁴⁰—persuasive cases that are not binding but might provide useful guidance. Here, the primary source of useful information is the state courts.⁴¹ The “individual” right to keep and bear arms for private purposes is a new arrival in federal constitutional law, but states have recognized such a right for over a century, and almost universally have held that the right is subject to “reasonable” regulation.⁴² For supporters of federalism, this would seem to be a good chance to give those “laboratories of experimentation” their due.⁴³

3) History

In addition to learning from each other, judges often take their cues from history. That approach has proven especially prominent in Second Amendment cases, thanks in part to *Heller*’s self-consciously originalist approach.

B. Kopel, *The Supreme Court’s Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999).

40. Cf. Brannon P. Denning, *State Legalization of Marijuana as a “Diagonal Federalism” Problem*, 11 FIU L. REV. 349 (2016).

41. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 380-84 (2011) (arguing for increased reliance on state constitutional doctrine).

42. Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL’Y REV. 597, 598 (2006). Of course, gun rights legislation has been most active at the state level, including changes to these standards that facially require extraordinary justifications for gun legislation. *See, e.g.*, La. Const. Art. I, §11 (imposing a strict scrutiny requirement on gun rights claims); Mo. Const. Art. I, §23 (same).

43. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Heller itself said that the Second Amendment did not lay down any novel principle, but was a right that pre-existed the Constitution. When Justice Scalia wrote that, he referred to the kinds of rights that the Founders – as Englishmen – would have understood themselves to have. Justice Scalia reiterated this notion in *McDonald*, stating that “traditional restrictions go to show the scope of the right.”⁴⁴ With the recent additions of Justices Gorsuch and Kavanaugh, the latter of whom has argued that the Second Amendment should be interpreted solely in light of “text, history, and tradition,”⁴⁵ history is likely to be given an even more prominent place going forward.

That makes accurate reconstruction of the history of gun rights and regulation crucial, and unfortunately there is perhaps no aspect of gun law that is more misunderstood or misrepresented.⁴⁶ People on both sides of the debate sometimes assume that “gun control” is a modern invention, but as a matter of history, rights to keep and bear arms have always gone hand in hand with regulation—all the way to England where this “pre-existing” right originated.

The challenge, we have found, is in identifying the proper historical sources and drawing relevant connections between them and contemporary challenges. Some major colonial cities regulated the storage of gunpowder in city limits. Does that provide a historical precedent for safe storage requirements today? Some cities—including famous cow towns like Dodge City and Tombstone—effectively banned handguns within city limits.⁴⁷

44. *McDonald v. City of Chicago*, 561 U.S. 742, 802 (2010) (Scalia, J., concurring).

45. See also Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013).

46. This is not for lack of exceptional sources. See, e.g., PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* (2018); H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2003); Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121 (2015).

47. See Joseph Blocher, *Firearm Localism*, 123 YALE L. J. 82 (2013) (arguing that Second Amendment doctrine can be tailored to urban areas); but see Michael P. O’Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 YALE L.J.

What relevance does that have for modern municipal gun regulations?⁴⁸

These questions cannot be answered without good, reliable historical sources. The Repository of Historical Gun Laws, an online resource now available through Duke Law School, attempts to supply some of that information.⁴⁹ The Repository is an effort to collect as comprehensive as possible a list of firearm-related laws from medieval England until the early part of the twentieth century.⁵⁰

But, as the Repository itself recognizes, collecting these citations is only part of the historical enterprise. How often were the laws enforced?⁵¹ What about laws that are not recorded? What about legal enforcement through private tort suits?⁵² The historical inquiry can provide essential information—as *Heller* itself demonstrates—but, as with other kinds of data, it is subject to legal interpretation.

4) Social Practice

The framers understood that the original understanding cannot provide all the answers. James Madison himself wrote that “it might require a regular course of practice to liquidate and settle the meaning” of some portions of the Constitution.⁵³ And so it is unsurprising that courts sometimes turn to social practice, custom, usage, convention, tradition and the like to give shape to

ONLINE 359 (2014), <http://yalelawjournal.org/forum/why-firearm-federalism-beats-firearm-localism> (arguing for state-level tailoring instead).

48. *Id.* at 117.

49. See REPOSITORY OF HISTORICAL GUN LAWS, <https://law.duke.edu/gunlaws/>.

50. *Id.*

51. See Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 GEO. J. L. PUB. POL’Y 223 (2016).

52. Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295 (2016).

53. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 435 (Max Farrand ed., 1911) (quoting letter of Madison to Judge Roane Sept. 2, 1819); see also Paul G. Ream, Note, *Liquidation of Constitutional Meaning Through Use*, 66 DUKE L.J. 1645 (2017).

legal doctrine. Punishment violates the Eight Amendment if it is both cruel and, in some sense, unusual by social standards.⁵⁴ Sectarian prayers to solemnize political events are constitutional in part because they have long been part of American political culture.⁵⁵ Obscenity is unprotected when “the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest. . .”⁵⁶

This fourth modality, which we call “social practice,” comes through in *Heller*’s rule that the Second Amendment extends to weapons “in common use.”⁵⁷ But *Heller* doesn’t say how to measure that. Do we count all uses? All legal ones? Only self-defense uses? *Heller* says that self-defense is the “core” of the right, instead of hunting and recreation, which until very recently were the predominant reasons for gun ownership.⁵⁸ Whatever we count, how many does it take to be common? The Fourth Circuit considered that question in *Kolbe v. Hogan*,⁵⁹ a case involving the constitutionality of a ban on so-called “assault weapons.” The dissenters said that such weapons *are* common, noting that more AR-15s are sold each year than Ford F-150s.⁶⁰

Of course, nothing in *Heller* says this is the right metric to use when deciding the relevance of social practice.⁶¹ The sales of AR-15s may be greater compared to Ford F-150s, but less compared to refrigerators, or cellphones. Or less even compared to other firearms, such as handguns.⁶² “Common use” could exclude

54. *Miller v. Alabama*, 567 U.S. 460, 469–70 (2012) (noting that the Eighth Amendment is viewed “less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society.”) (quotation marks and citation omitted).

55. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014).

56. *Miller v. California*, 413 U.S. 15, 24 (1973) (citation omitted).

57. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

58. See generally Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133 (2015).

59. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc).

60. *Kolbe*, 849 F.3d at 153 (Traxler, J., dissenting).

61. 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) (discussing the empirical and definitional challenges of counting weapons for a “common use” test).

62. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, EXPLOSIVES, U.S. DEP’T

common criminal use, but include common self-defense use.⁶³ Finally, which weapons are in common use will depend in turn on what weapons have been allowed in the past, which leads to the somewhat-circular result that constitutional rights are defined by a history of regulation.⁶⁴ In any event, social practice will likely continue—explicitly or not—to be one of the means in which legal claims on the Second Amendment are argued and articulated.

5) Structure

The focus on social practices helps demonstrate a sometimes-underappreciated point: The right to keep and bear arms does not exist in a vacuum. The Constitution protects other constitutional rights, and it also protects what is often called the constitutional “structure”—the relationship between various parts of government and between government and private institutions.⁶⁵ Under the pre-*Heller* militia-based reading of the Second Amendment, for example, the right to keep and bear arms was essentially a federalism provision, designed to protect state militias from federal disarmament. In the post-*Heller* world, different questions of federalism and structure are bound to arise.

Likewise, the Constitution divides power between the federal government and the states, preserving a modicum of self-governance at the sub-national level. That division has been at the center of some of the nation’s largest constitutional controversies, from the Civil War through the battle over the Affordable Care Act (also known as Obamacare),⁶⁶ and it comes up in the gun debate as well, for example in the recent debate about a nationwide concealed carry reciprocity law.⁶⁷ Some supporters of reciprocity

JUSTICE, FIREARMS COMMERCE IN THE UNITED STATES ANNUAL STATISTICS UPDATE 2018.

63. Volokh, *supra* note 58, at 1479.

64. *Id.* at 1481.

65. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011).

66. See *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (upholding Affordable Care Act despite a federalism-based challenge).

67. Michele Gorman, *Guns in America: NRA Boosts National Concealed Carry Reciprocity Push*, NEWSWEEK (Apr. 19, 2017),

argue that the federal government should force states like New York to accept concealed carry permits from places like Utah.⁶⁸ Some opponents argue that this would upend the notion of federalism, giving the federal government far too much power in an area where it should tread lightly—if states want reciprocity, then can agree to do so by compact, as they have done with drivers' licenses.⁶⁹

The same kinds of tensions arise with regard to other constitutional rights and other institutions built around those rights. Armed protestors can deter people from using the public forum, shutting down debate and peaceable assembly.⁷⁰ Schools, universities, and places of worship all have special functions and privileges under the First Amendment that can be threatened by the use of firearms. The gun debate, in other words, is not simply about a constitutional right on one side and policy considerations on the other; it is often about the accommodation of *multiple* constitutional interests.⁷¹

6) Analogy

Another tool that should be familiar to lawyers is that of analogy – the engine of the common law.⁷² In the Second Amendment context, analogy can function in many different ways, and with varying levels of success. Some judges have suggested looking for “lineal descendants” of guns or gun restrictions as they stood in 1791.⁷³ But how does one define the lineage? Cosmetic

<http://www.newsweek.com/guns-america-nra-national-concealed-carry-reciprocity-586438>.

68. Joseph Blocher, *Constitutional Hurdles for Concealed Carry*, TAKE CARE BLOG, Mar. 16, 2017, <https://takecareblog.com/blog/constitutional-hurdles-for-concealed-carry-reciprocity/>.

69. *Id.*

70. See Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175 (2018).

71. See TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS* (2018).

72. Cf. EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2 (1949) (“The finding of similarity or difference is the key step in the legal process.”).

73. *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007).

features? Relative firepower? In what ways is an AR-15 “related” to a musket?

Reasoning by analogy assumes some principle or rule that explains what makes a factor relevant, instead of idiosyncratic or trivial.⁷⁴ Some advocates have argued (though courts have universally rejected the view) that the Second Amendment, like the First, should forbid “prior restraints.”⁷⁵ But that only makes sense if there is some relevant similarity between the two scenarios – something that makes licensing a gun legally similar to licensing a book, or else any comparison is simply rhetorical. Should gun restrictions be evaluated like time, place, and manner restrictions on speech? If so, what would that mean? Is individual choice—of weapon, for example—as important in Second Amendment cases as it is in those involving free speech or personal intimacy?

7) Prudence

A final modality has to do with the role of courts as institutional actors. There are some kinds of decisions that judges are forbidden to make, and others that they are not well-equipped to make. After *Heller*, courts can no longer duck Second Amendment decisions, as they might have done before. But they still have to decide how much weight to give to the determinations of the political branches. If, for example, elected officials have concluded that a certain kind of gun restriction would make people more safe while respecting individuals’ rights, should the courts defer to that judgment?

This was the question that inspired the second dissenting opinion in *Heller*, by Justice Breyer, which was also joined three other Justices. Whereas Justice Stevens’ dissent argued that in fact the history showed that the right to keep and bear arms was

74. See Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 744, 745 (1993).

75. *E.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (“Plaintiffs . . . suggest we apply First-Amendment prior-restraint analysis in lieu of means-end scrutiny to assess the proper cause requirement” of a gun licensing scheme).

limited to the organized militia,⁷⁶ Justice Breyer assumed the existence of an “individual” right and argued that DC’s law was nonetheless constitutional.⁷⁷ He cited historical sources as well, but the center of his approach would be a kind of interest-balancing, “with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other.”⁷⁸ The issue for a judge, then, would be to see “whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.”⁷⁹

This was anathema to Justice Scalia, who was opposed to anything that sounds like interest-balancing.⁸⁰ But in many areas of constitutional law, it is well-established that in cases of uncertainty the Court will defer to the political branches, particularly on empirical questions of public safety, and particularly where the political process seems to be functioning properly—or at least not imposing burdens on “discrete and insular minorities.”⁸¹ To do otherwise is to risk charges of judicial activism.

As with so many other issues in this area, even a seemingly straightforward question of how to resolve Second Amendment challenges implicates fundamental matters of constitutional theory. Our hope in this book is to try to show how those questions, fundamental as they are, can be addressed using some of the standard tools of legal reasoning.

CONCLUSION

In the spirit of looking forward, let us close by saying that *Heller* is and will remain a fixture of our constitutional order.⁸² Most of the questions about the Second Amendment that prevailed

76. *Heller*, 554 U.S. at 637 (Stevens, J., dissenting).

77. *Id.* at 682 (Breyer J., dissenting)

78. *Id.* at 689 (Breyer, J., dissenting).

79. *Id.* (Breyer, J., dissenting).

80. *Id.* at 634 (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”).

81. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

82. BLOCHER & MILLER, *supra* note 1, at 176-82.

twenty or thirty years ago are no longer relevant. Our goal in *The Positive Second Amendment* is to help usher in a new era of Second Amendment discussion, one that doesn't try to re-litigate old debates, but understands that new issues need to be addressed with new ideas. We do not suppose that we can answer all those issues, but we hope to have identified some of the grammar—the modalities—that will be necessary.

Today, we are stepping into a new era of Second Amendment law and scholarship—a positive one. We are excited by the possibility of a richer and more productive discussion about the past, present, and future of gun rights and regulation, and we are glad to be a part of that conversation with all of you.