

THE POSITIVE SECOND AMENDMENT

The Second Amendment is among the most recognizable provisions of the Constitution. It is also perhaps the most misunderstood. Common misconceptions about the Amendment – what it forbids, what it permits, how it functions as law – distort the gun debate and American constitutional culture. In *The Positive Second Amendment*, Blocher and Miller provide the first comprehensive post-*Heller* account of the history, theory, and law of the right to keep and bear arms. Their aim is not to pick sides in the gun debate, but rather to show how a positive account of the constitutional Second Amendment differs from its political cousin. Understanding the right to keep and bear arms as constitutional law will challenge many deeply held beliefs. But it may also provide a better way to negotiate the seemingly intractable issues that afflict the gun debate.

Joseph Blocher is the Lanty L. Smith '67 Professor of Law at Duke University School of Law. As an associate at O'Melveny & Myers LLP, he coauthored the briefs for the District of Columbia in *District of Columbia v. Heller*. His Second Amendment scholarship has been published in the *Yale Law Journal*, *Stanford Law Review*, *NYU Law Review*, *University of Chicago Law Review*, and many other journals.

Darrell A. H. Miller is the Melvin G. Shimm Professor of Law at Duke University School of Law. He is a graduate of Harvard Law School and Oxford University and is a former Marshall Scholar. His scholarship has been cited by the Supreme Court of the United States, the United States Courts of Appeals, the United States District Courts, and in congressional testimony and legal briefs.

Cambridge University Press
978-1-107-15869-6 — The Positive Second Amendment
Joseph Blocher , Darrell A.H. Miller
Frontmatter
[More Information](#)

CAMBRIDGE STUDIES ON CIVIL RIGHTS AND CIVIL LIBERTIES

This series is a platform for original scholarship on US civil rights and civil liberties. It produces books on the normative, historical, judicial, political, and sociological contexts for understanding contemporary legislative, jurisprudential, and presidential dilemmas. The aim is to provide experts, teachers, policymakers, students, social activists, and educated citizens with in-depth analyses of theories, existing and past conditions, and constructive ideas for legal advancements.

General Editor: Alexander Tsesis, *Loyola University, Chicago*

Cambridge University Press
978-1-107-15869-6 — The Positive Second Amendment
Joseph Blocher , Darrell A.H. Miller
Frontmatter
[More Information](#)

The Positive Second Amendment

RIGHTS, REGULATION,
AND THE FUTURE OF *HELLER*

JOSEPH BLOCHER

Duke University School of Law

DARRELL A. H. MILLER

Duke University School of Law



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-107-15869-6 — The Positive Second Amendment
Joseph Blocher , Darrell A.H. Miller
Frontmatter
[More Information](#)

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.
It furthers the University’s mission by disseminating knowledge in the pursuit of
education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107158696
DOI: 10.1017/9781316666029

© Joseph Blocher and Darrell A. H. Miller 2018

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2018

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Blocher, Joseph, 1979-author. | Miller, Darrell A. H., 1972- author.
TITLE: The Positive Second Amendment: Rights, Regulation, and the Future of Heller /
Joseph Blocher, Darrell A. H. Miller.

DESCRIPTION: Cambridge; New York: Cambridge University Press, 2018. |
SERIES: Cambridge studies on civil rights and civil liberties |
Includes bibliographical references and index.

IDENTIFIERS: LCCN 2018012826 | ISBN 9781107158696 (hardback) |
ISBN 9781316611289 (paperback)

SUBJECTS: LCSH: Firearms—Law and legislation—United States. | United States. Constitution.
2nd Amendment. | Gun control—United States. | Constitutional history—United States. |
Heller, Dick Anthony. | BISAC: LAW / Constitutional.

CLASSIFICATION: LCC KF3941 .B56 2018 | DDC 344.7305/33—dc23 LC record available at
<https://lccn.loc.gov/2018012826>

ISBN 978-1-107-15869-6 Hardback
ISBN 978-1-316-61128-9 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy
of URLs for external or third-party internet websites referred to in this publication
and does not guarantee that any content on such websites is, or will remain,
accurate or appropriate.

Cambridge University Press
978-1-107-15869-6 — The Positive Second Amendment
Joseph Blocher , Darrell A.H. Miller
Frontmatter
[More Information](#)

For Marin, Ben, and Sam.
– J.B.

For my family.
– D.A.H.M.

Contents

<i>Acknowledgments</i>	<i>page ix</i>
Introduction: The Gun Debate and the Constitution	1
1 Gun Rights and Regulation in American History	13
2 Militias, Private Purposes, and the Road to <i>Heller</i>	51
3 Understanding <i>Heller</i>	72
4 <i>Heller’s</i> Aftermath: “A Vast <i>Terra Incognita</i> ”	100
5 The Constitutional Grammar of the Second Amendment	118
6 What Is the Second Amendment For?	148
7 Second Amendment Law and the Gun Debate	173
<i>Index</i>	197

Acknowledgments

We have been writing about the Second Amendment since the day *District of Columbia v. Heller* was decided. During that time, we have accumulated far too many debts of gratitude to enumerate here. We deeply appreciate the support, encouragement, and disagreements that have shaped our understanding of the Second Amendment in the last decade. This book is a product of those conversations, exchanges, and debates.

The book would not have been possible without the extraordinary help we have received from our friends and colleagues at Duke Law School. We owe special thanks to Dean David Levi, and to the colleagues who have helped guide us. Jamie Boyle, Maggie Lemos, Marin Levy, and Jeff Powell went far beyond the call of duty, reading and commenting on most or all of the manuscript – the structure and argument of the book owe a great deal to their wise counsel. Research librarians Jane Bahnson, Jennifer Behrens, and Cas Laskowski helped us locate and confirm some incredibly hard-to-find sources, from old books and articles to the century-old handwritten gun regulations of Tombstone, Arizona. Besides our friends and colleagues in Durham, we received especially insightful thoughts, comments, and criticisms from Saul Cornell, Mark Frassetto, Eric Ruben, and Adam Skaggs. And of course we are deeply grateful to Alex Tsesis, editor of this series, for shepherding it along.

Our students have been a truly remarkable resource, and some in particular deserve special mention. In the spring of 2017, we taught a research seminar based on an early version of the manuscript, and were fortunate enough to enroll a fantastic set of students: Ali Jessani, Boykin Lucas, Jon Ng, Nicolas Thomson, Emily Taft, Courtney Thomson, Bowen Wang, and Jake Wasserman. They helped us with everything from intra-chapter organization to the identification of case studies. Luke Morgan spent the better part of a summer doing book-related tasks, and we

are especially grateful for his hard work and contributions. And as the manuscript neared completion, Rich Hatch, Erin Mack, and Kelsey Smith joined the team to help us check every citation. Marlyn Dail and Leanna Doty managed innumerable administrative tasks, including the final preparation of the manuscript.

Although we've refined the expressions and argumentation through the many revisions of this book, many of the arguments and the supporting sources first found voice in our previous work, some of it coauthored, including the following:

- Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after Heller*, 67 DUKE L.J. 1433 (2018)
- Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69 (2016)
- 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. 297 (2016)
- Joseph Blocher & Darrell A. H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. LEG. 279 (2016)
- Darrell A. H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 GEO. J. L. & PUB. POL'Y L.J. 223 (2016)
- Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133 (2015)
- Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218 (2014)
- Darrell A. H. Miller, Peruta, *the Home-Bound Second Amendment, and Fractal Originalism*, 127 HARV. L. REV. F. 238 (2014)
- Joseph Blocher, *Gun Rights Talk*, 94 BOSTON U. L. REV. 813 (2014)
- Darrell A. H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013)
- Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013)
- Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012)
- Darrell A. H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011)
- Darrell A. H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939 (2011)
- Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009)
- Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009)

We gratefully acknowledge those journals and their editors. We also made use of the Duke Repository of Historical Gun Laws, <https://law.duke.edu/gunlaws/>, an interactive resource for historical materials on gun regulation and rights.

Cambridge University Press
978-1-107-15869-6 — The Positive Second Amendment
Joseph Blocher , Darrell A.H. Miller
Frontmatter
[More Information](#)

Acknowledgments

xi

Finally, we acknowledge in advance the scholars, students, lawyers, judges, fellow citizens, and others who will continue to shape the Second Amendment, and from whom we will continue to learn. One of the themes of this book is that the Second Amendment demands – and rewards – the kind of careful, reasoned discussion and debate that constitutional law can, at its best, deliver. We hope this book provides a blueprint for that kind of productive engagement.