

INSTITUTIONS AND THE SECOND AMENDMENT

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ABSTRACT

District of Columbia v. Heller ruptured the one institution—the militia—that courts had used for centuries to implement the right to keep and bear arms. If the question was “what arms?,” one looked to the militia to find an answer; if the question was “whose arms?,” again, one looked to the militia. Heller loosened the fit between the militia and the right, causing a welter of conflict as to what institutions now facilitate and constrain the Second Amendment. This Article attempts to restructure the inquiry into Second Amendment rights by drawing from the literature on institutionalism and constitutional law.

Although the institutional turn in constitutional law has been important to free speech scholarship, religion clause scholarship, and separation of powers scholarship, no one has consciously applied institutionalism to the Second Amendment. This Article fills that gap. In so doing, it situates institutionalism within the leading methodological approaches of today: textualism, originalism, common law constitutionalism, popular constitutionalism, and pragmatism. As such, this Article aims to reach beyond Second Amendment scholars and speak more generally to debates about constitutional law and constitutional theory.

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INTRODUCTION

We should consider institutionalizing the Second Amendment. Whatever one thinks of *District of Columbia v. Heller*¹ as a matter of public policy, as a matter of constitutional law and theory, or as a matter of principle, this much is certain: the old frameworks for implementing the right to keep and bear arms for self-defense have weakened and new frameworks must be built.

The Second Amendment contains two clauses. The first clause reads: “A well regulated Militia, being necessary to the security of a free State”; and the following clause reads: “the right of the people to

1. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (holding that the Second Amendment protects an individual rather than a collective right to keep and bear arms for self-defense).

keep and bear Arms shall not be infringed.”² For over two centuries, courts held these clauses in a tight seal. Joining the two clauses fortified the doctrine against the welter of conflicting, sometimes corrosive, historical, political, and moral claims that tend to surround any discussion of the right to keep and bear arms. If the question was “what arms?,” one only had to look to the militia clause.³ If the question was “whose arms?,” again, the militia clause supplied an answer.⁴ Outside the courthouse, economists, politicians, and historians waged a sometimes personal and acrimonious debate.⁵ But within the courthouse, the Second Amendment as law (as distinguished from rhetoric, politics, or faith) was calm, even arid. When the Supreme Court loosened the fit between the militia and the right to keep and bear arms⁶—whatever one may think of the correctness of its conclusion—it caused an irreparable breach, into which poured all the clamor and confusion of gun-rights talk.⁷

Now, existing forms of constitutional adjudication no longer hold. Historical prohibitions do not mesh with their justifications.⁸ Gun-free zones are criticized as the places guns are needed most.⁹ Weapons may

2. U.S. CONST. amend. II.

3. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (determining that a short-barreled shotgun was not shown to bear “some reasonable relationship to the preservation or efficiency of a well regulated militia”).

4. See *Presser v. Illinois*, 116 U.S. 252, 265–66 (1886) (holding that a law that criminalized persons who “associate together as military organizations, or . . . drill or parade with arms in cities and towns unless authorized by law, do[es] not infringe the right of the people to keep and bear arms”).

5. See, e.g., ALAN M. GOTTLIEB, *THE GUN GRABBERS: WHO THEY ARE, HOW THEY OPERATE, WHERE THEY GET THEIR MONEY* (1998); BOWLING FOR COLUMBINE (United Artists & Metro-Goldwyn-Mayer 2002). For a further discussion of the history, see generally Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *FORDHAM L. REV.* 681 (2004).

6. *Heller*, 554 U.S. at 627 (noting “that modern developments have limited the degree of fit between the prefatory clause and the protected right”).

7. See generally Joseph Blocher, *Gun Rights Talk*, 94 *B.U. L. REV.* 813 (2014) (surveying the rhetoric and cultural roots of gun-rights proponents).

8. Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA L. REV.* 1343, 1353 (2009).

9. See, e.g., Robert J. Caldwell, *The Lessons from Virginia Tech: Bloodbath in a ‘Gun-Free Zone,’* *SAN DIEGO UNION-TRIBUNE* (Apr. 22, 2007), http://www.utsandiego.com/uniontrib/2007/0422/news_lz1e13caldwe.html [<https://perma.cc/G96W-HDZQ>]; Nick Wing, *Dennis Baxley, Florida GOP Lawmaker: End Gun-Free School Zones After Sandy Hook Massacre*, *HUFFINGTON POST* (Dec. 17, 2012, 5:48 PM), http://www.huffingtonpost.com/2012/12/17/dennis-baxley-florida_n_2318140.html [<https://perma.cc/R26L-ECMK>].

be licensed when concealed, but not when displayed.¹⁰ Children not old enough to serve in the militia argue that they enjoy a right to arm for self-defense.¹¹ The felons who are least likely to confront violence want more gun rights than those felons who are most likely to confront violence.¹² Advocates claim that even *private* restrictions on the places one can carry weapons amount to an assault on “Second Amendment rights.”¹³

The law is in tumult, and the boundaries between political, economic, historical, and legal argument are indistinct and treacherous. Is evidence of the safety or dangerousness of a firearm relevant to constitutional litigation?¹⁴ Does the historical fact of a longstanding regulation on gunpowder matter?¹⁵ Are antityranny concerns for keeping and bearing arms legal, political, or moral arguments?¹⁶

We need a structure for the Second Amendment that can distinguish between a public park and public housing, between a Claymore sword and a Claymore mine. And we need a structure for the Second Amendment that amounts to something more than seat-of-

10. Rani Molla, *Map: Where Is ‘Open Carry’ Legal?*, WALL STREET J. (Aug. 22, 2014, 4:14 PM), <http://blogs.wsj.com/numbers/map-where-is-open-carry-legal-1715> [<https://perma.cc/7LNG-GHFM>].

11. *People v. Aguilar*, 2 N.E.3d 321, 328–30 (Ill. 2013).

12. *Compare* *United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (“We now join our sister circuits in holding that application of the felon-in-possession prohibition to allegedly non-violent felons like Pruess does not violate the Second Amendment.”), *with* *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010) (“[W]e recognize that [the federal felon-in-possession statute] may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent . . .”). For a further discussion of felon-in-possession laws, see generally C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695 (2009).

13. See Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 43 n.216 (2012) (citing Louise Red Corn, *NRA to Boycott Companies*, TULSA WORLD, Aug. 2, 2005, at A9 (quoting National Rifle Association (NRA) chief executive Wayne LaPierre as threatening “to make ConocoPhillips the example of what happens when a corporation takes away your Second Amendment rights”)).

14. *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1119, 1124–25 (N.D. Ill. 2012) (disputing the relevance of empirical data); Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL’Y 951, 956–57 (2011).

15. *District of Columbia v. Heller*, 554 U.S. 570, 630, 632, 634 (2008).

16. See *id.* at 598 (“[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”). *But see* Glenn H. Reynolds & Brannon P. Denning, *How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian*, 91 TEX. L. REV. SEE ALSO 89, 93 (2013) (arguing that the Second Amendment does not guarantee a right to overthrow the government).

the-pants intuitions, unelaborated cost-benefit analysis, and historical pastiche. We need to institutionalize the Second Amendment.

This Article explores an institutional approach to the right to keep and bear arms. An institutional approach is one where officials, and judges in particular, recognize and potentially defer to salient organizations, rules, traditions, and norms that both facilitate and constrain Second Amendment activity. An institutional approach means more than judicial respect for context, as context alone does not capture the mediating, decisionmaking, and constitutive functions of institutions. Finally, this institutional turn is different from the old collective versus individual rights debates of the last half century. It accepts *Heller*'s holding as definitive, and calls for an evaluation and recognition of the various institutions that will shape the doctrine going forward.

This Article explains the need for an institutional approach after *Heller* and identifies potentially relevant Second Amendment institutions to shape the doctrine. But my ambitions are broader. Although I discuss institutions relevant to the Second Amendment context, the applications are general. Institutions exist. But their role in constitutional construction remains undertheorized. Scholars of executive power,¹⁷ First Amendment speech and religion,¹⁸ and racial discrimination¹⁹ have made strides in institutional analysis within their particular fields, but their insights have not been applied to the Second Amendment, or across constitutional domains, despite the tendency of judges to borrow from various sources.²⁰ The Second Amendment provides space to think about these problems because the scope of gun rights is an unsettled area of law, but the insights here may prove useful

17. See, e.g., Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 59–62 (2014); see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014) (“[F]or purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”).

18. See, e.g., Ashutosh Bhagwat, *Religious Associations: Hosanna-Tabor and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 82–100 (2014); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 847–83 (2008); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–08 (2012) (deferring to the church to determine who is a “minister”).

19. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 1, 15–26 (2006); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1757–1823 (2000).

20. See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 462–82 (2010).

to more than just Second Amendment scholars. Our constitution, written and unwritten, contemplates many institutions—home, church, school, city, corporation, and family—and our exploration of institutions in the Second Amendment may generate models that will feed back into other constitutional fields.²¹

Part I briefly summarizes *Heller*. It then explores *Heller*'s tacit recognition of institutions in Second Amendment adjudication. First, it explains how *Heller*'s limits on the Second Amendment are difficult to reconcile with the “central component” of the right, self-defense. It then shows how the Court's conventional methodologies are inadequate to address present and future questions about the Second Amendment. This Part concludes by explaining how the Court has demonstrated a sensitivity to institutions, a sensitivity that could help to resolve these contradictions if used to implement the right. Part II offers a working definition of an institution, drawing on the literature that has developed in the past twenty years. Part III offers a series of defenses of institutionalism in constitutional adjudication, and considers how each may cash out with respect to Second Amendment cases. Part IV provides a sampler of “Second Amendment Institutions”: institutions that both facilitate and constrain Second Amendment activity. Part V situates institutionalism within larger debates about constitutional theory, explaining the relevance of institutions to textualists, originalists, common law constitutionalists, popular constitutionalists, and prudentialists. The Article concludes with a sketch of what an institutional approach may mean for the Second Amendment right to keep and bear arms, and for the broader project of constitutional adjudication.

I. *HELLER*: A BRIEF HISTORY

The Second Amendment states that “[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.”²² In *District of Columbia v. Heller*, the Court held for the first time that this amendment protects the right of an individual law-abiding adult citizen to possess an operable firearm, including a handgun, in his home for

21. See Randy J. Kozel, *Institutional Autonomy and Constitutional Structure*, 112 MICH. L. REV. 957, 977 (2014) (discussing the broader potential of institutional analysis in constitutional law).

22. U.S. CONST. amend. II.

self-defense.²³ *Heller* concerned a District of Columbia regulation that placed severe restrictions on the ownership and transportation of handguns and other firearms in the home, including a requirement that firearms be locked or disassembled when not in use.²⁴

Dick Heller, a special police officer for the Federal Judicial Center and a gun-rights champion, sued the District in federal court alleging that the regulation violated the Second Amendment. Among gun-rights advocates, it was assumed that the Second Amendment protected individual firearm ownership.²⁵ Several state constitutions expressly guaranteed an individual right to keep and bear arms,²⁶ and some lower courts and certain members of the Supreme Court had signaled that the Second Amendment protected an individual right.²⁷

But as a matter of constitutional doctrine, the right was far from clear. The Court had not spoken on the topic since *United States v. Miller*²⁸ in 1939. In *Miller*, the Court rejected a claim that indictments under the National Firearms Act of 1934 violated the right to keep and bear arms.²⁹ The defendants were charged with possessing a short-barreled shotgun, a firearm deemed illegal under the Act.³⁰ The defendants had initially persuaded the lower court to quash the indictment as a violation of the Second Amendment.³¹ But a unanimous Supreme Court reversed. According to Justice McReynolds, the Second Amendment “must be interpreted and applied” with the end of maintaining a well-regulated militia.³² Because the defendants had produced no evidence that possession of a short-

23. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).

24. *Id.* at 574–75.

25. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 207–13 (2008) (discussing the rise of the individual rights interpretation of the Second Amendment).

26. See, e.g., Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 n.11 (2007) (citing Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 59 n.2 (1989)) (identifying states with individual rights provisions prior to *Heller*).

27. See, e.g., *Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., concurring) (speculating on an individual rights interpretation of the Second Amendment); *United States v. Emerson*, 270 F.3d 203, 264–65 (5th Cir. 2001) (finding an individual right to keep and bear arms under the Second Amendment).

28. *United States v. Miller*, 307 U.S. 174 (1939).

29. *Id.* at 176.

30. *Id.* at 175–76.

31. *Id.* at 177.

32. *Id.* at 178. Justice Douglas did not take part in the case. *Id.* at 183.

barreled shotgun bore “some reasonable relationship to the preservation or efficiency of a well regulated militia,” they were not entitled to any constitutional protection.³³

The holding in *Miller* mentioned neither self-defense nor any firearm uses independent of the militia. For nearly seventy years after the decision, lower courts read *Miller* to endorse a militia-centric Second Amendment.³⁴ *Miller* itself seemed simply to follow decades of militia-focused state-law precedent.³⁵ Consequently, when *Heller* filed his suit in 2003, the idea that the Second Amendment protected an individual right to keep and bear arms was at best equivocal.³⁶ Former Chief Justice Warren Burger, speaking from retirement in the 1990s, thought the individual-rights reading of the amendment was so preposterous that it amounted to a “fraud.”³⁷ In *Heller*, in 2008, the Court held that the individual right to keep and bear arms was not a fraud—it is the law.

Justice Scalia, writing for the *Heller* majority, revisited the amendment’s text and broke it apart. The first clause—concerning “a well regulated Militia”—is “prefatory”; the second clause—concerning “the right of the people to keep and bear Arms”—is “operative.”³⁸ The operative portion “unambiguously refer[s] to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.”³⁹ The text is easily understood:

33. *Id.* at 178.

34. *See, e.g.*, *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942).

35. *See Miller*, 307 U.S. at 182 n.3 (citing, *inter alia*, *Fife v. State*, 31 Ark. 455 (1876); *City of Salina v. Blaksley*, 72 Kan. 230 (1905)). For other militia-centered opinions, see generally Haile v. State, 38 Ark. 564 (1882); *Hill v. State*, 53 Ga. 472 (1874); *English v. State*, 35 Tex. 473 (1872).

36. For a discussion of the historiography of this debate from various ideological perspectives, see generally Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3 (2000); Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing “Standard Model” Moving Forward*, 39 FORDHAM URB. L.J. 1727 (2012); David T. Hardy, *The Rise and Demise of the “Collective Right” Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315 (2011); Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L. REV. 1211 (2009).

37. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 25 (2011) (quoting Warren Burger).

38. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

39. *Id.* at 579.

it preserves a right of individual “people” to “have” and “carry” “weapons” for purposes of “confrontation.”⁴⁰

Under the majority’s reading, the prefatory clause contemplates an unorganized “citizens’ militia” comprised of “the people” who are armed for confrontation.⁴¹ From this body of armed people, Congress has “plenary” authority to form an “organize[d]” militia, such as the National Guard.⁴² This unorganized militia is “a safeguard against tyranny.”⁴³ Fear that Congress may abuse its plenary power, according to the *Heller* majority, explains why the amendment speaks in terms of the militia. But the militia does not undermine the personal right; that right is a preexisting “natural right of resistance and self-preservation,”⁴⁴ recognized by our English ancestors—a right that forms “the *central component*” of the right to keep and bear arms.⁴⁵

Of course, the majority assures us, the right is not for any person to carry any weapon for any confrontation in any place that that person happens to be.⁴⁶ *Heller* and its sequel *McDonald v. City of Chicago*⁴⁷ stipulate that the right only protects those weapons “typically possessed by law-abiding citizens for lawful purposes.”⁴⁸ And even then, nothing in the opinions “cast[s] doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ ‘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.’”⁴⁹

The Court indicates that this nonexhaustive list of limitations on the Second Amendment has “historical justification[],”⁵⁰ but does not

40. *Id.* at 581–92.

41. *Id.* at 579, 599.

42. *Id.* at 596.

43. *Id.* at 600.

44. *Id.* at 594 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *144).

45. *Id.* at 599.

46. *Id.* at 595 (“[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation”); *id.* at 626 (“[T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”).

47. *McDonald v. City of Chicago*, 561 U.S. 742 (2011). *McDonald* held that the right to keep and bear arms applies to the states through the Due Process Clause of the Fourteenth Amendment. *See id.* at 791.

48. *Heller*, 544 U.S. at 625.

49. *McDonald*, 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626–27).

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

explain what it means by a historical justification or how to identify other “presumptively lawful” regulations.⁵¹ The Court also “expressly reject[s]” tests for constitutionality that rely upon “judicial interest balancing.”⁵² That balancing, according to the *Heller* majority, already took place with the founding generation and cannot be repeated.⁵³

II. SECOND AMENDMENT INTUITIONS

Heller states that self-defense—“the natural right of resistance and self-preservation”⁵⁴—is the “central component,” the “core” of the Second Amendment.⁵⁵ This is a peculiar turn for such a self-consciously textualist opinion; self-defense was a term known to the Framers, and they did not use it when drafting the amendment.⁵⁶ If the original meaning of the Second Amendment was to protect individual self-defense, the manner in which the amendment expresses that protection—by reference to a thing used for self-defense—is an odd way to do it.⁵⁷

Most of the Second Amendment’s drafting and discussion centered upon the organization and control of the militia. The individual-rights reading of the Second Amendment is more a product of the nineteenth than the eighteenth century.⁵⁸ It is more John Bingham than James Madison.

51. *Id.* at 627 n.26; see *McDonald*, 561 U.S. at 786.

52. *McDonald*, 561 U.S. at 785.

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

54. *Id.* at 594 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *144).

55. *Id.* at 599, 629 (emphasis omitted).

56. *Id.* at 576 (“In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))); *id.* at 642 (Stevens, J., dissenting) (noting the omission of a self-defense purpose in the text of the Second Amendment).

57. Odd, but not unprecedented: the right to criticize the government through publication may be expressed through a First Amendment right to the “press.” See Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 416–19 (2013); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PENN. L. REV. 459, 461–81 (2011).

58. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 326 (2005) (noting the transition from militia-centered to individual-rights interpretation of the amendment); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 746 (2013) (noting that *Heller*’s reading of the Second Amendment comes “not from Founding-era sources or practices, but from

But, having abandoned the militia as an organizing concept, *Heller* needs something to keep the prefatory and operative clauses from slipping out of joint. *Heller* maintains that the Second Amendment contained a hitherto unacknowledged individual right at its ratification in 1791.⁵⁹ Enter self-defense. *Heller* uses self-defense to smooth the spotty and pitted eighteenth-century record on an individual right to bear arms with the thicker, more direct expression of an individual right during Reconstruction.⁶⁰ What emerges is a Second Amendment right to keep and bear arms that appears seamless, timeless, and natural. But to do this, Justice Scalia must hoist the right to a level of generality that earns his ire elsewhere,⁶¹ and very quickly his opinion buckles under the strain.

“The natural right of resistance and self-preservation”: at that stratospheric level of abstraction, there is no distinguishing between threats from a tyrannical government, an invading army, rogue police officers, or the common burglar.⁶² Inmates with homemade knives and nations with nuclear weapons equally partake of a right to self-defense at these heights.⁶³ But the Constitution as law, rather than aspiration or rhetoric, cannot long stay at this dizzying altitude. The surly question: “What is to be done?” is constantly tugging at the opinion. The response, “the natural right of . . . self-preservation” is not much

a set of legal rules elaborated by two nineteenth-century authors of legal treatises written over a half a century after the Second Amendment was framed and adopted”).

59. *Heller*, 554 U.S. at 576–77 (relating that the Second Amendment includes idiomatic meaning and implicates what “ordinary citizens in the founding generation” would have known).

60. See Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 899–900 (discussing the more individual-rights focus of the Second Amendment during Reconstruction).

61. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (Scalia, J.) (criticizing the dissent for failing to “refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”).

62. Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 93 (1992) (“Whether murder, rape, and theft be committed by gangs of assassins, tyrannous officials and judges or pillaging soldiery was a mere detail . . .”); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1454 n.358 (“The Framers . . . saw community defense against a criminal government as simply one end of a continuum that began with personal defense against a lone criminal . . .”).

63. Cf. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

of an answer.⁶⁴ The “core” of the amendment may help bridge the centuries, but it is too wispy to support judgments of who must go to prison, and who must be set free.

The Justices agree. Despite occasional references to a brooding omnipresence of natural law in the majority opinion,⁶⁵ the right is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁶⁶ The Justices in *Heller* and *McDonald* may diverge on the limits to the Second Amendment, but they all agree that a bare moral claim to self-defense does not vanquish all regulation. In fact, *Heller* suggests that some kinds of arguments—even when couched in the language of self-defense—are not Second Amendment claims at all. The Court is clear that some categories of “keeping,” “bearing,” and “arms” are not in fact *Second Amendment* keeping, bearing, or arms, just as some kinds of speech (obscenity, true threats) are not *First Amendment* speech.⁶⁷

It seems intuitive (although it is not certain) that a prisoner may defend himself from an attack in prison. But that prisoner has no right to possess an “arm” to do so, whether that arm is a gun, a knife, or any other type of contraband weapon.⁶⁸ Prisoners who defend themselves with homemade shanks are simply not exercising *Second Amendment*

64. See *Heller*, 554 U.S. at 687 (Breyer, J., dissenting) (“[T]o raise a self-defense question is not to answer it.”).

65. The reference is to Justice Holmes’s famous dissent in *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.”). For more on the “brooding omnipresence” critique of *Heller*, see Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 26 (2011). For a discussion of natural law folded into *Heller*’s reasoning, see Diarmuid F. O’Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1523–26 (2011).

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

67. *Id.* (suggesting that concealed carry is not a type of “bear[ing]” protected by the Second Amendment). See generally Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009) (forecasting that the Court may have to address the same categorical and balancing issues with respect to gun rights as it has with free speech rights).

68. Compare *McDonald v. City of Chicago*, 561 U.S. 742, 767 (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present . . .”), and *Griffin v. Martin*, 785 F.2d 1172, 1186 n.37 (4th Cir. 1986) (“It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether, thereby leaving one a Hobson’s choice of almost certain death through violent attack now or statutorily mandated death through trial and conviction of murder later.”), *opinion withdrawn* by 795 F.2d 22 (4th Cir. 1986), with *Rowe v. DeBruyn*, 17 F.3d 1047, 1052 (7th Cir. 1994) (“[W]e find no precedent establishing a constitutional right of self-defense in the criminal law context.”), *vacated*, 1994 U.S. App. LEXIS 10069 (7th Cir. 1994).

rights to “keep” or “bear” an “arm,” no matter how central self-defense may be to the Second Amendment. Similarly, it seems apparent that certain weapons, such as nuclear munitions, landmines, and perhaps even powerful firearms such as “M-16 rifles and the like,”⁶⁹ may not be kept by civilians. These simply are not “arms” as that word is used in the Second Amendment, no matter the grammatical meaning of that word and irrespective of the utility of these weapons for confrontation.

But these are just intuitions. We have instincts that a prison is different from a house and that a machine-gun is different from a shotgun. But ever since *Heller* ruptured the one institution used to manage these distinctions, we have no structure to explain why these differences are constitutionally relevant. All we have are intuitions that the Second Amendment must operate differently in different contexts.

III. SECOND AMENDMENT BALANCING AND THE INSTITUTIONAL TURN

The Court has not helped us move much beyond intuitions. The majority blessed a nonexclusive set of pragmatic “presumptively lawful” regulations, but left the details to future litigation.⁷⁰ Although these “presumptively lawful” regulations seem sensible, little in their origin or their justification follows from the logic or method of *Heller* and *McDonald*.⁷¹ Worse, the *Heller* majority and *McDonald* plurality denigrate the one jurisprudential mechanism—balancing—that has been the predominant method to address presumptions. Yet the Court offers no analytical framework to replace balancing.⁷² Nevertheless, the Court’s dictum shows sensitivity to the different places, persons, and activities that may trigger Second Amendment scrutiny. This sensitivity may form the basis for a more cohesive institutional structure for the Second Amendment going forward.

Heller’s “sensitive places” exception to the Second Amendment reveals the weakness of existing tools of constitutional analysis, but it also hints at the Court’s receptiveness to an institutional approach. In *Heller*, and then again in *McDonald*, the Court assures us that “nothing

69. *Heller*, 554 U.S. at 627.

70. *Id.* at 626.

71. See Lund, *supra* note 8, at 1353.

72. Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 855 (2013).

in our opinion should be taken to cast doubt on longstanding prohibitions” such as “the carrying of firearms in sensitive places such as schools.”⁷³ That schools may ban guns is difficult to understand given the Court’s stated purpose of the Second Amendment, which is to protect a core right to keep and carry arms for confrontation. School violence is a disheartening reality.⁷⁴ Moreover, if gun-rights rhetoric is true, the fact that the government can designate a school or any other “sensitive place” a “gun-free zone” makes that place potentially more hazardous.⁷⁵ Gun-rights advocates insist “gun-free zones” are “victim zones” and, in creating them, government does exactly what the amendment forbids: it renders a person comparatively defenseless at a time and place where she is most vulnerable.⁷⁶

Conventional doctrinal methods cannot explain the Court’s “sensitive places” dicta. Either they simply state the dicta as a conclusion, or they rely on balancing tests that *Heller* and *McDonald* seem to repudiate. Take, for instance, the most common form of Second Amendment analysis to date: the mixed scope-plus-scrutiny approach, partially drawn from First Amendment doctrine.⁷⁷ The Fifth Circuit says the first step requires the court “to determine whether the challenged law impinges upon a right protected by the Second Amendment—that is, whether the law regulates conduct that falls

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

74. ANALYSIS OF SCHOOL SHOOTINGS, EVERYTOWN FOR GUN SAFETY (2016), <http://everytownresearch.org/documents/2015/04/analysis-of-school-shootings.pdf> [<https://perma.cc/EG52-T739>].

75. See *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring in part and concurring in judgment) (“The notion that ‘self-defense has to take place wherever [a] person happens to be’ . . . portend[s] all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities.” (first alteration in original) (quoting 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, 1515 (2009))).

76. See, e.g., S. 2011, 76th Sess., at 3 (Nev. 2011) (statement of Sen. John J. Lee) (“Nevada colleges and universities are labeled ‘gun free zones.’ I argue these zones are ‘defenseless-victim zones.’”); Caldwell, *supra* note 9; John R. Lott, *Did Colorado Shooter Single Out Cinemark Theater Because It Banned Guns?*, FOX NEWS (Sept. 10, 2012), <http://www.foxnews.com/opinion/2012/09/10/did-colorado-shooter-single-out-cinemark-theater.html> [<https://perma.cc/9UZf-2BTW>].

77. *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) (“[W]e are persuaded to adopt the two-step framework [for the Second Amendment] outlined above because First Amendment doctrine informs it.”); *United States v. Marzarella*, 614 F.3d 85, 89 n.4 (3d Cir. 2010) (looking to First Amendment doctrine for guidance).

within the scope of the Second Amendment’s guarantee.”⁷⁸ Framing the question narrowly—is there a right to take a gun to school for self-defense?—puts the rabbit in the hat. The Court has already said that gun-free school zones are presumptively lawful, akin to felon-in-possession laws. If the Court’s list of presumptively lawful regulations supplies an answer rather than an analysis, then the response to the question is always “no.” Framing the question by reference to the “core” of the right—self-defense—is equally unhelpful. If the question is—could there be a need to defend oneself in a school?—the answer is always “yes.” But, at this level of generality, “yes” is always the right answer: whether we speak of a school, a church, a saloon, or a courtroom.

Assuming the regulation or activity falls within the scope of the amendment—here, a gun-free zone—the second step of the test requires the court “to determine whether the law survives the proper level of scrutiny.”⁷⁹ If self-defense is a natural right codified in the Second Amendment, and if any regulation that makes self-defense with a firearm harder to accomplish thereby implicates that right, then every regulation is subject to some heightened level of scrutiny.

At risk of oversimplification, there are two levels of heightened scrutiny: strict scrutiny and intermediate scrutiny.⁸⁰ Strict scrutiny requires that the regulation be narrowly tailored to serve a compelling government interest.⁸¹ Accordingly, strict scrutiny will usually invalidate the regulation.⁸² A ban on guns in sensitive places infringes the right. Even if one stipulated that the government designated the place sensitive for a compelling reason (whether that reason was to

78. *Nat’l Rifle Ass’n*, 700 F.3d at 194.

79. *Id.*

80. There is plenty of academic commentary suggesting that, in practice, the three-tiered structure of constitutional scrutiny—rational basis, intermediate scrutiny, and strict scrutiny—has weakened, if not completely disintegrated. *See, e.g.*, Jack M. Balkin, Plessy, Brown, and Grutter: *A Play in Three Acts*, 26 *CARDOZO L. REV.* 1689, 1727 (2005) (suggesting the “doctrinal structure is coming apart” and citing cases); Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 *MICH. L. REV.* 1447, 1450 (2004) (noting the sexual orientation cases have undermined tiers-of-scrutiny analysis).

81. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001).

82. *See Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment) (calling conventional strict scrutiny “strict in theory, but fatal in fact”). *But see Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668–69, 1673 (2015) (upholding nonsolicitation rule in judicial campaigns under strict scrutiny); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (upholding material-support-for-terrorism statute against First Amendment challenge under strict scrutiny).

avoid mayhem or accidents, or to protect the police or the citizenry), it would never be narrowly tailored because scofflaws will never obey the gun-free zone (or any other regulation) and only the law-abiding citizen will be burdened. Accordingly, there would nearly always be a less restrictive method to advance the government interest.⁸³

Intermediate scrutiny, by contrast, may preserve a regulation on guns in sensitive places, but for reasons that appear arbitrary or idiosyncratic. First, the intermediate scrutiny standard is unstable even at the level of its articulation. Some courts state that the regulation must be “*substantially* related to an *important* government objective”;⁸⁴ other courts say that the regulation needs to be “*reasonably* adapted to a *substantial* governmental interest.”⁸⁵ Some courts separately evaluate whether there are less restrictive or less burdensome methods of advancing the stated goal;⁸⁶ some courts require that the regulation go no further than what is “essential” to the goal;⁸⁷ and some require no such inquiry at all.⁸⁸ Second, even when courts agree on how to formulate the test, they diverge on how to assess what counts as a “substantial relationship” or a “reasonable” adaptation. And third, this method of scrutiny does not explain why the government’s substantial interest in preventing armed mayhem is less weighty when regulating a public park or a city sidewalk, than when regulating a school or a government building.

83. See *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (“Were we to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers’ ability to ‘prevent[] armed mayhem’ in public places.” (alteration in original) (quoting *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010))); *Heller v. District of Columbia*, 45 F. Supp. 3d 35, 54 (D.D.C. 2014) (“According to Plaintiffs . . . municipalities should be limited to enacting only those firearms regulations that lawbreakers will obey—a curious argument that would render practically *any* gun laws unconstitutional.”), *aff’d in part, rev’d in part*, 801 F.3d 264 (D.C. Cir. 2015).

84. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (emphasis added).

85. *Masciandaro*, 638 F.3d at 471 (emphasis added); see also *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (looking for a “reasonable fit between the law and an important government objective”).

86. See *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989) (“We uphold such restrictions so long as they are ‘narrowly tailored’ to serve a significant governmental interest . . . a standard that we have not interpreted to require elimination of all less restrictive alternatives.” (citations omitted)).

87. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

88. See ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 553 (4th ed. 2011) (calling “less restrictive alternative analysis” an “unresolved question” in intermediate scrutiny, and collecting cases).

Intermediate scrutiny assumes that preventing armed mayhem is an important government objective. If we cannot stipulate to the legitimacy of the government interest, the test becomes even more unpredictable. With other areas of constitutional law, we have at least a modicum of agreement about the evils we want to smoke out: invidious or subordinating classifications in equal protection suits, for example, or content and viewpoint regulation in First Amendment cases. But in Second Amendment litigation, we still lack a basic consensus on how to distinguish a government evil from a government function.⁸⁹ Certainly universal citizen disarmament is an evil, but few seriously advocate ignoring *Heller* and beginning confiscation. If every regulation inevitably tilts toward the abyss of universal disarmament, it is hard to figure out how *any* regulation is constitutional.⁹⁰

Further, some government purposes directly conflict with *Heller's* stated reasons for the right. Laws that protect police from firearms also protect tyrants from firearms; laws denying guns to the mentally ill also deprive them of an effective means of self-protection. Frequently, intermediate scrutiny seems to produce judgments preordained by the judge's assessment of the relative merits of the policy.⁹¹ As a result, a handful of judges have rejected intermediate scrutiny as illegitimate Third Branch tinkering.⁹²

The only rationale *Heller* offers for the constitutionality of gun-free zones is the assertion that these regulations are “longstanding.”⁹³ “Longstanding” could mean a number of things. It could mean any regulation that existed in 1791. Perhaps there were prohibitions on firearms in schools in 1791, but no one has identified any to date. It could mean regulations that meet a certain threshold of longevity, even if there is no precise example from 1791. Some states regulated guns in

89. Cf. *Dalehite v. United States*, 346 U.S. 15, 56 (1953) (Jackson, J., dissenting) (“[I]t is not a tort for government to govern . . .”).

90. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 363 (1985) (discussing slippery slopes as depending on a set of empirical assumptions).

91. See Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 301 (1992) (remarking on intermediate scrutiny's “shifting bottom line”).

92. See *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting), *opinion withdrawn and superseded on reh'g* by 682 F.3d 361 (5th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1280–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1119 (N.D. Ill. 2012).

93. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

schools in the mid- to late 1800s,⁹⁴ although no one has investigated how common the regulations were, or how often they were enforced—assuming “longstanding” also means “widespread” and “not desuetudenal.”⁹⁵ Even then, that historical evidence would only account for schools. The inside of a commercial airliner feels like a sensitive place, even though Congress did not regulate guns on planes until 1961.⁹⁶

It could be that prohibitions are longstanding when they resemble other types of historical regulations. The Court applies similar reasoning with jury-trial rights.⁹⁷ But the Court did not specify in *Heller* how similar such a regulation must be,⁹⁸ and has offered only oblique guidance since.⁹⁹ Further, even if we accept some Burkean notion that longevity equals constitutionality in Second Amendment cases,¹⁰⁰ much of the constitutional canon is built upon the ruins of longstanding regulations.¹⁰¹ Finally, *Heller* may not require that the regulation be longstanding so long as some other justification applies.¹⁰² But

94. See *infra* Part V.D.

95. See Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*, GEO. J.L. & PUB. POL’Y (forthcoming 2016). Compare Charles, *supra* note 36, at 1799–1821 (challenging historian Joyce Lee Malcolm’s claim that public carry regulations were not enforced in England in the seventeenth century), with JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 104–05 (1996) (arguing that gun laws in England were seldom enforced and unpopular in the seventeenth century).

96. Act of Sept. 5, 1961, Pub. L. No. 87-197, 75 Stat. 466.

97. See generally Miller, *supra* note 72, at 872 (concluding that “the Court has fashioned a test that relies primarily on historical analogues to determine the kinds of suits that trigger a jury-trial right and the constitutionality of procedural innovations that control the jury”).

98. *Heller*, 554 U.S. at 630, 634 (dismissing gunpowder storage and a single Boston regulation as immaterial to the constitutionality of the District of Columbia regulation).

99. Cf. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016) (reiterating that “the Second Amendment extends . . . to . . . arms . . . that were not in existence at the time of the founding” (quoting *Heller*, 554 U.S. at 582)).

100. Cf. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (“The Court’s inquiry . . . must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.”).

101. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (striking down bans on same-sex marriage); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down antimiscegenation laws).

102. There is some adjectival slip between *Heller* and *McDonald*. It is not clear from *Heller* that the “longstanding” description is meant to apply to any restriction except those concerning felons and the mentally ill. *McDonald* uses the adjective to cover all categories of regulations. The full passage from *Heller* reads as follows:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill,

justifications based upon an express cost-benefit analysis or other kinds of weighing must reckon with the skepticism of balancing expressed in *Heller* and *McDonald*, as already discussed.

An institutional approach to the Second Amendment could give some content to what makes a school a “sensitive place.” But more broadly, it could structure the inquiry into why any set of regulations or protections is contemplated by the Second Amendment. When *Heller* says an arm is protected because it is in “common use” or is “typically” used for purposes like self-defense and hunting, the Court appears to appeal to some kind of social practice as constitutive of the Second Amendment.¹⁰³ The same can be said of “longstanding regulations.” Presumably, then, social practice, tradition, norms, and values are thought to shape the Second Amendment right, in a way that is loosened from—but not completely independent of—a cost-benefit analysis or other consequentialist considerations. Put another way, it seems as if the Court understands the Second Amendment not to encode some abstracted, naked natural right to self-defense or a calcified set of historically-delineated regulations, but instead to permit the legal evaluation and management of a number of concurring or conflicting cultural practices, behaviors, values, and institutional arrangements.¹⁰⁴

IV. INSTITUTIONAL ANALYSIS: DEFINITIONS AND JUSTIFICATIONS

The Court has confirmed a strong intuition that the Second Amendment is shaped by institutions. The problem is not that this intuition is wrong. The problem is that the Court has not supplied a theory to build this intuition into constitutional doctrine, told us how to identify other unstated institutions that influence the Second Amendment, or explained how these institutions map onto other

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.

Heller, 554 U.S. at 626–27; see also Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 715 n.64. (2012) (noting this ambiguity).

103. *Heller*, 554 U.S. at 577, 627; see also Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from the denial of certiorari) (mem.) (“*Heller* asks whether the law bans types of firearms commonly used for a lawful purpose.”).

104. Cf. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 487–96 (2011) (discussing Fourth Amendment jurisprudence as managing an equilibrium of police practice versus privacy set at some point in the past).

constitutional doctrines and methods of constitutional adjudication.¹⁰⁵ This Part outlines a working definition of institutions and provides a series of normative justifications for institutional sensitivity in constitutional law. The subsequent Part identifies a few institutions salient to the Second Amendment, although the list is by no means exhaustive.

A. *What Is an Institution?*

Institutions could provide some structure to contain and administer the otherwise broad rights proposed in *Heller's* headier passages. Before I address that set of issues, some definitional work is required. What do I mean by an institution?¹⁰⁶ For my purposes, institutions are rules, norms, practices, conventions, and perceptions that are durable, relatively stable, intelligible, and communicable (both within and between generations), and that can variously facilitate or constrain behavior, coordinate action, delegate or allocate decisionmaking authority, create or maintain identity, intermediate between groups and between individuals and the state, or constitute social reality.¹⁰⁷

105. See Kozel, *supra* note 21, at 962 (explaining that the “sweet spot” of institutionalism is “greater sensitivity to the unique factual realities that characterize certain institutions, coupled with increased transparency about the relevance of those realities to constitutional adjudication”).

106. The term “institution” is often used, but seldom fixed. In fact, one challenge to a more systematic institutional approach to constitutional law has been the multiple definitions of the term “institution.” See Michael R. Siebecker, *Building a “New Institutional” Approach to Corporate Speech*, 59 ALA. L. REV. 247, 286 (2008) (noting the “significant barrier” placed on institutional analysis by disagreement as to basic definitions); see also Daniel H. Cole, *The Varieties of Comparative Institutional Analysis*, 2013 WIS. L. REV. 383, 388 (“Despite the fact that institutional analysis (comparative or otherwise) has been with us for a very long time . . . surprisingly little agreement exists on the meaning of that rather ordinary-seeming term.”).

107. In crafting this definition, I draw upon the work of a number of institutional scholars. For example, James March and Johan Olsen state that institutions are “a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover.” James G. March & Johan P. Olsen, *Elaborating the “New Institutionalism,”* in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 3, 3 (R.A.W. Rhodes, Sarah A. Binder & Bert A. Rockman eds., 2006). Elinor Ostrom defines institutions as “sets of working rules . . . [that] determine who is eligible to make decisions in some arena, what actions are allowed or constrained . . . what procedures must be followed, what information must or must not be provided, and what payoffs will be assigned” and that “contain prescriptions that forbid, permit, or require some action or outcome.” ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 51 (1990). Paul Horwitz and Isaiah Berlin both recognize the identity-forming role of institutions.

Although social context informs institutions, social context alone does not exhaust my definition of an institution. Institutions, depending on their salience, may, as described above, intermediate, determine, delegate, or constitute in ways not fully captured by the brute fact that a hotel is different from a hospital and both are different from a home.¹⁰⁸ Schools are an example of this distinction: schools are not just “where a certain kind of person—a child—happens to be,”¹⁰⁹ schools are institutions because of a set of conventions, rules, and norms that make the concept of a “school” socially meaningful.¹¹⁰

An institution also differs from an organization.¹¹¹ Many organizations are institutions, but not all institutions are organizations. To modify slightly Frederick Schauer’s example: hitting a ball with a bat is a phenomenon, baseball is an institution, and Major League Baseball is both an institution and an organization.¹¹² An institution also differs from a momentary, or even frequent, set of individual preference-maximizing exchanges between atomized, autonomous, rational actors.¹¹³ An institution, as I use the term, contemplates a “collection of structures, rules, and standard operating procedures”

See PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 76 (2013); ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY*, 118, 154–56 (1971). John Searle and John Rawls discuss institutions and their constitutive work. See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 27–30 (1995); John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 24 (1955). Jacob Levy describes the intermediating function of institutions. See JACOB T. LEVY, *RATIONALISM, PLURALISM & FREEDOM* 1 (2015).

108. See HORWITZ, *supra* note 107, at 97. For a discussion of the difference between “brute fact” and “institutional fact,” see generally SEARLE, *supra* note 107.

109. Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 *VILL. L. REV.* 273, 286 (2008); cf. Karl N. Llewellyn, *The Constitution as an Institution*, 34 *COLUM. L. REV.* 1, 18 (1934) (“Any family is an institution. Any family is made up of persons. But not every aggregation of persons is a family.”).

110. Garnett, *supra* note 109, at 286; see also Richard Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 *J. LEGAL STUD.* 725, 739–41 (1998) (discussing schools as a particular type of institution).

111. See Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 143, 144 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Richard C. Schragger, *Decentralization and Development*, 96 *VA. L. REV.* 1837, 1865 n.87 (2010).

112. Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 *UCLA L. REV.* 1747, 1752 (2007) (describing baseball as an institution as opposed to an “artifact”); see also SEARLE, *supra* note 107, at 110–12 (using baseball to distinguish phenomena from institutions).

113. See March & Olsen, *supra* note 107, at 4 (“Institutions are not simply equilibrium contracts among self-seeking, calculating individual actors . . .”); Rawls, *supra* note 107, at 24 (“[A] practice necessarily involves the abdication of full liberty to act on utilitarian and prudential grounds.”).

that “are carriers of identities and roles,” that empower as well as constrain human agency, and play “a partly autonomous role in political life.”¹¹⁴ To paraphrase Douglass North: “Institutions are the rules of the game that survive even when the players change.”¹¹⁵

Institutions carve up the Constitution.¹¹⁶ In some areas they are salient. The Senate holds trials for impeachment and confirms judicial nominees.¹¹⁷ Congress may provide for an army.¹¹⁸ We hold elections.¹¹⁹ We empanel juries.¹²⁰ These concepts grow diffuse and contested at the margins, but where one can find some measure of terminological consensus, one can find an institution.¹²¹

In other areas, institutions are neither systematized nor acknowledged. For many years, the First Amendment right to free speech (expressly identified as a model for Second Amendment doctrine¹²²) was one such area. As Frederick Schauer has written, the Court has historically professed blindness to institutional differences in First Amendment cases.¹²³ The Court treats the press, despite its textual prominence, not as an institution but as “simply . . . another speaker.”¹²⁴ The Court holds the First Amendment to protect “certain behaviors . . . regardless of the actor” and to prohibit certain “government actions . . . regardless of the . . . target.”¹²⁵ The test for

114. See Jepperson, *supra* note 111, at 144; Llewellyn, *supra* note 109, at 17 (“An institution is in first instance a set of ways of living and doing.”); March & Olsen, *supra* note 107, at 4.

115. Thanks to an anonymous Yale Law student for this pithy summary. See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 1 (1990) (“Institutions are the rules of the game in a society . . .”).

116. See Schauer, *supra* note 112, at 1747 (“Law carves up the world.”).

117. See U.S. CONST. art. I, § 3; *id.* art. II, § 2.

118. *Id.* art. I, § 8; Jepperson, *supra* note 111, at 144 (identifying the army as an institution).

119. U.S. CONST. art. I, § 4; Jepperson, *supra* note 111, at 144.

120. U.S. CONST. amends. VI, VII.

121. Cf. Jepperson, *supra* note 111, at 146 (“In systems, cores are institutions relative to peripheries.”).

122. See Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 53 (2012).

123. Schauer, *supra* note 112, at 1754 (describing First Amendment doctrine as “institutionally blind”). But see generally HORWITZ, *supra* note 107 (discussing the manner in which First Amendment doctrine uses institutions in unacknowledged ways).

124. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1257, 1257 (2005).

125. *Id.* at 1261.

obscenity under the First Amendment is the same whether the medium of communication is a public theater or a smartphone application.¹²⁶

Institutions, like other constitutional concepts, can be described through metaphors of density. We can speak of thick institutions, thinner institutions, and thin institutions.¹²⁷ An institution is thick when its existence is specified in the text, and its rules, customs, and norms are highly stable and observable. This stability and transparency may arise because the institution uses formal mechanisms for change or rule making, or it can arise through a long and documented history. Thick institutions are especially resistant to change. Congress is one such institution. It is textually specified, it has many traditions and rules, and it has been present in American society and governance since the Founding.¹²⁸ Thinner institutions are not necessarily specified in the constitutional text, but constitute the myriad presuppositions of political and social life that judges occasionally elaborate upon.¹²⁹ The Department of Defense, the IRS, the police, cities, universities, and corporations are examples of thinner institutions.

But an institution does not require even this level of organization. Habituated, repeated, reproduced cultural behaviors and assumptions can also be institutions.¹³⁰ These thinnest types of institutions are those explored by legal scholars such as Ian Haney López and political scientists in the “New Institutional” school,¹³¹ and by philosophers such as John Searle and John Rawls.¹³² These institutions are the

126. See *id.* But see *Stanley v. Georgia*, 394 U.S. 557, 561 (1969) (treating obscenity in the home differently than obscenity in public).

127. For example, Mark Tushnet has distinguished between the “thick” portions of the Constitution that deal with organizational details about the federal government, and “thin” constitutional provisions that reflect “deep [theoretical and political] commitments, [that are] . . . truly basic to the Constitution” and are more subject to popular debate and discussion. Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1506–08 (2009); see also Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 644–46 (2013) (using these metaphors to describe theories of original semantic meaning); cf. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 6, 12–13 (2009) (describing “hard” or “deep” originalism as compared to “soft” or “shallow” originalism).

128. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2569 (2014) (discussing the Senate’s “institutional” resources).

129. See Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1817–18 (2012).

130. See SEARLE, *supra* note 107, at 4 (describing some aspects of institutions as “weightless and invisible” and “tak[en] . . . for granted”).

131. See López, *supra* note 19, at 1769–84.

132. See SEARLE, *supra* note 107, at 27–30; Rawls, *supra* note 107, at 24.

“scripts” and “paths” that shape choice and social reality.¹³³ Although these institutions may exhibit only minimal or no organization, they can nevertheless become entrenched. Courtesy is an example of a thin institution,¹³⁴ as is money and promise keeping.¹³⁵ These concepts are not meaningful without a prior institution to supply that meaning.¹³⁶ The more an institution exhibits “taken for grantedness,”¹³⁷ unconscious reproduction, or reinforcement “through reference to natural or spiritual law,” the more resistant it is to alteration.¹³⁸

Institutions divide, but do not always isolate. Institutions interact with each other. Sometimes they complement each other, sometimes they conflict with each other, sometimes they nest within each other; but it is rare, if not impossible, for an institution to remain sequestered from the web of working rules, norms, assumptions, and customs of daily life.¹³⁹ As Stephen Elkin has reminded us, institutions are “patterns of behavior, or practices, [that] are interconnected; what we can and ought to do about one set of practices has strong implications for what happens or ought to happen elsewhere in the political-economic order.”¹⁴⁰

B. *Why Institutions?*

Institutions are social facts, but so what? Why have legal reality follow social reality, rather than the other way around?¹⁴¹ In response, scholars offer a number of reasons for judges to recognize or defer to

133. See López, *supra* note 19, at 1782.

134. See RONALD DWORKIN, *LAW'S EMPIRE* 47 (1986) (discussing “the institution of courtesy”).

135. See SEARLE, *supra* note 107, at 32 (identifying money and promising as examples).

136. See, e.g., John R. Searle, *How to Derive “Ought” from “Is,”* 73 *PHIL. REV.* 43, 54 (1964) (“[A] man has five dollars, given the institution of money. Take away the institution and all he has is a rectangular bit of paper with green ink on it.”).

137. Jepperson, *supra* note 111, at 152; see also SEARLE, *supra* note 107, at 4 (describing some aspects of institutions as “weightless and invisible” and “tak[en] . . . for granted”).

138. Jepperson, *supra* note 111, at 152; see also March & Olsen, *supra* note 107, at 7 (“Rules are followed because they are seen as natural, rightful, expected, and legitimate.”).

139. See Stephen L. Elkin, *The Constitutional Theory of the Commercial Republic*, 69 *FORDHAM L. REV.* 1933, 1943–44 (2001); Jepperson, *supra* note 111, at 152; see also HORWITZ, *supra* note 107, at 234 (speaking of “nested” institutions).

140. Elkin, *supra* note 139, at 1944; Llewellyn, *supra* note 109, at 18 (institutions, like the Constitution, “embrace[] the interlocking ways and attitudes of different groups and classes within the community”).

141. See HORWITZ, *supra* note 107, at 68.

an institution when they address a constitutional problem. None of these reasons are exclusive, and many are reinforcing.¹⁴²

An institution may have expertise and knowledge, or the capacity to assemble expertise or knowledge, unavailable to other decision makers (like judges). For constitutionally specified institutions, like Congress, this kind of advantage is apparent. Congress can commission studies, hold hearings, and summon experts. This does not mean that these technocratic efforts go unsullied by politics, but it is undeniable that a legislature has resources at its disposal that dwarf those of other agents.¹⁴³

Another reason is that institutions may provide the best allocation of authority in the absence of clarity. In an ideal world, a benevolent dictator would supply costless tailoring of legal rules and norms to create optimal outcomes. But because we do not live in an ideal world, deference to institutions is the best alternative.¹⁴⁴

Institutions, born of practice, tend to be bottom-up rather than top-down. Consequently, law may follow institutions in that institutions are more democratically legitimate than judicial dictates.¹⁴⁵ Certainly this applies to legislatures, but it may also apply to various other organizations and institutions for which the options of loyalty, exit, and voice are effective.¹⁴⁶

Relatedly, institutions may foster civic republican values that are more difficult to generate through hierarchical mandates. As de Tocqueville famously put it, “the free institutions of the United States . . . provide a thousand continual reminders to every citizen that

142. Special thanks to Matt Adler for helping me formulate this crisp summary.

143. See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178–79 (2001) (discussing resource advantages of Congress versus courts).

144. See Rawls, *supra* note 107, at 24 (discussing how, because it is impossible to accurately predict everyone’s behavior, practices develop to coordinate behavior); see also Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 25 (2009) (identifying in James Madison’s *Federalist 51* the assumption that “the best second best [constitutional design] is to ensure an array of institutions, each of which promotes its own institutional ambitions”).

145. See Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1538 (1989) (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988)) (“The tradition of this political community cannot accept the proposition that the elite make better decisions than the people, or that popular institutions are inferior to electorally unaccountable ones.”).

146. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (discussing these concepts).

he lives in society. . . . By dint of working for the good of his fellow citizens, he in the end acquires a habit and taste for serving them.”¹⁴⁷ People may feel more invested in a community theater staffed by volunteers and supported by subscriptions than one run by civil-service employees and maintained through taxation.

Although it seems contradictory, a person’s identity and self-direction may depend upon his participation in an institution.¹⁴⁸ Many people define themselves by reference to their church membership, their alumni status, their profession, or their hobbies.

Finally, institutions may be the product of incomplete agreements about certain values or meanings. In this sense, an institution, like a constitutional text, may serve a coordinating function.¹⁴⁹ Relatedly, the legal salience of an institution may reflect hard-won political settlements that should be renegotiated only with good cause.¹⁵⁰ A university, for example, coordinates the educational function of a community and enjoys a certain deference with respect to its internal workings, including discriminating based on the content or viewpoint of speech,¹⁵¹ using race in admissions,¹⁵² and compelling payment for speech—even when that university is a public entity.¹⁵³

In sum, law may take cognizance of institutions for a number of reasons. Some or all of these reasons may come into play as the courts continue to adjudicate Second Amendment suits. Criminological

147. See RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 26 (7th ed. 2009) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., George Lawrence trans., Doubleday 1969) (1835)); see also HORWITZ, *supra* note 107, at 221.

148. HORWITZ, *supra* note 107, at 221; Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 237 (1998) (speaking of the self-realizing powers of organizations like corporations).

149. Rawls, *supra* note 107, at 24 (stating that institutions coordinate behavior because accurately predicting everyone’s behavior is not possible). See *infra* Part VI.D.

150. Cf. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1742–44 (1995) (discussing the “important virtue” of achieving “convergence on particular disputes without resolving large-scale issues of the right or the good”).

151. Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 831 (1993) (“Initial hirings, tenure, and promotion all involve subject matter restrictions, and in practice viewpoint discrimination as well.”).

152. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214 (2016) (“Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”); *Grutter v. Bollinger*, 539 U.S. 306, 340–41 (2003).

153. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000) (upholding mandatory “activity fee”); see HORWITZ, *supra* note 107, at 120–28.

experts, sportsmen, or police unions may have epistemic advantages concerning the hazards and benefits of certain types of firearms or ammunition. A believer in markets as first-best distributors of coercive power may defer to the preferences of various institutions (churches, gun clubs, schools) as the way to achieve the optimal mix of gun rights and restrictions. The ideal amount of deference, autonomy, or even “sovereignty” that law should accord to institutions I leave to others.¹⁵⁴ My aims for this Article are more modest—they are: first, to show that as Second Amendment jurisprudence matures, transparency about and sensitivity to institutions could help the doctrine avoid hazards that threaten other constitutional areas, and second, to identify some of the institutions that could be relevant to such a jurisprudence.

V. A SAMPLER OF SECOND AMENDMENT INSTITUTIONS

As a provisional definition, a Second Amendment institution is an institution that facilitates or constrains Second Amendment activity, and in particular, its core feature of self-defense. Although this Article focuses on Second Amendment institutions, it is likely that many of these institutions overlap with other constitutional provisions, and so there may be institutions that facilitate and constrain more than one constitutional right. For example, a church, a mosque, or a home is clearly a First Amendment institution, but it also may be thought of as a Second Amendment,¹⁵⁵ a Fourth Amendment,¹⁵⁶ or a Fourteenth Amendment¹⁵⁷ institution. This overlap is a feature of all institutional analysis, because the boundaries of institutions are informed by social practice, not dictated by the lawyer’s needs.¹⁵⁸

154. See HORWITZ, *supra* note 107, at 177–84 (discussing “sphere sovereignty” for institutions); Kozel, *supra* note 21, at 963 (“[A]n institutional *focus* does not necessarily imply the need for institutional *autonomy*.”).

155. See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264–66 (11th Cir. 2012) (discussing concealed-carry rules in churches).

156. See *Fazaga v. FBI*, 885 F. Supp. 2d 978, 985 (C.D. Cal. 2012) (“A reasonable officer knows that there is a reasonable expectation of privacy in one’s home, office, and in certain discrete areas of a mosque”); *United States v. Hubbard*, 493 F. Supp. 209, 213 (D.D.C. 1979) (“[T]he searches plainly involved the plaintiff’s fourth amendment rights: the Church of Scientology was the owner and operator of the premises and the party challenging the searches.”).

157. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (stating that a private school operated under the auspices of the Roman Catholic Church facilitates fundamental “liberty of parents and guardians to direct the upbringing and education of children” and that a compulsory public school law violated the Constitution).

158. See HORWITZ, *supra* note 107, at 68–72.

What follows is a sampler because these examples do not exhaust the number of institutions that may facilitate or constrain Second Amendment activity. I do, however, think these examples offer a range of salient institutions relevant to the right to keep and bear arms for self-defense, and about which judges could be more attentive and transparent.¹⁵⁹ How courts may address the sometimes-coordinating, sometimes-conflicting institutions and constitutional rights presented here is beyond the scope of this Article. It seems apparent, however, that the choice of constitutional methodology identified in Part VI may affect which institutions a court chooses to recognize as well as how much that institution may shape, constrain, or facilitate the various rights claims that arise in litigation.

A. *The Militia*

The *Heller* Court did not render the militia redundant.¹⁶⁰ The prefatory clause of the Second Amendment, “[a] well regulated Militia, being necessary to the security of a free State [.]” is still in place. In fact, *Heller* invoked the institutional features of the militia numerous times to explain why the eighteenth-century understanding protected an individual right. Under *Heller*’s reading of history, citizens are members of an *unorganized* militia, an institution different from the official state militias, which constitute the various states’ National Guards.¹⁶¹ Why is this significant? Because it helps to give institutional context to personal firearm possession and use.¹⁶² Although personal firearms are not *wholly* militia related, they are still *somewhat* related to a “well regulated Militia” and to the “security of a free State.” Consequently, those firearms most suitable for use in an organized militia may be subject to more regulation than those that are suitable purely for personal self-defense and only incidentally for the militia. Authorities designated to supervise the organized militia could help identify those features.

159. See *id.* at 81 (discussing the need for transparency).

160. Magarian, *supra* note 122, at 77 (noting that it is implausible that the militia clause was read out of the Second Amendment).

161. See *District of Columbia v. Heller*, 554 U.S. 570, 599–600 (2008) (discussing the “peoples’ militia” or “citizens’ militia” as distinct from the “organized militia”).

162. See Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1308 (2013) (stating that the unorganized militia’s “constitutional pedigree [was] established in *Heller*” and asking “whether certain types of guns serve that interest more than others”).

Institutional sensitivity to the militia can help us decide what the term “well regulated” means and does.¹⁶³ In *Heller*, the Court suggested that “well regulated” simply means the imposition of “proper discipline and training.”¹⁶⁴ But the distinction between “proper discipline and training,” as opposed to impermissible regulation, is contextual. Evidence of the scope of proper training, storage, and safety for firearms in the context of the organized militia can help us understand what kinds of regulations government can impose upon members of the unorganized militia.

The militia can also help us understand *who* can assert a personal right to keep and bear arms as a member of this institution. Certainly, the militia is not the whole of the “people.”¹⁶⁵ Nor does it protect noncitizens the same as citizens, despite the fact that *McDonald* incorporated the Second Amendment through the Due Process Clause rather than the Privileges or Immunities Clause.¹⁶⁶ Because one purpose of the Second Amendment is to protect firearms personally held by persons who are members of an unorganized militia, the government has some discretion in specifying who can be members of that unorganized militia. Laws can keep criminals, the mentally ill, minors, and noncitizens from owning firearms (as distinguished from exercising their right to self-defense) because of the government’s interest in regulating this unorganized militia.

It also suggests an important scalability to the right to keep and bear arms. In *Marsh v. Alabama*,¹⁶⁷ the Supreme Court held that private parties become subject to constitutional constraints when they take on key attributes of an institution we call the city.¹⁶⁸ So too, private claims to be able to assemble private arsenals and security details mean that these private entities become like the institution of the militia, and

163. *United States v. Zaleski*, 489 F. App’x 474, 475 (2d Cir. 2012) (rejecting the argument that a member of the “unorganized militia” is entitled to privately possess machine guns).

164. *Heller*, 554 U.S. at 597.

165. Akhil Reed Amar, *Heller*, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 167 (2008).

166. *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010). The Due Process Clause protects “person[s],” U.S. CONST. amend. XIV § 1, and the Privileges or Immunities Clause protects “citizens,” *id.* art. IV, § 2, cl.1.

167. *Marsh v. Alabama*, 326 U.S. 501 (1946).

168. *Id.* at 507–09.

subject themselves to the constitutionally specified regulatory authority of the state and federal government.¹⁶⁹

To demonstrate, consider the following hypothetical: It is 1963, and Governor George Wallace, like Orval Faubus, John Patterson, and Ross Barnett, defies federal orders to integrate segregated educational institutions. But instead of calling out the *organized* militia, as other governors had done, Wallace follows through with a plan to summon members of the *unorganized* militia to resist integration.¹⁷⁰ Leagues of otherwise law-abiding citizens assemble at the schoolhouse door with personal arms at the behest of Wallace to resist integration. Is there any reason to think the president could not federalize *this* group of citizen soldiers to *enforce* integration, just as the president had done with the National Guard in Arkansas? And if these members of the citizens' militia had disobeyed lawful orders or deserted, wouldn't they have been subject to courts martial just as if they were members of an organized militia?¹⁷¹ At a minimum, it would seem that individuals who style themselves as public peace officers owe some duty, care, and obedience to the public commensurate with that role. Further, as discussed more below, the institution of the militia can also help us to understand how the right to keep and bear arms may be different in the context of public policing, as opposed to private self-defense.

B. *The Home*

The home is an institution that has long shaped the right to arm for self-defense.¹⁷² Although not textually specified in the Second Amendment, the history of self-defense and firearms has centered on

169. See Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 954–57 (2011).

170. There is no doubt that this unorganized militia exists. *Heller* points to its existence as supporting a personal right to arms and 10 U.S.C. § 311(b)(2) identifies it as “members of the militia who are not members of the National Guard or the Naval Militia.” 10 U.S.C. § 311(b)(2) (2012). For a discussion of Wallace’s plans to use such a militia, see DAN T. CARTER, *THE POLITICS OF RAGE* 113 (2d ed. 2000). See also H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 546 (2000) (discussing the militia’s history and the distinction between an organized and unorganized militia).

171. See 10 U.S.C. § 802; 53A AM. JUR. 2D MILITARY AND CIVIL DEFENSE § 242 (2006).

172. See generally Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (making this argument).

confrontation within the home.¹⁷³ The result is to give institutional shape to what the naked right to “bear” arms for “self-preservation” can mean.

Although the Second Amendment does not mention the home, there is an ancient cultural and constitutional recognition of the home as a special place of refuge and sanctuary. Whether that institutional sensitivity is represented through the Third or Fourth Amendment text,¹⁷⁴ through due process protections of property, privacy, or family,¹⁷⁵ or through the increased protections in the home for (and from) speech,¹⁷⁶ the home is salient in constitutional jurisprudence.

Anglo-American common law and culture has long recognized the home as an institution that maximizes self-defense and autonomy. For example, even though English law generally disarmed Catholics in the seventeenth century, they were permitted to keep arms in their homes necessary for self-defense as allowed by the Justices of the Peace.¹⁷⁷ Confederate officers, freshly defeated by Union troops, could take their private side-arms home.¹⁷⁸ And the common law has long recognized the “castle doctrine” which provides that no one must flee from his home before using force against an intruder in self-defense.¹⁷⁹

Early proposed regulations on the carrying of weapons during the colonial era recognized the home as a demarcation. One bill made it a crime for poachers to carry arms outside one’s own property unless performing military duty.¹⁸⁰ During Reconstruction, Congress’s source

173. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (focusing the Second Amendment inquiry on self-defense in the home).

174. U.S. CONST. amends. III, IV.

175. *See id.* amends. V, XIV; *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965).

176. *City of Ladue v. Gilleo*, 512 U.S. 43, 54–59 (1994) (observing a difference between the government interest in regulating signage in public streets as opposed to homes); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (concluding that obscene materials are constitutionally protected in the home); *see also* *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988) (upholding an ordinance that prohibited picketing outside an individual’s residence).

177. *Miller*, *supra* note 172, at 1324.

178. *See* MATTHEW S. MUEHLBAUER & DAVID J. ULBRICH, *WAYS OF WAR: AMERICAN MILITARY HISTORY FROM THE COLONIAL ERA TO THE TWENTY-FIRST CENTURY* 247 (2013).

179. *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914).

180. The bill stated:

[W]ithin twelve months after the date of the recognizance he shall bear a gun out of his inclosed ground, unless whilst performing military duty, it shall be deemed a breach of the recognizance, and be good cause to bind him a new, and every such bearing of a gun shall be a breach of the new recognizance.

of indignation was that the Ku Klux Klan was breaking into freedmen's homes and disarming them,¹⁸¹ not necessarily that the government regulation forbade whites and blacks alike from publicly bearing arms.¹⁸²

Judicial sensitivity to the home as an institutional focus of the Second Amendment is not itself an answer to the question of whether the right is home-bound. However, to the extent that the judiciary must maintain a certain configuration of institutional arrangements, as opposed to merely maximizing self-defense or minimizing armed mayhem, a focus on the institutional aspects of the home does nudge the judiciary along a more productive line of analysis.

In litigation, courts may continue to ensure the home is a unique setting for facilitating Second Amendment activity. This may lead to increased justifications for regulations that interfere with self-defensive protections in the home and correspondingly lesser protections for activity outside the home. One result? Weapons that are uniquely capable of safely protecting homes may enjoy more constitutional protection than weapons that are less suitable for home protection.

C. *The City*

We have strong intuitions that carrying an arm through Manhattan is different from carrying an arm through the Adirondacks. As with the division between the home and the public, the division between the city and the country is a demarcation justified by history and consequentialist considerations.¹⁸³

In the thirteenth century, regulations forbade all but certain designated people from carrying arms in the city of London after curfew.¹⁸⁴ The fifteenth-century law was more general, and forbade

Alan Gura, *Briefing the Second Amendment Before the Supreme Court*, 47 DUQ. L. REV. 225, 245 (2009) (quoting *A Bill for Preservation of Deer* (1785), in 2 PAPERS OF THOMAS JEFFERSON 443–44 (Julian P. Boyd ed., 1950)); see Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1701 (2012).

181. Miller, *supra* note 172, at 1331.

182. *Id.* at 1335.

183. For a full discussion of the urban/rural divide on gun regulation, see generally Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).

184. See Statutes for the City of London 1285, 13 Edw. 1 (Eng.), *reprinted in* 1 STATUTES OF THE REALM 102 (London 1810) (making it unlawful to go “about the Streets of the City, after Curfew tolled . . . with Sword or Buckler, or other Arms for doing Mischief . . . nor . . . in any other Manner, unless he be a great Man or other lawful Person of good repute”). For these

“any man of whatsoever estate or condition to go armed within the city and suburbs,” with the exception of certain elites, such as “lords, knights and esquires” who were allowed a single sword.¹⁸⁵ Blackstone traced this prohibition back to ancient Athens, where “every Athenian was finable who walked about the city in armour.”¹⁸⁶

This institutional constraint upon the right to keep and bear arms persisted into the nineteenth century, with Arizona forbidding certain weapons such as knives and pistols “within any settlement, town, village or city.”¹⁸⁷ The Idaho territorial government went further, prohibiting all weapons from being carried in the city except those carried by law enforcement or active “officers or employees of any express company.”¹⁸⁸

These historical citations imply that the law has long respected a divide between the city and the country with respect to firearms. The sources of this distinction may be consequentialist; it is more dangerous for a greater number of people for gun battles to rage in densely populated areas.¹⁸⁹ But even if we put aside the consequentialist justification for the distinction, as with the home, if one of the purposes of constitutional law is to preserve a certain set of institutional arrangements, then courts should be permitted to maintain a distinction between arms in the city and arms in the country, irrespective of data concerning the likelihood of harm.

D. *The School, the University, and the Church*

The Court has shown (although it has not always acknowledged) that it considers schools, universities, and churches as important

historical citations, I consulted a compilation: Mark Anthony Frassetto, *Firearms and Weapons Legislation up to the Early Twentieth Century* (Jan. 15, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2200991> [<https://perma.cc/NJ39-BNPX>].

185. 3 CALENDAR OF THE CLOSE ROLLS, HENRY IV, at 485 (Jan. 30, 1409, Westminster) (A.E. Stamp ed., 1931) (quoted in Frassetto, *supra* note 184, at 16).

186. Blocher, *supra* note 183, at 113 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49).

187. An Act Defining and Punishing Certain Offenses Against the Public Peace, No. 13, § 1, 1889 Ariz. Sess. Laws 30, 30 (West) (quoted in Frassetto, *supra* note 184, at 25).

188. An Act Regulating the Use and Carrying of Deadly Weapons in Idaho Territory, § 1, 1888 Idaho Sess. Laws 23, 23 (West) (quoted in Frassetto, *supra* note 184, at 26).

189. See Blocher, *supra* note 183, at 99–100 (“[T]he vast majority of gun control regulations in the United States are local, and are tailored to the particular risks of gun use in densely populated areas.”).

institutional actors in First Amendment cases.¹⁹⁰ Courts routinely, though not invariably, defer to school officials, university administrators, and pastors about how best to organize and discipline membership.¹⁹¹ It may well treat these institutions similarly with respect to Second Amendment claims as well.

Historical sources recognize the special institutional status of these entities with respect to firearms. The *Sir John Knight's Case*¹⁹² in England, for example, involved a prosecution under the Statute of Northampton for the carrying of a weapon into a church.¹⁹³ In the nineteenth century, Texas also prohibited the carrying of weapons “into any church or religious assembly, any schoolroom or other place where persons are assembled for educational, literary, or scientific purposes.”¹⁹⁴ Oklahoma had an almost identical provision,¹⁹⁵ as did the City of Huntsville, Missouri.¹⁹⁶ Georgia also criminalized the carrying of weapons in “any place of public worship.”¹⁹⁷ (Although, a hundred

190. See HORWITZ, *supra* note 107, at 140–43, 175–77 (discussing schools, universities, and churches as institutional actors); see also *Gott v. Berea Coll.*, 161 S.W. 204, 207 (Ky. 1913) (observing that a university, “its officers and students, are a legal entity, as much so as any family”).

191. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (finding a ministerial exception to employment discrimination suits); *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 697 (2010) (finding a public law school’s policy of requiring student groups to accept “all comers” did not violate the First Amendment); *Oller v. Roussel*, No. 6:11-CV-02207, 2014 WL 4204836, at *6–7 (W.D. La. Aug. 22, 2014) (finding no violation of tenured professor’s free speech rights for reassignments due to his promotion of creationism and vaccine-autism link).

192. *Sir John Knight’s Case* (1686) 87 Eng. Rep. 75 (KB).

193. See *id.* at 76. Knight was acquitted, but that says little about the validity of the law itself. See Charles, *supra* note 36, at 1831–33 (discussing *Sir John Knight’s Case*).

194. An Act Regulating the Right to Keep and Bear Arms, Art. 6511, in 2 A DIGEST OF THE LAWS OF TEXAS: CONTAINING LAWS IN FORCE, AND THE REPEALED LAWS ON WHICH RIGHTS REST 1322, 1322 (3d ed. 1873).

195. WILL T. LITTLE, L.G. PITMAN & R.J. BARKER, THE STATUTES OF OKLAHOMA: 1890, at 496 (Guthrie, Okla., The State Capital Printing Co. 1891) (listing Art. 47, § 7, which prohibited “any person, except a peace officer” from bearing any offensive or defensive weapon in “any church or religious assembly, any school room or other place where persons are assembled for public worship, for amusement, or for educational or scientific purposes”).

196. An Ordinance in Relation to Carrying Deadly Weapons, § 1, in THE REVISED ORDINANCES OF THE CITY OF HUNTSVILLE, MISSOURI 58 (Huntsville, Mo., Herald Print 1894) (prohibiting any person, except police officers or those with good cause, to go armed “into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, literary or social purposes”).

197. An Act to Preserve the Peace and Harmony of the People of this State, and for Other Purposes, 1870, § 1, in PUBLIC LAWS, PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, AT THE SESSION OF 1870, at 42 (Atlanta, New Era Printing Establishment 1870).

years before, Georgia had *required* individuals to bring guns to church.)¹⁹⁸

In a recent case, the Eleventh Circuit upheld a regulation prohibiting firearms from being taken into churches, because “the pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner’s wishes.”¹⁹⁹ And numerous state universities and colleges have voiced concern that allowing armed students onto campus will change the learning environment for all students. Some administrators’ concerns have been respected,²⁰⁰ and some ignored.²⁰¹

What this evidence shows is that, irrespective of the effect these policies have on safety, something about how the institution understands its own character is changed by the presence of firearms.²⁰² An institutional approach to the Second Amendment would defer to the institution’s assertion that the presence of firearms alters its identity, and would not focus solely upon the issue of whether the presence of arms actually makes the students or congregants more or less safe.

198. An Act for the Better Security of the Inhabitants, by Obliging the Male White Persons to Carry Fire Arms to Places of Public Worship, 1770, § 1, in *A DIGEST OF THE LAWS OF THE STATE OF GEORGIA* 157 (Phila., Pa., R. Aitken 1800).

199. *Georgia Carry, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012). The court rested its decision on a background of private property, trespass, and criminal law, although it emphasized throughout that this was a case involving a “place of worship.” Whether it would have been different if it had been a hotel or restaurant is an issue explored in a recent work. See 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, 314 (2016).

200. Marc Lacey, *Arizona Governor Rejects Bid to Loosen Gun Rules*, N.Y. TIMES (Apr. 18, 2011), <http://www.nytimes.com/2011/04/19/us/19arizona.html> [<https://perma.cc/MP9K-CMFC>] (reporting on the Governor’s veto of a bill that would have permitted guns on college campuses).

201. TEX. GOV’T CODE ANN. § 411.2031 (West 2016) (allowing firearms onto Texas campuses); see also Betsy Z. Russell, *Otter Signs Guns-on-Campus Bill into Law*, SPOKESMAN-REVIEW (Mar. 12, 2014, 5:14 PM), <http://www.spokesman.com/stories/2014/mar/12/otter-signs-guns-campus-bill-law> [<https://perma.cc/J6JY-47MV>] (reporting that Idaho’s governor signed a bill permitting guns on campuses).

202. Cf. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (“The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos. Inc.*, 515 U.S. 557, 573–75 (1995) (discussing the First Amendment’s protection of the speaker’s right to “choose the content of his own message”).

E. Shooting, Sporting, and Gun-Rights Organizations

Guns are popular—intensely so in some circles. As Reva Siegel has documented, the social activism of gun-rights advocates helped overturn over two centuries of scholarly neglect and turn the Second Amendment from a militia-centered right into an individual one.²⁰³ No theory of Second Amendment institutions can disregard this powerful social force. Organizations like the National Rifle Association (NRA) and its allies expend a lot of time and energy shaping the cultural meaning of firearms and arm bearing.²⁰⁴

In Second Amendment adjudication, gun organizations can provide data to give meaning to “common use” with respect to the definition of an “arm.” They can and do provide minimum standards of training for state-licensed concealed carry,²⁰⁵ and counsel gun owners on best practices concerning gun storage and safety. To the extent that membership in gun organizations helps form a gun-rights-holder identity, that too is significant, especially when a court must evaluate the need for spaces in which gun owners can associate, exchange information, or practice shooting.²⁰⁶

Pro-gun organizations like the NRA are just one type of institution among many, however. They may be more vocal, but their values and concerns are no more or less important than the values and traditions of institutions dedicated to religious worship, nonviolent protest, free and uninhibited exchange of ideas, or racial equality— all of which are of equal dignity in determining the scope and application of Second Amendment rights under an institutional approach.

F. Police, Policing, and Public Carry

Public policing is an institution as well. The professionalized police force is approximately 150 years old. Before that, policing was less organized, but no less institutional. Policing was a sociological

203. Siegel, *supra* note 25, at 208–12.

204. See MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 90–98 (2014) (discussing efforts of the NRA and allies to change perceptions of the Second Amendment).

205. See, e.g., LA. STAT. ANN. § 40:1379.3 (2014) (identifying the NRA as an approved trainer for concealed weapons permits).

206. *Ezell v. City of Chicago*, 651 F.3d 684, 708–09 (7th Cir. 2011) (finding that a ban on gun ranges within city limits when practice at ranges is required for handgun ownership violates the Second Amendment).

phenomenon, “a community affair”²⁰⁷ governed by a set of customs, behaviors, rules, and norms that empowered individuals and constrained behavior. For example, private individuals were (and in some jurisdictions, continue to be) authorized to arrest anyone seen or suspected of having committed a felony.²⁰⁸ Rotating details of community watchmen were supposed to raise a “hue and cry” in cases of danger, to which male community members were obliged to respond.²⁰⁹

The suggestion that publicly armed persons are behaving in some public manner, for some public purpose, extends from English history to the American nineteenth century. In the seventeenth century, an English statute generally prohibited the carrying of arms, except when assisting law enforcement or “upon the Hue-and-cry ma[d]e to keep the peace.”²¹⁰ Arizona’s regulations on public arms did not extend to “a person in actual service as a militiaman, nor as a peace officer or policeman, or *person summoned to his aid*, nor to a revenue or other civil officer engaged in the discharge of official duty.”²¹¹ At the very least, these examples demonstrate that publicly carrying arms by private parties has for many centuries been tied to the conduct of government business, or to the specific or temporary institution of peacekeeping.

G. *Self-Defense*

Even the prototypical encounter in a dark alley with an aggressor can be understood from an institutional perspective. It may seem strange to talk of individual self-defense as an institution. We often conceive of self-defense as something natural and reflexive. As Nicholas Johnson put it, “[i]f a psychopath kicks down my door,

207. See David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1197 (1999).

208. *Id.* at 1197 (“The earliest manuals and treatises on the subject, written in the seventeenth century, drew no sharp distinction between the powers of constables and those of what were already called ‘private persons’: both could arrest individuals ‘probably suspected of felonies,’ but only if a felony had in fact been committed.” (quoting Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 567–80 (1936))); see also *id.* at 1184–85 & n.85 (citing jurisdictions in which private citizens may still arrest offenders).

209. *Id.* at 1197.

210. Charles, *supra* note 36, at 1835 (quoting JOSEPH KEBLE, AN ASSISTANCE TO THE JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY 646 (London, W. Rawlins, S. Roycroft & H. Sawbridge 1689)).

211. An Act Defining and Punishing Certain Offenses Against the Public Peace, no. 13, § 2, 1889 Ariz. Sess. Laws 30, 30 (emphasis added) (quoted in Frassetto, *supra* note 184, at 25).

nothing [a government may] say or do will keep me from going at him with something heavy or sharp.”²¹² But the idea that self-defense is natural and reflexive, that it is somehow beyond the law, unshaped by convention, habit, or custom, is one feature of an institution that conceals itself “through reference to natural or spiritual law.”²¹³ It is to fall into the naturalistic fallacy—the assumption that what people do is what they should do.

Two historical facts challenge the natural-law and naturalistic conception of self-defense. First, the nonviolent civil rights movement of the 1960s repudiated the “naturalness” of self-defense. As Jepperson has written, institutions are exposed when someone takes “action” against the institution. The person who refuses to shake hands exposes the institution of courtesy.²¹⁴ The person who turns the other cheek, even in the face of brutality, exposes the institution of self-defense.²¹⁵

Second, the notion of a pre-political, irreducible, inalienable, and *legally* (as distinct from morally) cognizable “right” to self-defense is not altogether certain. There is evidence that self-defense at common law required supplication to and pardon from the sovereign, although that pardon eventually became routine.²¹⁶ The principle behind such formalities was that “the first business of a ruler is the elimination of all forms of self-help.”²¹⁷ One criminal law theorist has argued that self-defense is an institution enmeshed with the state; self-defense is only justified (as opposed to excused, like an accident) because the person is performing a “delegated state function” in the absence of a

212. Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL’Y 187, 194 (2006).

213. Jepperson, *supra* note 111, at 152.

214. *Id.* at 148.

215. See WESLEY C. HOGAN, *MANY MINDS, ONE HEART: SNCC’S DREAM FOR A NEW AMERICA* 24 (2013) (discussing the training of sit-in activists to not strike back when attacked); see also *Matthew 5:39* (King James) (“But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also.”).

216. See Bernard Brown, *Self-Defence in Homicide from Strict Liability to Complete Exculpation*, in *CRIM. L. REV.* 583, 584 (John Burke & Peter Allsop eds., 1958) (“[I]n the thirteenth century, he who killed by misadventure or in self-defence, ‘deserved but needed a pardon.’”); see also *Mullaney v. Wilbur*, 421 U.S. 684, 692 (1975) (“At early common law only those homicides committed in the enforcement of justice were considered justifiable; all others were deemed unlawful . . .”); Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 *HARV. L. REV.* 567, 575 (1902) (noting the ancient distinction between “justifiable and unjustifiable homicides . . . [was] between cases of execution of the law and cases of private defense”).

217. Brown, *supra* note 216, at 583.

government official.²¹⁸ And therefore, although the brute fact of striking another to prevent injury may be considered natural or reflexive, *self-defense* can be understood as socially constructed, just like marriage, family, or any other institution.

What this analysis suggests is that when advocates claim that they are simply exercising a natural, inalienable, individual right to carry arms for self-defense, they are tapping into an institution. The institution can change over time, in that it can become more inclusive or shrink or merge into another institution, but to call it natural is to conceal the institutionalized character of the activity. Once the institutionalized nature of self-defense is recognized and accepted, that institution is placed on a similar footing with hosts of other institutions—religious worship, deliberative democracy, education, child rearing, entertainment—that judges may recognize and must reconcile.

VI. INSTITUTIONS AND CONSTITUTIONAL THEORY

Commentators celebrate *Heller* as profoundly originalist, but its eclecticism lies just beneath the surface. Textualism,²¹⁹ originalism,²²⁰ common law constitutionalism,²²¹ popular constitutionalism,²²² and prudentialism²²³ all teem uneasily, and unacknowledged, within the passages of *Heller*, its cousin *McDonald*, and in the numerous lower-court opinions that have followed.

The Justices may settle on a Second Amendment test that reflects one particular methodology, or (more likely) they will continue to

218. See Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1127 (2008).

219. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (“In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

220. *Id.* at 576–77 (stating that the meaning of text determined by knowledge of “ordinary citizens in the founding generation”).

221. *Id.* at 582 (“Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.”).

222. *Id.* at 629 (“[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).

223. *Id.* at 626–27 (recognizing the validity of regulations prohibiting 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”).

generate methodologically pluralist opinions. Either way, institutions likely will influence outcomes. Institutions are inescapable social facts: constitutional methodologies will simply identify and defer to different institutions to different degrees and with more or less transparency. This Part explores how institutions may influence constitutional adjudication no matter the methodology or combination of methodologies the courts choose to employ.

A. *Institutions and Textualism*

Textualism focuses on the meaning of words—in this case, the words of the Constitution. Textualism promises clarity and objectivity.²²⁴ But words are frequently unclear even when a text is written in one sitting, much less when written over a span of two hundred years.

Words can be unclear in a number of ways. They can be ambiguous, in that they can have more than one meaning. For example, “bright” can mean “intelligent” or “luminous.” They can be vague, in that they admit a range of applications for which there is no generally agreed-upon measurement or point of reference; words like “bald” or “short” are vague.²²⁵ Words can be “open textured”: something in the surrounding context has happened which makes a once-clear word unclear.²²⁶ And words can be unclear because the same word is used in different places and at different times, although the text purports to be an integrated whole.²²⁷

224. James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1525–26 (2011).

225. For prior use of some of these examples and for a discussion of these concepts, see generally Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008); and Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–70 (2013).

226. Schauer, *supra* note 225, at 1124–32. Another way to think of “open texture” is the irreducible risk of ambiguity or vagueness inherent in the fact that language exists through time. *See id.* at 1126 (“Waismann’s valuable addition . . . was the conclusion that it is impossible to eliminate the *potential* for vagueness in even nonvague terms, and this is the phenomenon he called ‘open texture.’”). A goldfinch that suddenly exploded is the chestnut that beggars description in this literature (can we still call it a goldfinch?). *See id.* at 1127 (discussing J.L. Austin’s “exploding goldfinch” hypothetical).

227. To borrow Lawrence Lessig’s example, an Englishman who creates a bequest to “provide scholarships for public schools” and then permits his American descendants to amend it to “provide equipment and scholarships for public schools,” generates uncertainty as to what is meant by “public schools.” “Public school” to the English means a private school, whereas it

Institutions can provide “contextual enrichment” for unclear terms. Contextual enrichment is the clarification that context gives to semantic meaning, especially if the semantic meaning is underdeterminate.²²⁸ For example, no contextual enrichment is necessary to make the phrase “two Senators” intelligible.²²⁹ There is little to be added in deferring to the opinion of The International Mathematical Union concerning the word “two.” By contrast, maritime institutions may better grasp the meaning of the words “high seas”²³⁰ or “Tonnage”²³¹ than nonmaritime institutions. Similarly, the professional bar is perhaps better able to assess the meaning of the word “speedy” in the Speedy Trial Clause, or economists to evaluate what is “excessive” in the Excessive Fines Clause.

Of course, other textual specifications may alter or even foreclose an institutional contribution to meaning.²³² Historians observe that treason at common law included killing one’s husband,²³³ small-government populists lambaste the Affordable Care Act as treason.²³⁴ But the text of the Constitution belies both of these contextual enrichments, because treason “shall consist only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort.”²³⁵

Finally, a judge who defers to institutions about communicative content does not necessarily defer with respect to the legal effect. Linguists, political scientists, and historians could determine what a “republican form of government” meant in 1791, 1868, or at some other fixed point, but that does not guarantee that judges will enforce those

means government-financed school to Americans. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1175 (1993).

228. See Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1939.

229. See Ryan, *supra* note 224, at 1526 (“The Constitution says clearly . . . that each state shall have two Senators.”).

230. U.S. CONST. art. I, § 8.

231. *Id.* art. I, § 10.

232. See Solum, *supra* note 225, at 466 (“Contextual enrichment can be cancelled by explicit statement.”).

233. 4 WHARTON’S CRIMINAL LAW § 659 (Charles E. Torcia, ed., 15th ed. 1996).

234. See Josh Israel & Adam Peck, *Mississippi Tea Party Chairman Calls for Open Rebellion Against Federal Government After Obamacare Ruling*, THINK PROGRESS (June 29, 2012, 4:15 PM), <http://thinkprogress.org/politics/2012/06/29/509010/tea-party-obamacare-rebellion> [https://perma.cc/P8NQ-J3CH] (quoting the remarks of a Mississippi Tea Party leader).

235. U.S. CONST. art. III, § 3; see Solum, *supra* note 225, at 466 (“Contextual enrichment can be cancelled by explicit statement.”).

words as law.²³⁶ Such restraint is the basis of the political question doctrine, for example.

The Second Amendment uses vague terms like “well regulated,” ambiguous terms like “infringed,” and open-textured terms like “Arms.” The amendment also poses intratextual challenges: “the people” in the Second Amendment could mean “law-abiding citizens,”²³⁷ or it could mean “a class of persons who . . . have otherwise developed sufficient connection with [the United States] to be considered part of th[e] community,”²³⁸ as it does in the Fourth Amendment.

In sorting through how to read these words, judges may resort to various institutions for guidance. They may look to sociologists, psychologists, or civic organizations to decide when a class of persons has developed a “sufficient connection” with the United States. As discussed above, if “well regulated” is still influential in Second Amendment adjudication, courts may defer to military officials to evaluate the constitutional minimum for appropriate “discipline and training.” “Arms” could simply mean weapons²³⁹—but that sweeps in rocket launchers and anthrax—and so courts are likely to look to institutions—police departments, hunters, and pistol clubs—for textual guidance as to what kinds of “Arms” are commonly used for lawful purposes.

236. 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3534.1, at 727–28 (3d ed. 2008) (“[I]t has been well established that political questions are presented by challenges . . . grounded on the constitutional mandate in Article IV, § 4, that the United States shall guarantee every state a ‘Republican Form of Government.’”); *see also* *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849). Chief Justice Taney noted that:

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.

Id.

237. *See* *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

238. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1999) (Rehnquist, C.J.) (plurality opinion).

239. *See* *Heller*, 554 U.S. at 582 (“[T]he most natural reading of ‘keep Arms’ in the Second Amendment is to ‘have weapons.’”).

B. Institutions and Originalism

Originalism is now more properly described as a “family of theories,” rather than one theory.²⁴⁰ “Old originalism” concerned itself with intentions: at first, those of the Framers—Madison, Hamilton, and Jefferson (even though Jefferson was not at the Convention²⁴¹)—and later, those of the ratifiers.²⁴² Old originalism succumbed to crippling public-choice and democratic-legitimacy problems, giving rise to “new originalism.” New originalism is less concerned with the subjective intentions of identifiable speakers than the objective understandings among a community of speakers. What keeps originalism distinct as a family, at least according to some scholars, is its “fixation” thesis.²⁴³ Either the intentions or words or meanings (or all three) are fixed at some point in the past, and (for most originalists anyway) that fixation constrains judicial review.

Because new originalism focuses on demonstrable linguistic meaning, it resembles textualism. What distinguishes new originalism from textualism is fixation. Nothing about textualism requires fixation by the linguistic habits of all English speakers at a certain point in time. The relevant linguistic community could have lived in 1791, 1868, 1937, 1954, 2016, or across those times. The community could be composed entirely of lawyers²⁴⁴ or mariners.²⁴⁵ The linguistic community could include the enslaved,²⁴⁶ foreign nations,²⁴⁷ or women.²⁴⁸ It could be an amalgam of all these communities. New originalism tends to substitute

240. See, e.g., Solum, *supra* note 225, at 526.

241. Jefferson is included in many lists of Framers, although he attended neither the Philadelphia convention nor the ratifying conventions. See David Thomas König, *Thomas Jefferson's Armed Citizenry and the Republican Militia*, 1 ALB. GOV'T L. REV. 250, 253 (2008).

242. Solum, *supra* note 225, at 526.

243. Solum, *supra* note 225, at 459, 526–28; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013).

244. See John O. McGinnis & Michael Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 765 & n.51 (2009).

245. See *supra* notes 230–31 and accompanying text for a discussion of the role of maritime institutions in interpreting nautical terms in the Constitution.

246. Guyora Binder, *Did the Slaves Author the Thirteenth Amendment?: An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. 471, 472–77 (1993).

247. *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (discussing international opinions with respect to cruel and unusual punishment).

248. See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 9–13 (2011).

a fictive reasonable speaker of English for these communities,²⁴⁹ but nothing about the exercise requires this fiction.

Originalism typically presumes that the legal content of words flows directly from the fixed meaning. Hence, two Senators from each state leads to the conclusion that it is unconstitutional to sit three Senators.²⁵⁰ But, as Lawrence Solum has observed, the underdeterminate nature of language, even if lexically fixed by a group of speakers at some point in the past, gives rise to choices about legal effect. “Excessive,” “cruel and unusual,” and “unreasonable” are vague and ambiguous terms whether one consults an eighteenth century dictionary or a modern one.²⁵¹ Consequently, judges must use other tools to administer the *legal* content of underdeterminate words. Those tools could be varied, including extra- or subconstitutional texts, precedent, *stare decisis*, judicial restraint, economic efficiency, libertarianism, structure, or default rules.²⁵²

Again, this is where institutions may play a role. The Fourth Amendment standard of reasonableness differs depending on whether the search takes place in a home, a phone booth, or an automobile. It matters whether the search is performed by a police officer or a high-school football coach.²⁵³ As discussed above, the Second Amendment’s words are ambiguous, vague, or open textured, even if one assumes that the communicative content of the words was fixed in 1791. Where some (but not all) originalists may part company with more dynamic theorists is with respect to their willingness to defer to noncontemporaneous institutions in constructing legal rules.²⁵⁴ For example, an originalist may allow state universities to ban firearms from campus because universities did so in 1791, or, at a higher level of abstraction, because of a tradition of universities acting *in loco*

249. See Solum, *supra* note 225, at 464.

250. *Id.* at 469 (using this example).

251. See *id.* at 469–72.

252. See PHILIP BOBBITT, CONSTITUTIONAL FATE 3–93 (1982) (discussing different modalities of constitutional argument); Solum, *supra* note 228, at 1953–80.

253. Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) (“A student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.”).

254. Compare United States v. Jones, 132 S. Ct. 945, 949 (2012) (modeling the Fourth Amendment with the law of property and trespass at common law), with William Baude & James Y. Stern, *A Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1874 (2016) (advocating for a more flexible positive law model of the Fourth Amendment that “will frequently be context-specific and even jurisdiction-specific”).

parentis.²⁵⁵ But originalists might not accept a similar institutional tailoring by a city park department hosting a hip-hop or rock concert on the ground that such regulations are insufficiently analogous.

C. *Institutions and the Common Law Constitution*

Common law constitutionalism is a theory advanced by scholars like Richard Fallon, David Strauss, and Cass Sunstein. To these scholars, written text is less important than the kind of judge-made rules that courts use to “implement” the Constitution.²⁵⁶ Common law constitutionalists recognize text as important, but not primarily because of its ability to constrain judges. Instead, text serves as a “focal point” around which policymakers build consensus or coordinate activity.²⁵⁷ Judges are constrained more by Burkean values of humility, precedent, judicial minimalism, and tradition than by any independent fidelity to textual “meaning.”²⁵⁸

To common law constitutionalists, institutions—especially ones with deep roots in American culture—deserve respect for their capacity to “meet[] the needs of society through a continuing process of adaptation” even though their policy prescriptions “may or may not be consistent with the original intentions of the founders.”²⁵⁹ Institutions like “the family; churches, synagogues and mosques; charitable associations; civic associations . . . ; labor unions . . . small businesses, local government units such as . . . town hall meetings, and political parties” interpose themselves between the state and the

255. See *Gott v. Berea Coll.*, 161 S.W. 204, 206 (Ky. 1913). Judge Nunn noted that:

College authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose.

Id.

256. See, e.g., RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 10 (2001); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 240–41 (2001); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883–84 (1996).

257. See Strauss, *supra* note 256, at 910–12.

258. See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1482–85 (2007).

259. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 664 (1994).

individual as a buffer,²⁶⁰ but they also help mediate normative debates about textual provisions. As such, they can supply a structure for judges to fashion constitutional decision rules. For example, “due process” forms a focal point that is subject to a number of potential meanings; through the prism of the well-established institution of the family and the home, the Court has generated a rule that constitutionally protects contraception.²⁶¹

In the context of the Second Amendment, institutions have already done similar work in this common-law-like fashion. The home is an institution in which courts recognize self-defense and privacy as being particularly important. It is no wonder, then, that *Heller* should repeatedly focus on the special place of the home for self-protection.²⁶²

D. *Institutions and Popular Constitutionalism*

Popular constitutionalism is a theory associated with Larry Kramer, Mark Tushnet, and sometimes Reva Siegel and Bruce Ackerman.²⁶³ In the popular-constitutionalist model, norm entrepreneurs generate normative commitments. These normative commitments give rise to social movements, these social movements lobby opinion makers in their various guises (for example, legislatures, executives, courts), and then these opinion makers translate the norms of social movements directly or indirectly into constitutional law. The most radical popular constitutionalists do not require the people to wait for opinion makers, but rather make new constitutional law themselves—sometimes through the formal Article V process, sometimes without it.

The product of these social movements can become constitutive of the nation—consider the abolition of slavery and the civil rights

260. Steven G. Calabresi, *Freedom of Expression and the Golden Mean*, 79 BROOK. L. REV. 1005, 1012 (2014) (identifying this list of mediating institutions).

261. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). Whether this move is a Burkean cloak for a normative revolution in privacy jurisprudence I leave to others. See Kozel, *supra* note 21, at 974 (discussing the relationship between institutionalism and common law constitutionalism); Llewellyn, *supra* note 109, at 17 (“[I]nstitutions . . . test whether there is still force in the Words [of a constitution], and how much force, and what that force is.”).

262. See *supra* Part V.B. *Heller* uses the term “home” over twenty-five times in the majority opinion. See *District of Columbia v. Heller*, 554 U.S. 570, 573–636 (2008).

263. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004).

movement.²⁶⁴ Although it is also possible the people will swiftly repudiate the products of popular constitutionalism—consider Prohibition. Sometimes social movements generate momentum that other coalitions channel elsewhere. According to one author, the New Deal was a salutary by-product of the temperance movement's overreach.²⁶⁵

Because popular constitutionalism is so oriented toward social practice, it is heavily dependent upon institutions, even as it works against other forms of institutional inertia. In this sense, institutions are as much engines and conduits for constitutional change as they are impediments. The civil rights revolution likely would never have overcome Jim Crow without the coordinating functions of the church, the synagogue, and the NAACP. Nor would *Heller* have been possible without the nearly thirty-year effort of the NRA to make its vision of the Second Amendment the Court's.²⁶⁶

Distinguishing between varieties of popular constitutionalism is less about isolating which institutions influence the development of constitutional law as it is about determining the methods by which they do so. One can imagine, for example, violent uprisings as a manifestation of popular constitutionalism (although violent uprisings may mark the event horizon of any intelligible meaning of “constitutionalism”). One can also see popular constitutionalism mediated through other institutions: the Voting Rights Act of 1965 is the Selma, Alabama marchers' vision of equal protection and the Fifteenth Amendment mediated through another institution, Congress. Similarly, the NRA has translated its vision of the Second Amendment into gun-rights legislation and “strict scrutiny”

264. See, e.g., James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 944, 968 (1997); Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 445 (2012).

265. See Andrew Koppelman, *Left-Evangelicalism and the Constitution*, 28 HARV. L. REV. F. 1, 1 (2014) (reviewing JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* (2014)). Koppelman noted that:

In response to pressure from evangelicals who wanted to ban alcoholic beverages and gambling, the Court relaxed the preexisting constitutional rules. The consequence was a growing doctrinal incoherence, with police powers that, once acknowledged, could not be limited in any sensible way. The New Deal judges were simply amputating doctrines that had already become gangrenous.

Id.

266. Siegel, *supra* note 25, at 210–15.

protections in state constitutions. Their successes are another example of an institution working to shape constitutional meaning.²⁶⁷

To the extent that states, heavily lobbied by gun-rights organizations, adopt more gun-friendly provisions in their own constitutional and subconstitutional law, they potentially affect federal constitutional law.²⁶⁸ For example, the effort by gun-rights organizations and gun owners to normalize the carrying of deadly weapons, either concealed or openly, is an attempt to influence what the word “bear” means in the Second Amendment.²⁶⁹ More subtly, and just as importantly, the effort to normalize the bearing of deadly weapons can influence norms such as what kind of behavior raises a “reasonable suspicion” of criminal activity under the Fourth Amendment²⁷⁰ or what kind of bearing constitutes an unlawful disturbance of the peace.²⁷¹

E. Institutions and Prudentialism

Even judges who view constitutional theory as tedious (at best) or toxic (at worst) are likely to look to institutions.²⁷² For prudentialists²⁷³

267. See, e.g., ALA. CONST. art. I, § 26; MO. CONST. art. I, § 23.

268. The migration of state statutory and constitutional law norms into federal constitutional law is well documented. For a scholarly account, see Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 358 (2011).

269. *Open Carry FAQ*, LOUISIANA OPEN CARRY AWARENESS LEAGUE, <http://www.laopencarry.org/faq.shtml> [<https://perma.cc/6YRS-3CAM>] (stating that its “main mission [is] normalizing carry of firearms commonly used in self defense”).

270. See *United States v. Robinson*, 814 F.3d 201, 204 (4th Cir. 2016) (“Because the carrying of a concealed firearm is not itself illegal in West Virginia, and because the circumstances did not otherwise provide an objective basis for inferring danger, we must conclude that the officer who frisked Robinson lacked reasonable suspicion that Robinson was not only armed but also dangerous.”), *vacated and reh’g en banc granted*, 2016 U.S. App. Lexis 13678 (4th Cir. Apr. 25, 2016); *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2014) (Hamilton, J., concurring in part and concurring in the judgment) (“[A]s public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt.”).

271. See *Williams*, 731 F.3d at 692 (“Wisconsin had amended its disorderly conduct statute to protect civilians’ rights to possess and even display loaded firearms in public places.”). For more on these points, see Blocher & Miller, *supra* note 199, at 320–23.

272. See J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* 7, 10, 21–23 (2012); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 5–11 (1998). I take these jurists at their word and place them in this category, well aware that others may place them in one of a number of different categories already specified.

273. In this subsection, I refer to both Judge Harvie Wilkinson and Judge Richard Posner as prudentialists, in that they both share a disdain for overarching constitutional theories, well aware that they may not agree on the depth of each other’s skepticism. See WILKINSON, *supra* note 272,

like Judge Wilkinson who prefer Thayerian judicial restraint, institutions—especially democratically accountable ones—command deference. However, an institution need not be political to command respect. Institutional deference may also cut *against* government regulation, as shown by Judge Wilkinson’s recent decision striking down a requirement that abortion providers narrate ultrasound results to their patients.²⁷⁴

For prudentialists like Judge Richard Posner, who are more concerned with consequences than with restraint, institutions are epistemic. As Jerome Frank advocated eighty-four years ago, institutions can provide pragmatists with information to test, modify, or discard legal postulates that are spurious, or have become so over time.²⁷⁵ For example, a prudentialist in the mode of Wilkinson may defer to the judgment of the medical community as to whether asking patients about firearms in the home is necessary for the competent delivery of medical advice.²⁷⁶ A prudentialist like Posner may defer to criminological consensus to assess whether regulations on gun possession outside the home further government interests in safety.²⁷⁷

VII. CONCLUSION: TOWARD AN INSTITUTIONAL SECOND AMENDMENT

An institutional approach to the Second Amendment may help resolve a recurrent dilemma in constitutional adjudication: the basic lack of a common vocabulary as to what the Court is balancing. Current balancing regimes fall into the rights-discourse trap. What is the meaning of a “right” if it can be undermined by a sufficiently important

at 80–103 (2012) (identifying Judge Posner with a particular “pragmatic” strand of constitutional theory); Richard A. Posner, *The Rise and Fall of Judicial Restraint*, 100 CALIF. L. REV. 519, 534–38 (2012) (critiquing the character of Judge Wilkinson’s judicial restraint).

274. *Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014) (“The government’s regulatory interest is less potent in the context of a self-regulating profession like medicine.”).

275. See Jerome Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568, 584–601 (1932).

276. Compare *Stuart*, 774 F.3d at 248 (“The government’s regulatory interest is less potent in the context of a self-regulating profession like medicine.”), with *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1229–30 (11th Cir. 2014) (upholding in part a regulation that prohibited physicians from asking patients about firearms in the home), *vacated*, 797 F.3d 859 (11th Cir. 2015), *vacated*, 814 F.3d 1159 (11th Cir. 2015), *vacated and reh’g granted*, No. 12–14009, 2016 WL 2959373 (11th Cir. Feb. 3, 2016).

277. See *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

government “interest”?²⁷⁸ In one sense, if one thinks of an “infringement” not as a violation, but as any diminution, then balancing is the very definition of an “infringement.”²⁷⁹

Understanding the Second Amendment in an institutional context, however, situates the balancing not as between personal, atomized moral claims versus government interests, but as the judicial management of a set of institutional arrangements either specified at the Founding (for originalists), recognized as traditional (for the Burkeans), or developed over time (for the dynamic constitutionalists).²⁸⁰ Elsewhere I have briefly explored the mechanisms by which the judiciary may maintain this set of arrangements.²⁸¹ But for my purposes, whether the Court continues to use balancing, history, tradition, or some mix of tests is less important than whether courts acknowledge that institutions exist in Second Amendment adjudication and begin to build the doctrine that translates those institutions into law. The pride (if not the practice) of institutional blindness in the First Amendment should not be reproduced in the Second.

An institutional approach to the Second Amendment could also help address the frequent allegation that judges treat the right to keep and bear arms as a second-class right.²⁸² Second Amendment advocates often leverage First Amendment doctrine to ratchet Second Amendment protections to stratospheric heights. It is commonplace to hear advocates argue that judges should treat the Second Amendment and First Amendment identically, and that judges should forbid prior restraints, overbreadth, or content discrimination when it comes to

278. For a discussion of this problem, see Pildes, *supra* note 110, at 733 (“What does it mean to ‘balance’ seemingly incommensurable entities, such as rights and social welfare?”); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1280–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

279. *But see* Blocher & Miller, *supra* note 199, at 334 (casting doubt on the meaning of the word “infringement” as “diminution”).

280. *See* Pildes, *supra* note 110, at 744 (“[R]ights are vehicles not for atomistic, self-regarding interests of the right holders but for protecting collective interests and structural concerns.”).

281. *See generally* Miller, *supra* note 72 (exploring the mechanisms through which the judiciary maintains the scope and role of the civil jury with procedural innovations).

282. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (mem.) (Thomas, J., dissenting from the denial of certiorari) (“I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right.”).

firearms, just as they do with speech.²⁸³ When judges balk at such proposals, they are attacked for having privileged some constitutional rights over others.²⁸⁴

Institutional sensitivity blunts this criticism by recognizing that institutions—whether sourced in text, common law, history, tradition, or evolving consensus—shape some constitutional rights differently than others. No constitutional right is absolute, but constitutional rights may be “not absolute” in different ways.²⁸⁵ Some constitutional rights, because of their text, history, tradition, or consequence, are more amenable to institutional tailoring than others. The Second Amendment right to keep and bear arms is one such right, as this Article has attempted to show.

283. See Magarian, *supra* note 122, at 69 (criticizing these arguments); Amy Davidson, *Feinstein and Cruz Fight About Guns*, NEW YORKER (Mar. 14, 2013), <http://www.newyorker.com/news/amy-davidson/feinstein-and-cruz-fight-about-guns> [<https://perma.cc/J27J-QLCU>].

284. Cf. BERLIN, *supra* note 107, at 169 (“The necessity of choosing between absolute claims is . . . an inescapable characteristic of the human condition.”).

285. See Pildes, *supra* note 110, at 734 (observing that rights are about constraining government reasons for action, which may differ based on the “common goods that those rights are meant to realize”).