

STANDING OUR LEGAL GROUND: Reclaiming the Duties Within Second Amendment Rights Cases

Christopher N.J. Roberts[†]

ABSTRACT

The Supreme Court is likely to hear another contentious Second Amendment gun case in the near future. This Article argues that focusing exclusively on rights—the dominant mode of legal analysis in such cases—is, ironically, not the appropriate foundational starting point. By pitting competing personal interests and incompatible rights claims against one another, this legal issue is likely to devolve into a dispute over politics and ideologies rather than law. If we are to prevent the next Second Amendment Supreme Court case from drifting away from its legal moorings into another ideological contest, this Article suggests that the appropriate starting point begins with recognition of one of the most basic, yet widely overlooked legal propositions: For every right there is a correlative duty. Interestingly, although every legal right must be associated with a legal duty, this analysis of the recent District of Columbia v. Heller gun case shows that the subject of duties is almost entirely absent from consideration. This analysis shows that without duties, legal rights are reduced to mere politics—one-way paths directed toward individual interests, political purposes, and ideological ends. The analytic framework outlined in this Article not only offers a nuanced and precise rendering of how our Constitutional rights operate in context, it also provides the theoretical and conceptual scaffolding necessary for the empirical study of these rights.

[†]. Associate Professor, University of Minnesota Law School. cnr@umn.edu. For comments, suggestions, and assistance the author thanks Elizabeth Anderson, Susanna Blumenthal, June Carbone, Tony Chen, Lauren Edelman, Michele Goodwin, Rosann Greenspan, Oren Gross, Sandy Levitsky, Roger Michalski, Cal Morrill, Robin Phinney, Spencer Ptacek, Dan Schwarcz, Greg Shaffer, Jonathan Simon, Margaret R. Somers, Sarah Song, Kiyo Tsutsui, Mary Vogel, and Susan Waltz. The author is also grateful for comments received at the University of Minnesota Law School's Faculty Workshop and meetings convened by the Law and Society Association, the American Sociological Association, and the American Political Science Association.

INTRODUCTION.....	236
I. THE <i>HELLER</i> CASE AND INDIVIDUAL, NATURAL RIGHTS CLAIMS	240
A. The Second Amendment Debates	240
B. The <i>Heller</i> Case and the Difficulty with Rights.....	242
C. The <i>Heller</i> Case: Contemporary Articulations of Individual, Natural Rights	244
D. The Implications and Powers of Natural, Individual Rights.....	248
II. THE RELATIONAL NATURE OF RIGHTS	249
A. Enforceable Rights and Duties.....	250
B. Rights of Membership.....	254
C. Duties of Membership.....	255
III. A NEW MULTILEVEL FRAMEWORK FOR THE EMPIRICAL STUDY OF RIGHTS.....	257
A. The Empirical Study of Rights.....	257
B. Individual and Natural Rights	259
C. Enforceable Rights	260
D. Membership Rights	262
IV. IMPLICATIONS & PRINCIPLES	264
CONCLUSION.....	267

INTRODUCTION

It is sometimes worth stating the obvious: Another Second Amendment gun case is coming to the Supreme Court. If past events are reliable predictors, the prelude to the case will be a contentious, impassioned struggle in defense of competing rights. The media will depict a divided nation, interest groups such as the National Rifle Association and the American Civil Liberties Union will draw predictable lines around the issue, and politicians will rise and fall at the polls depending on where they stand on the issue. Ultimately, this divisive rights contest is likely to come down to a question of constitutional interpretation and be decided by a thin margin largely dependent on the pre-existing ideological composition of the Court. But regardless of the legal outcome, a vast number of Americans will believe that an overreaching, activist, politicized Court has trampled their rights.

Legal preparations for the inevitable Court battle are already underway. Although much attention has been directed towards the controversial “stand

your ground laws,” judges have warned that a much broader range of questions remain open from the most recent landmark Second Amendment cases.² Legal scholars are now dusting off old arguments about the nature of Second Amendment rights and the appropriate forms of Constitutional interpretation, while advocates pore over the latest studies on the effects of stand your ground laws, waiting periods, and mandatory safety courses upon public safety, racial disparities, and so forth.³ Yet, it is argued within this Article that the standard assumptions that inhere within the dominant mode of legal analysis in such cases are, ironically, not the appropriate foundational starting point. Indeed, by pitting competing personal interests and incompatible rights claims against one another, this legal issue is likely to become a *political* affair.

To prevent the next Second Amendment case from devolving into a battle of competing political ideologies, this Article argues that the appropriate legal starting point begins with the recognition of the following proposition: For every right there is a correlative duty. That every legally enforceable right relies on a corresponding legal duty is a foundational, time-honored principle. As Oliver Wendell Holmes and Wesley Hohfeld each demonstrated over a century ago, the interdependence of rights and duties is a legal constant as inescapable as a basic arithmetic equation—if there is a legal right, there must be a legal duty associated with it.⁴ But as contemporary legal scholars have also recognized, in the modern legal context, duties are often an afterthought in legal analyses, or absent altogether.⁵ It is quite true that the fundamental relationship between rights and duties is always implied—so embedded within the law that there is generally little need to remind ourselves of the basic legal fact. Nevertheless, jurists who neglect to account for this necessary piece of the legal equation do so to the detriment of their

2. See *McDonald v. City of Chicago*, 561 U.S. 742, 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). As the Seventh Circuit Court of Appeals noted in the recent case, *Ezell v. City of Chicago*, 651 F.3d 684, 690 (2011), “[t]o be fair, the standards for evaluating Second Amendment claims are just emerging, and this type of litigation is quite new.”

3. Dennis A. Henigan, *A Second Amendment Quartet: Heller and McDonald in the Lower Courts; The Woollard Decision and the Lessons of the Trayvon Martin Tragedy*, 71 MD. L. REV. 1188, 1189–90 (2012); Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 857–58 (2013); William G. Merkel, *Uncoupling the Constitutional Right to Self-Defense from the Second Amendment: Insights from the Law of War*, 45 CONN. L. REV. 1809, 1840 (2013).

4. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 219–20 (1881); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–32 (1913).

5. Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 751–53 (1980).

conclusions.⁶ This Article explores the nature and consequences of our *missing duties* within the constitutional context of Second Amendment rights cases.

This analysis of the seminal Second Amendment case, *District of Columbia v. Heller*,⁷ shows how although duties are a crucial necessity in the determination of a Second Amendment right, the court and the parties to the controversy omit them from their legal analyses. The various modes of constitutional interpretation employed in *Heller* similarly neglect to consider the historical meaning of the text in terms of the commensurate responsibilities an individual rights holder is expected to assume as a member of the broader society by virtue of exercising that right. As argued here, the result of focusing heavily on the “rights” half of the legal equation has been that many participants in these debates have neglected to consider explicitly the nature of the duties and burdens any Second Amendment decision—whether it is permissive or restrictive—places on the society at large.

Although focusing on Second Amendment rights at the expense of Second Amendment *duties* is the standard mode of legal inquiry in such cases, doing so advances a fictive kind of individualism that removes the rights claimant from the very social and legal context within which he exists. As a result, the question of Second Amendment rights has so often assumed an ideological foundation rather than a legal one before the parties even have their day in court.

The issue of gun rights has become a zero-sum contest; any perceived gain on one side necessarily infringes on the perceived rights of the other.⁸ And as these struggles carry on, Americans remain insecure of their rights and uncertain of their duties while thousands perish or are gravely wounded every year.⁹ It is no secret that politics infiltrated the gun debate long ago. It is also no secret that each side in the debates over the appropriate mode of

6. *Id.*

7. 554 U.S. 570 (2008).

8. For an extensive discussion about the harmful effects of the rights-heavy rhetoric in contemporary political discourse, see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

9. For instance, while gun control advocates struggle with gun rights’ supporters, over 30,000 Americans continue to die and nearly 70,000 are injured every year. According to the National Center for Health Statistics’ publication *Vital Statistics*, the average number of firearm related deaths from 1993 to 2006 was 32,136. See WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, *GUN CONTROL LEGISLATION 5–7* (2012). Data from the National Center for Injury Prevention and Control show that from 2001 to 2009 the average number of non-fatal gunshot injuries was 67,619. See *Overall Firearm Gunshot Nonfatal Injuries and Rates per 100,000*, CTR. FOR DISEASE CONTROL, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (last updated Mar. 28, 2013) (report options “all intents,” what caused the injury? “firearm,” year(s) of report “2001” to “2009,” then click submit request).

constitutional interpretation are tuned into specific ideological and political interests. The pressing question is how do we approach this issue on legal, rather than ideological, foundations?

To prepare for the inevitable Supreme Court case, this Article seeks to reconstitute and reintegrate a foundational legal framework into the legal discussion. From this legal foundation there emerges a legal question that does not just concern the right, but requires also asking: what is the nature of the corresponding duty, and upon whom do we consign it? By recognizing the need to consider rights along with the commensurate duties, the axis of existing legal debates shift and law becomes the foundation to politics and ideology rather than the other way around.

The framework presented here does not represent a definitive “answer” about who will or should prevail in future Second Amendment cases. This is not its function. The purpose of this objective analytic framework is to offer a structured approach to addressing a specific constitutional question without privileging a particular party, interest, or outcome. The Article is intended to offer a new legal framework for approaching Constitutional rights questions with a greater degree of nuance and specificity. In particular, this analysis suggests that the disputes over the right to bear arms are not so much about the right, itself. Interestingly, the polarized sides within these debates tend to have a very different duty holder in mind. But without a framework that explicitly invokes both rights and duties, we have overlooked this crucial element.

When the United States Supreme Court hears the next Second Amendment case, we might be better prepared with the recognition that there has never been a determination of a Constitutional right without a simultaneous determination of a Constitutional duty. By staking out a legal foundation at the outset that recognizes this legal fact and integrates duties into the legal analysis of rights, it just might be possible to move beyond the partisan politics and ideological divisions that have defined this issue for so long. To prepare for this future case, it is therefore worth adopting the most obvious, yet overlooked legal premise at the outset: For every right there is a correlative duty.

This Article is organized into three main parts: Part I provides a brief overview of the gun debates as well as a few words on this Article’s methodology. Part II examines the individual conception of rights that represents the foundation of the gun supporters’ rights claims in the recent Supreme Court case, *District of Columbia v. Heller*.¹⁰ Part III shows that although the rights claims rely on the discourse of individual, natural rights,

10. 554 U.S. 570 (2008).

they are often actually invoking rights as a relational concept that arises not from nature or the individual, but from the claimant's relative position and place within society. Together, duties and rights are legal representations of such relations. Part IV seeks to sort through the confusion, conflict, and misconceptions surrounding rights that inevitably accompany such debates by outlining an analytic framework for disentangling the oft-conflated individual and relational dimensions of right claims. Part V focuses on the analytic and normative implications of using this framework to understand rights struggles. This Article concludes with several basic principles to incorporate into discussions surrounding rights.

I. THE *HELLER* CASE AND INDIVIDUAL, NATURAL RIGHTS CLAIMS

A. *The Second Amendment Debates*

The ongoing controversy surrounding the Second Amendment rights is an excellent point of departure for this analysis of rights. Strong notions of individual and natural rights tend to occupy a central place in these divisive and polarizing debates. Although in recent decades the tenor and tone of the debate has become increasingly polarized and acerbic, questions over the Second Amendment are not new. Over the past two hundred years the Second Amendment has been defined and redefined in response to changing circumstances, claims, and exigencies. For example, in the Civil War era in the South, the notorious "Black Codes" limited the civil liberties of African Americans that included limitations of firearm possession.¹¹ And after the assassinations of John F. Kennedy, Robert F. Kennedy, and Martin Luther King Jr., Congress passed the Gun Control Act of 1968 which placed restrictions on the ownership, sale, and transfer of firearms.¹²

On a more immediate timeline, over the past several decades courts and legislatures have defined the scope of this right with respect to background checks, waiting periods, gun registration, prohibited classes of purchasers, and ammunition restrictions.¹³ But perhaps the most definitive response to the

11. Megan Ruebsamen, Note, *The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post-Heller Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 63–64 (2013).

12. Robert A. Bracken, *Foreign Convictions Are Not Proper Predicate Offenses Under the Statutory Language "Convicted in Any Court"*: *Small v. United States*, 44 DUQ. L. REV. 383, 390–91, 390 n.59 (2006); *see also* 18 U.S.C. § 922(a)(1) (2012).

13. An example of this is the Brady Act, which amended the Gun Control Act of 1968. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993); *see also* *Printz v. United States*, 521 U.S. 898, 902–04 (1997).

longstanding question of whether the Second Amendment represents an individual right or refers to the rights of those affiliated with a state regulated militia, came from the Supreme Court in the 2008 *District of Columbia v. Heller* case.¹⁴ In a 5–4 decision, the Court held that the Second Amendment protects “an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”¹⁵

This Article focuses on the individual rights claims used in the *Heller* case. Court documents—particularly the more than forty amicus briefs representing hundreds of individuals and organizations—provide thousands of pages of data on the nature of the a priori assumptions that underlie common understandings of rights. The arguments within the amicus briefs—produced by a broad spectrum of the American public—represent some of the most up-to-date, succinct, and clearly articulated syntheses of the rights arguments that occupy a central place in contemporary Second Amendment debates.¹⁶

It should be noted at the outset that the goal here is not to assess the merit of the arguments, or to scrutinize whether or not the Court got it right, or to comment on the state of the law. The close examination of the rights arguments used in *Heller* is intended to identify *how* rights are used in these debates. Doing so sheds light on the implicit assumptions about the nature of rights that underlie many such rights debates. So this Article is not merely about guns, gun control, gun violence, or what the Second Amendment actually means. The gun debate is just a device used here to serve a broader purpose: to gain a better understanding of rights. The debates surrounding healthcare, abortion, organ donors, and drug legalization, for instance, could just as easily be used to serve this purpose. Therefore, throughout the analysis the rights claims under examination are not received in terms of their normative valence. Within this study, any statement that a rights claimant

14. 554 U.S. 570, 577 (2008). Since *Heller*, the Court has taken further steps to define the scope of the Second Amendment in *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (holding that “the Second Amendment right is fully applicable to the States”).

15. *Heller*, 554 U.S. at 577. For discussions of recent cases relating to the Second Amendment, see CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 222–67 (1994); Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4 n.7 (2000); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 297–300 (2000); Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263, 1263–75 (2010); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 654–55 (1989); Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 366–70 (2000).

16. See *infra* Part I.B.

makes is received as data—an empirical fact (i.e., it was written and uttered—thus it is a fact). The ultimate “truth,” political appropriateness, or normative correctness is not assessed during this phase of the analysis. From a case selection strategy, the intention here is to begin with the strongest versions of rights rhetoric, melded with the most deadlocked and intractable social problems where legal solutions no longer seem to work, and to draw an image of where the law exists and the countenance of the individual who it is designed to help.

B. The Heller Case and the Difficulty with Rights

The individual rights claims in the *Heller* gun case take on numerous guises—an incredible array of disparate definitions derived from a range of conflicting foundational sources. Rights can, of course, represent enforceable claims. But in *Heller*, the individual right to bear arms is just as often (perhaps even more so) invoked as a concept that has no legal bearing—a moral or normative statement about something that ought to be. To add to the confusion, the sources and origins of such rights claims are just as numerous—they are considered God-given, or arise in the state of nature. Rights can accrue by virtue of one’s humanity, through one’s citizenship, via common law, custom, treaty, birth, race, gender, religion, sovereign edict, or act of parliament. The list goes on and on.¹⁷

The term human rights can be thought of as a “free-floating” or “empty” signifier—a concept that is constantly deployed, yet vague, highly variable, and stripped of context and specified meaning. For example, when the phrase human rights is invoked, it is entirely unclear whether it refers to the eighteenth century French “rights of man and citizen,” the fundamental right of citizenship Hannah Arendt discusses in the context of European statelessness, or the rights associated with the modern post-World War II international human rights regime.¹⁸

17. As shown below, the court briefs in *Heller* refer to each of these sources. See *infra* Part I.B. For similar discussions about the multiplicity of rights, see Mark Goodale, *Introduction: Locating Rights, Envisioning Law Between the Global and the Local*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 1–3 (Mark Goodale & Sally Engle Merry eds., 2007); Margaret R. Somers & Christopher N.J. Roberts, *Toward a New Sociology of Rights: A Genealogy of “Buried Bodies” of Citizenship and Human Rights*, 4 *ANN. REV. L. & SOC. SCI.* 385, 385 (2008).

18. Christopher N.J. Roberts, *Sociology of Law*, in *HANDBOOK OF SOCIOLOGY AND HUMAN RIGHTS* 204, 204–05 (David L. Brunnsma et al. eds., 2013).

Amazingly, a single word carries the burden of all of these distinct forms and meanings. Rights are certainly a fuzzy concept. But as it is argued throughout this Article, to understand and ameliorate legal problems, rights *must* be defined as a precise concept. This Article seeks to clarify one vital distinction in the study of rights: the difference between individual, natural rights and a *relational* understanding of rights, in which a right is simply the name given to a particular relationship between an individual and the rest of society. Though this notion of rights is generally eclipsed by the dominant individual understanding of rights, it identifies the necessary foundations for having any rights at all.¹⁹

Recognition of the vague and indeterminate usage of rights is not a new problem, nor a particularly novel insight. Judges who are routinely forced to make sense of these murky waters have long been aware of the difficulties, confusion and indeterminacy of rights talk in both colloquial and professional settings. In 1871, for example, Justice Seed griped that the concept of rights is “abusively used” and that the “word *rights* is generic, common, embracing whatever may be lawfully claimed.”²⁰ Yet, 140 years later judges continue to offer a very similar refrain.²¹ The confusion and indeterminacy experienced in these rights struggles continues to confound those who adjudicate them. As the Honorable Duncan of the Fourth Circuit conveyed in her dissent in *Taylor v. Progress Energy, Inc.*,²² the ambiguity and “elasticity” of the term “rights” poses significant problems in judicial decision-making—“[t]here are few words in the legal lexicon more ubiquitous and freighted than the term ‘right.’”²³ In recent years scholars have also warned those studying rights against tacitly accepting (or reproducing) the legally and analytically imprecise understandings of rights that are common in colloquial settings.²⁴

19. See, e.g., *infra* note 26 and accompanying text.

20. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–31 (1913) (quoting *Lonas v. State*, 50 Tenn. 287, 306 (1871)). For similar assertions by judges see *id.* at 31 (quoting *People ex rel. Coleman v. Dikeman*, 7 How. Pr. 124, 130 (N.Y. Sup. Ct. 1852)); *United States v. Patrick*, 54 F. 338, 348 (M.D. Tenn. 1893).

21. See, e.g., *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 463–64 (4th Cir. 2007) (Duncan, J., dissenting); *Newman v. Sathyavaglswaran*, 287 F.3d 786, 798 (9th Cir. 2002).

22. 493 F.3d 454 (4th Cir. 2007).

23. *Id.* at 463–64 (Duncan, J., dissenting) (citations omitted).

24. Goodale sees the same indeterminacy in the field of human rights:

It is actually quite surprising how rarely studies of human rights take the time to explain how, in fact, “human rights” is being used. Within the voluminous human rights literature it is much more common that the intended meaning of human rights is kept implicit, or allowed to emerge in context without formally addressing this issue analytically. While a contextual strategy has much to

As Norberto Bobbio cautions, great care should be taken to demarcate the parameters of their usage.²⁵ But even when the goal of analytic precision exists, there is very little consensus about how to proceed.

This Article presents a new analytic framework for approaching rights with a greater degree of nuance and specificity.²⁶ It is derived from a close examination of how rights are actually used and conceived of in the course of one such struggle. This approach reveals not only the source of much of the confusion surrounding rights, but it also offers a structured approach for thinking about rights. This analysis shows that although duties are a crucial and necessary part of the rights equation, they are generally an afterthought in these legal struggles over rights. The concept of duties becomes the analytic lynchpin for understanding rights with greater precision. Once such struggles are viewed within the more complete context of rights and duties, the legal landscape suddenly changes—several entirely distinct dimensions of rights comes into focus. When these discrete rights universes are conflated (as they often are) rights and the individuals they protect appear (incorrectly) to be in great conflict. Charting the path that rights and duties run through each of these dimensions generates a precise framework and much-needed structure for approaching these rights struggles.

C. *The Heller Case: Contemporary Articulations of Individual, Natural Rights*

A textual analysis of the court documents in the *Heller* case provides a wealth of information about how the rights concept is used in practice while simultaneously revealing numerous unspoken assumptions about what rights are taken to be. In their respective briefs, the respondent and the amici are quite clear and succinct about *what* their Second Amendment right is. The

recommend it—in particular, it suggests that the answer to the question “what is human rights?” is itself contextual—it is also possible that in taking the meaning of human rights for granted, when it is in fact highly contested, a certain opacity has crept into the literature. Different analyses or arguments come to be marked by the disciplinary orientations from which they emerge, when what is desired is an approach to this most encompassing of topics that transcends (or unifies) the many different academic and political traditions.

Goodale, *supra* note 17, at 6 n.1; see also CHRISTOPHER N.J. ROBERTS, THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS (2015); Somers & Roberts, *supra* note 17, at 390.

25. NORBERTO BOBBIO, THE AGE OF RIGHTS, at xii–xv (Allan Cameron trans., 1996).

26. See also Kenneth J. Arrow, *Methodological Individualism and Social Knowledge*, 84 AM. ECON. REV. 1 (1994).

respondent in the case, for example, asserts that the “Second Amendment plainly protects ‘the right of the people’—an individual right—‘to keep and bear arms.’”²⁷ Much more space in their briefs, however, is dedicated to identifying *where* that right came from. The Respondent, the many amici curiae, and even Justice Scalia in his majority opinion all go to great lengths to locate the origins of their claims to the individual right to bear arms in pre-political, natural, and historical realms. For instance, Heller, the respondent in this case, explicitly grounds his claim in a “pre-existing right” to possess and bear arms.²⁸ In his majority opinion, Justice Scalia agrees that there is a pre-political, fundamental right for individuals to bear arms. This is not a right, he argues, that the U.S. Constitution in any way creates—it only enshrines it in law.²⁹ Justice Scalia states that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’”³⁰ Invoking case law to support this position, Justice Scalia quotes the Court in *United States v. Cruikshank*: “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence. The Second amendment declares that it shall not be infringed”³¹ The supporters of the individual right to bear arms thus find support from Justice Scalia for their assertions that the right to bear arms exists independent of the Constitution and precedes both its creation and the founding of the nation. Although this portion of the rights claim speaks to what the right to bear arms is *not* (i.e. simply positive law), the question of the foundation(s) or ultimate source(s) of this pre-political right still remains.

In their briefs, the gun supporters tend to argue that the right to keep and bear arms is rooted in nature, or the fundamental laws of nature. Heller, for instance, cites numerous colonial-era and pre-Revolution sources to provide evidence for this particular aspect of his claim. Citing the eighteenth century *Journal of the Times*, Heller agrees that the rights “to keep arms for their own defence,” is a “natural right which the people have reserved to themselves.”³²

27. Respondent’s Brief at 2, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (quoting U.S. CONST. amend. II).

28. *Id.* at 18.

29. *Heller*, 554 U.S. at 592.

30. *Id.*

31. *Id.* (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)).

32. Respondent’s Brief, *supra* note 27, at 20 (citing *N.Y. J.*, 1 (Supp. Apr. 13, 1769)); *see also* Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae

In its amicus brief, the Cato Institute explicitly connects the right to self-defense with the right to bear arms by invoking Blackstone's discussions of the law. The Cato amici write, "Blackstone twice connected the arms right to personal defense. He described it as 'a public allowance under due restrictions, of the natural right of resistance and self-preservation,' and as 'for self preservation and defence.'"³³ In its brief, the Second Amendment Foundation similarly suggests that self-defense, in the context of the right to bear arms, "is the most fundamental right known to liberal theory."³⁴ Justice Scalia, in turn agrees with this assessment.³⁵ To bolster his own position regarding the natural right to bear arms, Justice Scalia invokes St. George Tucker's hundred-year-old interpretation of Blackstone's Commentaries in which he similarly identifies "the Blackstonian arms right as necessary for self-defense."³⁶ Tucker (again cited by Justice Scalia) continues, "[t]he right to self defence is the first law of nature."³⁷

Importantly, the gun rights supporters argue that the natural right to bear arms and defend oneself extends to defending oneself against an unduly coercive or tyrannical government. As Heller argues, "The Framers, who used militia organized in direct defiance of the government they deposed, envisioned the militia as a tool for restoring the Constitution in the event of usurpation."³⁸ Amongst the many legal sources used to support this part of its argument, Heller cites Story's 1851 *Commentaries on the Constitution of the United States*:

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.³⁹

Supporting Respondent at 23, *Heller*, 554 U.S. 570 (No. 07-290) [hereinafter Brief of the Cato Institute] (citing N.Y. J., 1 (Supp. Apr. 13, 1769)).

33. Brief of the Cato Institute, *supra* note 32, at 14 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *144).

34. Brief of Second Amendment Foundation as Amicus Curiae Supporting Respondent at 38, *Heller*, 554 U.S. 570 (2008) (No. 07-290).

35. See *Heller*, 554 U.S. at 606.

36. *Id.* (citing 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 143 (1803)).

37. *Id.* (citing 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. at 300 (1803)).

38. Respondent's Brief, *supra* note 27, at 30 (citing THE FEDERALIST NO. 46 (James Madison); THE FEDERALIST NO. 29 (Alexander Hamilton)).

39. *Id.* (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 607 (2d ed. 1851)).

The amici tend to agree that the right to bear arms was necessary for a free society,⁴⁰ and was a “means to defeat tyranny.”⁴¹

In their arguments about the inherent right to bear arms arising from pre-political laws of nature, the gun rights supporters also locate their rights claims within a historical realm.⁴² Indeed, the respondents and their amici fill many pages in their respective briefs drawing on colonial-era sources in support of the right to defend against government tyranny.⁴³ The respondent and amici variously trace this right back as far as the Saxons,⁴⁴ the Stuart monarchs,⁴⁵ the 1688 Declaration of Rights,⁴⁶ the American Revolution,⁴⁷ and various state Constitutions,⁴⁸ amongst numerous other historical sources. While such sources are of course in no way controlling, Justice Scalia did find these arguments relevant and persuasive.⁴⁹ Filling in the logical antithesis of their argument with historical support, Justice Scalia suggests that when a government or its ruler wishes to suppress liberty, revoke popular power, or otherwise augment his own, disarming the people is a common method.⁵⁰ “Between the Restoration and the Glorious Revolution,” Justice Scalia writes, “the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.”⁵¹ He goes on to provide many similar examples of the

40. See, e.g., Brief of Second Amendment Foundation as Amicus Curiae Supporting Respondent, *supra* note 34, at 31–40.

41. Brief Amicus Curiae of Gun Owners of America, Inc., Gun Owners Foundation, Maryland Shall Issue, Inc., Virginia Citizens Defense League, Gun Owners of California, Inc., Lincoln Institute for Research & Education & Conservative Legal Defense & Education Fund Supporting Respondent at 3, *Heller*, 554 U.S. 570 (2008) (No. 07-290) [hereinafter Brief Amicus Curiae of Gun Owners of America, Inc.].

42. See, e.g., Respondent’s Brief, *supra* note 27, at 19.

43. See, e.g., Brief Amicus Curiae of Gun Owners of America, Inc., *supra* note 41, at 10 (citing VA. CONST. §§ 2–3); Respondent’s Brief, *supra* note 27, at 15 (citing BOSTON EVENING-POST, Nov. 21, 1768, at 2).

44. Brief of Second Amendment Foundation as Amicus Curiae Supporting Respondent, *supra* note 34, at 14.

45. See Brief of the Cato Institute, *supra* note 32, at 4–21; see also Brief of Amicus Curiae Academics for the Second Amendment in Support of the Respondent at 15, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

46. Brief of Amicus Curiae Academics for the Second Amendment in Support of the Respondent, *supra* note 45, at 15.

47. Brief Amicus Curiae of Gun Owners of America, Inc., *supra* note 41, at 22–27.

48. Brief of the Second Amendment Foundation as Amicus Curiae Supporting Respondent, *supra* note 34, at 14; see also *Heller*, 554 U.S. at 584–85, 585 n.8.

49. See generally *Heller*, 554 U.S. at 570.

50. *Id.* at 655.

51. *Id.* at 592.

historical connection between disarmament and tyranny.⁵² Supporting the “historical origins” arguments, Justice Scalia suggests that the Second Amendment codified a pre-existing right that was “inherited from our English ancestors.”⁵³

D. The Implications and Powers of Natural, Individual Rights

Importantly (though not surprisingly), the rights arguments found in both the court briefs and Justice Scalia’s majority opinion reveal much about the nature of the individual they are designed to protect. In abstract, ideal typical terms,⁵⁴ this category of rights protects a very specific person. He is an autonomous, freedom-loving individual whose forefathers fought against absolute monarchs and drew on their inherent nature to depose tyrants and topple kings. As a direct descendent, it is in his nature to be ever-wary of the state and its political apparatus, which are simply necessary evils for him to remain a free and autonomous, rights-bearing individual. The Second Amendment to the U.S. Constitution is emblematic—the right to bear arms (so it is argued) allows a citizen to retain this natural state of independence, to defend his freedom, and as a last resort wage a Lockean revolution to alter or abolish his own government if, for example, in the course of events it becomes abusive or destructive.⁵⁵ The individual that emerges from these briefs is actually well-known and central to Western liberalism.

Such talk of natural rights in these briefs may seem abstract and a far departure from the foundations of law. Natural rights arguments, however, in no way represent an ethereal exercise in philosophy, theory, or metaphysics. Natural rights arguments are often based on fundamental laws of nature, religious principles, and so forth.⁵⁶ These qualities make natural rights powerful political weapons and formidable opponents out of the individuals wielding them, for they locate the source of the rights claims in a conceptual universe that is entirely unassailable by either positive law or political power. Natural rights, therefore, can never be taken away by the law, or any other political or legal force, no matter how mighty it may be.

52. *Id.* at 592–95.

53. *Id.* at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

54. An ideal type is an analytical abstraction coined by Max Weber, that serves to represent not an actual entity or individual, but provides a more concrete form to a particular concept. *See generally* MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947).

55. A very loose, interpretive paraphrase of the Declaration of Independence. *Cf.* KROUSE, *supra* note 9, at 6.

56. *See generally* WILLIAM A. EDMUNDSON, *AN INTRODUCTION TO RIGHTS* (2004).

Embedding such natural rights arguments within the historical record—quite common in the amici briefs—is no accident. The resulting depiction is a stylized narrative of the birth of the United States. The theories, reasons, justifications, and history all invoke a version of the nation’s own civic history. This “Second Amendment rights story” identifies the historical antecedents and justifications for the American Revolution, as well as the principles that were responsible for the birth of the nation. In this story, the right to bear arms represents the quintessential liberal right in Western political thought. It is in a class of civil and political rights intended historically to keep the political apparatus of the state small, limited, and out of the affairs of its citizens. These individual rights such as the freedom of speech and religion, as well as the protection against unreasonable search and seizure, are intended to provide for citizens a substantive guarantee that they will be free from undue government intervention and other forms of state coercion in their private lives.⁵⁷

In addition, the civic narrative being foundational, its protagonist—the autonomous, individual, freedom-loving, rights bearer—is also central to Western society. This notion of rights permeates and shapes how we think about rights in the United States. It is a powerful political and conceptual device. But as argued below, it often overshadows other conceptual formulations that offer greater analytic traction for an empirical approach to the study of rights.

II. THE RELATIONAL NATURE OF RIGHTS

Although the idea of individual rights is a powerful leitmotif within Western society, the concept is actually, at its most basic essence, a relational one that extends far beyond any particular “rights holder.” This overlooked relational dimension resides within every manifestation of the concept of rights.⁵⁸ Within such an understanding of rights, rights claims (as well as the individuals claiming them) are viewed not in terms of natural, individual, or inherent traits, for example, but within the social relationships that constitute them. Although a number of scholars have suggested that rights are most

57. Isaiah Berlin has dubbed this the “freedom from.” Somers & Roberts, *supra* note 17, at 387. In his *Blackstone’s Commentaries*, St. George Tucker suggests that the Second Amendment and the right to self defense “may be considered as the true palladium of liberty.” *See Heller*, 554 U.S. at 606 (citing 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. at 300 (1803)).

58. This distinction is in no way connected to the debates over individual vs. group rights. *See, e.g.*, WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (2003).

fundamentally about relationships, this observation is generally not elevated to the level of an analytic framework for studying rights as it is here.⁵⁹ Most importantly for legal analyses, this dimension of rights can only be accessed by looking at rights along with *duties*. Two categories of relational rights are discussed below: enforceable rights and membership rights.⁶⁰

A. *Enforceable Rights and Duties*

Unlike the natural and pre-political rights claims discussed above, a *legally enforceable* right to bear arms always requires other parties to be realized. Therefore, if it is to be guaranteed under force of law, the individual right to bear arms does not and *cannot* exist completely by itself. If the Supreme Court in *Heller*, for instance, decided that there was an individual right to bear arms and that residents of the District of Columbia were permitted to possess handguns as they wished, but did not specify the individuals or entities that had the duty to honor the right, the legal right would be entirely meaningless. In fact, it would not even constitute a legally enforceable right. Without a legal obligation, the District of Columbia, its mayor and employees would be under no obligation to lift the ban. Moreover, there would be no way to bring a cause of action to enjoin the government to honor the right without a legally responsible duty holder.

So, as Oliver Wendell Holmes argued in *The Common Law*, “[l]egal duties are logically antecedent to legal rights . . . Legal duties then come before legal rights.”⁶¹ Thus, *before* a right can become an “enforceable right” a duty holder must be identified. Through the *Heller* decision, for instance, the District of Columbia became duty-bound to Dick Anthony Heller (as well as to other actual and prospective District gun owners) to honor their Second

59. See Edward H. Carr, *The Rights of Man*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 5 (UNESCO ed., 1948); Claude Lefort, *Politics and Human Rights*, in THE POLITICAL FORMS OF MODERN SOCIETY 239 (John B. Thompson ed., 1986); Arnold J. Lien, *A Fragment of Thoughts Concerning the Nature and the Fulfillment of Human Rights*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 11 (UNESCO ed., 1948); Quincy Wright, *Relationship Between Different Categories of Human Rights*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 131 (UNESCO ed., 1948); Morris Ginsberg, *The Individualist Basis of International Law and Morals: The Presidential Address*, 43 PROC. ARISTOTELIAN SOC’Y at i, i (1942–43); see generally IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); Hohfeld, *supra* note 20.

60. There also exists an entirely separate temporal dimension. While this third dimension of rights is not discussed in the present Article, it is the subject of a future analysis.

61. HOLMES, JR., *supra* note 4, at 219–20.

Amendment right as outlined in *Heller*.⁶² But even though the District of Columbia was identified as a duty holder, if it failed or refused to act in accordance with its legally defined status—e.g. it refused to repeal its prior prohibition on handgun ownership in the District—the nature of the right would be proportionally diminished. In fact, the potency of any enforceable right is directly related to the duty holder upholding its own obligations vis-à-vis the rights holder. Conversely, the nature of the duty holder’s responsibilities and obligations is directly related to the qualities and characteristics of the enforceable right. So unlike the natural rights claims discussed above that placed the rights holder in an autonomous, individual position, an enforceable right by definition constitutes a relationship with other individuals and institutions.

The assertion that every enforceable right requires a duty holder is relatively mundane. This basic fact of law is not lost on any lawyer or law student. In fact, nearly a century ago, the legal scholar Wesley Hohfeld devised a sophisticated framework for categorizing and understanding this type of correlative relationship between juridical categories.⁶³ Although the typology he outlined in his seminal article extends to categories beyond the rights that are the focus of this Article, his schema of jural correlatives shows that entitlements such as rights never operate alone—they are constituted within a legal relationship that must include another party that undertakes a corresponding role.⁶⁴ In the context of enforceable rights, he shows that there is always a duty holder.⁶⁵ If there is no duty holder there is no legal right. If there is a legal right, there is a legal duty bearer. Thus, an enforceable right is not a thing exclusive to an individual that can exist in isolation from others—by definition, enforceable rights constitute a legal relationship between parties.⁶⁶ Though immensely insightful, the complexity of his

62. Though as the Court suggested, this right is subject to any superseding restrictions. *Heller*, 554 U.S. at 626. For instance, limitations on certain types of firearms and restrictions that prevent certain categories of individuals from owning or purchasing firearms. *Id.* at 626–27.

63. Hohfeld, *supra* note 20, at 28; *see also* Kennedy & Michelman, *supra* note 5, at 751.

64. Hohfeld, *supra* note 20, at 30.

65. *Id.*

66. The broader contribution of this typology was to show that the concept of rights cannot be used indiscriminately to refer to any entitlement—care must be taken in the legal setting, for example, to apply the concept of legally enforceable rights to a situation in which there is the necessary correlative duty holder. He accomplished this by showing that there are four primary categories of legal entitlements that are entirely distinct from one another: rights, privileges, powers, and immunities. Hohfeld, *supra* note 20, at 30. The jural opposites of these concepts—that is the legal concepts that represent the negation or absence of such entitlements—are no-rights, duties, disabilities, and liabilities. *Id.* On the other hand, when a person is said to have a right, a privilege, and power or an immunity, there must be another party that bears a correlative

typology as well as its abstract character has made it difficult to apply directly to contemporary legal problems. This “translatability” issue has prompted two admiring legal scholars to lament that his typology of rights, “like a sack of dried beans” survives, but is “unesteemed by those who have lost the recipe for its use.”⁶⁷ Nevertheless, it is the correlative nature of rights and duties that is of greatest relevance here.

Despite its logical and practical necessity, the “duties” portion of the legal equation is often omitted or overlooked in debates over rights. The briefs of the gun rights supporters in *Heller*, for instance, only mention duties with the briefest and most passing reference. Interestingly, the instances in which duties are mentioned in these briefs typically are not in the context of enforceable rights, but in the historical context of Second Amendment “militia” and “military service” duties.⁶⁸ Though significant, this absence of a “duties discourse” in such debates is not very surprising. For one, the language of rights no doubt represents a much easier and direct avenue for gathering support for a collective call to arms (so to speak). Indeed, as a rallying cry and political strategy the “individual right to bear arms” is a much more succinct legal and conceptual package for motivating collective action. The legal reality—that it is incumbent on gun rights supporters, if they wish their aspirational rights claim to bear the force of law, to first identify the necessary duty holders who in such legal capacity will constitute their correlative right to bear arms—is not quite as direct or politically expedient. So while rights can be (and are) powerful political weapons, in this instance they are more powerful when denuded of the underlying legal specificity.

Beyond framing and political mobilization strategies, however, there are no doubt other reasons why duties escape attention. For one, the question before the Supreme Court was one of rights rather than of duties. The respondents only had to convince the Court of its Second Amendment rights claim for the District of Columbia, as the petitioner, to become the duty holder. The latter point raises a related issue: within the confines of a legal setting—be it in a court, in legal scholarship, in a judicial opinion, or in doctrinal analysis, it is often unnecessary to give explicit mention to the correlative relationship between rights and duties. Legal and doctrinal analyses have built-in methods for distinguishing the implied contours of the correlative relationship between rights and duties absent its explicit mention. In such cases duties are so obviously implied in the context of enforceable

duty, has no-right, a liability, or a disability. *Id.* at 33. For an excellent discussion on the broader historical dilemmas see Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 979.

67. Kennedy & Michelman, *supra* note 5, at 751.

68. This in itself is extremely revealing and will be discussed in the following section.

rights that it is no doubt semantically and intellectually more practical simply to focus on rights. So although it is often unnecessary (or even ill-advised) to invoke the conceptual formalism that posits the fundamental correlative relationship between rights and duties, the central idea here is that enforceable rights always refer to a *relationship*.

Although the word “right” is generally used to describe the implied relationship between duty and right holder, it is actually the *relationship* that defines the right. This point is crucial. The claims of a pre-political, natural right to bear arms that is inherited by virtue of one’s civic ancestry, the fundamental laws of nature, or one’s inherent attributes, for example, do nothing to define the terms of the enforceable right. The guarantee that the District of Columbia, or any other city or municipality will permit handgun ownership within one’s home, for example, is a consequence of the rights-duties relationship. Those natural rights might provide support or the basis of an argument for why a particular rights claim should become law. They do nothing, however, to determine the substance of the enforceable right. The latter is a function of the correlative relationship. Thus the natural rights that were so central to the gun supporters’ arguments in their briefs are only a means to an end. And once that end is attained, their power and importance cedes to that of the actual association between the rights holder and the duty bearer. This means that when an enforceable right is in question, much more can be inferred by focusing on the nature of the *relationship*, than just the individual attributes of the rights holder or the duty holder. This is not to say that the affected individuals are in any way unimportant or should be overlooked altogether. It does suggest that there is much to understanding rights that lies beyond the individual level of analysis. Indeed, if a complete and nuanced understanding of rights is to be attained, it is essential to leave the individual dimension for the relational dimension.

So while the word “right” is often used simply as a useful semantic or conceptual proxy for the correlative relationship, difficulties can arise. A major problem is that the signifier “right” can obfuscate the fact that, at the level of enforcement, it is the underlying correlative relationship that defines the right, rather than the other way around. For example, if the only goal within a struggle for rights is to attain the nominal right at the expense of creating the underlying and fundamental relationship with an entity that can assume the necessary duties (thereby constituting the enforceable right), its substance is sure to be lacking.⁶⁹ The fact that it is the nature of the correlative relationship that reveals more about the nature of the enforceable right than

69. See ROBERTS, *supra* note 24, for historical examples, in which rights aspirants neglected to name duty holders and suffered greatly when the duty holders were named on behalf of their cause, thereby subverting the entire project.

the individual claiming those rights applies as much to the struggle for human rights as it does to constitutional rights.

The successful adoption of a human rights instrument is a great accomplishment and certainly cause for celebration. But just because a text outlines fundamental, inalienable human rights that everyone apparently possesses, unless there are duty holders that undertake the correlative obligations that the statement of rights defines, the rights remain normative, moral, and aspirational rather than binding. The Universal Declaration of Human Rights (UDHR), for instance, is one of the greatest human rights milestones of modern times. But because it identifies no legal duty holders (and was not intended to), it serves as a normative or moral statement of principles, not as enforceable law.⁷⁰ While the rights within the UDHR are virtually indistinguishable from the rights listed in binding treaties such as the International Covenant of Civil and Political Rights, the latter identifies a relationship between rights and duty holders. The documents then occupy two entirely distinct dimensions of rights and should not be assumed to accomplish anything more than is defined by the duty holders.

So although the discourse of rights seems to imply a focus on the individual “rights bearer,” in the context of enforcement, what is implied and often unstated is an association with other units of society. So now there is a dyadic relationship that inheres within rights. But what can be said about the nature of this dyadic relationship itself? Where is this relationship situated? What are its foundations? Where does it come from and what sources can it call on for its own strength and justification?

B. *Rights of Membership*

In *Heller*, the respondent claimed that both he and the District of Columbia were subject to the laws of the United States Constitution. To support this contention, the respondent argued that because the “[p]etitioners’ legislative authority is not above the Constitution, but derived from it,”⁷¹ “the government of the nation’s capital must obey the Constitution.”⁷² Justice Scalia agreed that the District of Columbia was bound by the laws of the U.S. Constitution. Therefore, he wrote, “[a]ssuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him

70. See Wiktor Osiatynski, *On the Universality of the Universal Declaration of Human Rights*, in HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 33, 46 (András Sajó ed., 2004).

71. Respondent’s Brief, *supra* note 27, at 63.

72. *Id.* at 62.

to register his handgun and must issue him a license to carry it in the home.”⁷³ This piece of the gun rights supporters’ argument identifies the foundational and controlling legal authority while providing justification for the claim. It also situates the claimant and the government under the same legal umbrella—they are both bound by and subject to the laws of the U.S. Constitution. Situating a claim within the relevant applicable law is, of course, an essential element of legal argumentation and process. It is also what gives the rights claim its legal meaning. Without situating it within the relevant and applicable law, a rights claim is all but legally meaningless. A Second Amendment rights claim in Great Britain, for instance, is void of the legal meaning it carries if proclaimed within the District of Columbia.⁷⁴

In addition to providing legal meaning, situating a rights claim under the relevant and controlling legal authority also implies *membership* within a particular legal and political community. By virtue of the claimant’s place within that community—be it local, state, or federal, for instance—he accrues a set of associated rights and legal guarantees. Thus, rights can be said to be sourced from one’s membership within a legal and civic community. Again, within this relational dimension of rights, the nature and parameters of the relationship define the right. But unlike with enforceable rights, it is not simply a relationship between a right and duty holder. It is the relationship between an individual and the broader group or community (i.e., as a member) that defines the right.

C. *Duties of Membership*

Membership is never granted free of charge. Whether it is in the context of citizenship, cultural membership, ethnic membership, or membership at one’s local gym, there are always minimum conditions, obligations, and associated duties.⁷⁵ So in addition to rights protections, various duties and obligations accrue by virtue of one’s membership within a particular group. The formal obligations of citizenship, for instance—defined here loosely as legal and political membership within a nation or state—may establish legally enforceable duties to pay taxes, serve on juries, serve in the military, and so forth. This is similarly true in non-legal settings. Claiming membership in a particular religion may impose obligations relating to prayer, attire, food

73. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

74. See David Kopel et al., *Is There a Relationship Between Guns and Freedom? Comparative Results from Fifty-Nine Nations*, 13 *TEX. REV. L. & POL.* 1, 11 (2008).

75. There are also often substantial penalties for relinquishing one’s membership (e.g., the Gun Control Act of 1968 prohibits selling firearms to those who have renounced their U.S. citizenship). See 18 U.S.C. § 922(d)(7) (2012).

consumption, and community service. Membership within a labor union might obligate its workers to pay dues and attend meetings. So as argued above, rights claims always situate a claimant within a particular legal and political community. And through a rights claim, the claimant is therefore claiming membership within a particular legally defined group or class.

Now, what is the relationship between the rights claim and one's duties of membership? The *Heller* briefs provide an indication of the specific relationship between membership rights and membership duties. As mentioned above, to locate support for the claim that there exists an individual right to bear arms, the respondent and the amici cite numerous pre-colonial and colonial sources. Interestingly, in the forty or so amicus briefs, the discussion of duties of membership—that is an individual's responsibility to the society he is a part of—is virtually absent. There is one notable exception: the numerous quotes from colonial-era sources that correctly pair the rights of citizens with the duties of membership that one has to his community. Indeed, Blackstone, Thomas Jefferson, John Adams, and many others certainly argued there was a basic right to bear arms. But these three lawyers who are cited a number of times in the *Heller* briefs also understood quite well that this right was inseparable from the broader duty to protect one's own society. The founders knew well that one's rights within a polity were founded on one's duties and obligations to the polity. The amici, however, seem to almost inadvertently include these quotes that reference *duties of membership*.⁷⁶ But while the founders time and time again highlight the individual right to bear arms within the context of one's duties to the broader community, the respondent, the amici, and even Justice Scalia himself, skip over the numerous references to the inseparable duties and focus their attention almost exclusively on rights. For instance, in its attempt to locate the historical origins of the right to bear arms, the Cato Institute cites eighteenth century sources that are acutely aware not only of the inseparability of duties and rights, but the fact that any rights claim is dependent on one's membership *and* his duties of membership. In 1785 the "Recorder" wrote, "It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the

76. See, e.g., Brief Amicus Curiae of Organizations and Scholars Correcting Myths and Misrepresentations Commonly Deployed by Opponents of an Individual Rights-Based Interpretation of the Second Amendment in Support of Respondent at 14, 18, 20–21, *Heller*, 554 U.S. 570 (2008) (No. 07-290); Respondent's Brief, *supra* note 27, at 13.

preservation of the public peace.”⁷⁷ The Cato Institute used this to support the contemporary right to bear arms, with no discussion of the respondent’s corresponding duties to the broader society on which the right is based.

The Gun Owners of America wrote in their brief that “America’s founders viewed armed resistance to tyranny as not only a ‘right,’ but a ‘duty.’”⁷⁸ The Declaration of Independence, of course, provides that when “the People” are confronted with abuse and tyranny, “it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.”⁷⁹ They too, however, do not discuss the duties of membership that gun owners today found their rights on. Instead, they focus on what is said about the rights—and in the process they wrench the correlative foundations of legal and political membership from one another.

III. A NEW MULTILEVEL FRAMEWORK FOR THE EMPIRICAL STUDY OF RIGHTS

A. *The Empirical Study of Rights*

It is necessary to receive the distinct dimensions of rights as they actually exist. The individual rights claims in the *Heller* case show that within the dominant natural, individual conception of rights, there actually exists a relational dimension in which rights exist by virtue of their relationships. The power and influence of the individual notion of rights is undeniable. For even when one is referring directly to the relationship from which a right originates, the individual conception of the “rights bearer” possessing his own bundle of rights tends to prevail.⁸⁰ The above analysis shows that within the relational dimension there exist enforceable rights and rights of

77. Brief of the Cato Institute, *supra* note 32, at 10–11 (citing Recorder, *Legality of the London Military Foot-Association* (1780), reprinted in WILLIAM BLIZARD, *DESULTORY REFLECTIONS ON POLICE* 59, 59–60 (1785)).

78. Brief Amicus Curiae of Gun Owners of America, Inc., *supra* note 41, at 18.

79. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

80. See, e.g., J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712 (1996) (“The currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a ‘bundle of rights.’ In its conventional formulation, the bundle of rights thesis is a combination of Wesley Hohfeld’s analysis of rights and A.M. Honoré’s description of the incidents of ownership. According to Hohfeld, any right in rem should be regarded as a myriad of personal rights between individuals. Thus my ownership of a car should not be regarded as a legal relation between me and a thing, the car, but as a series of rights I hold against all others, each of whom has a correlative duty not to interfere with my ownership of the car, by damaging it, or stealing it, and so on.”).

membership.⁸¹ The relational dimension only appears when “duties”—the lynchpin for achieving a precise depiction of what is actually occurring beneath the surface of these debates—are brought back into the rights equation.

As mentioned above, in practice and in legal analyses it is generally unnecessary to specify the precise nature of the underlying relationship beyond the word “right,” which tends to serve as a placeholder or a proxy for the actual underlying relationships. But all these omissions add up. For those studying, adjudicating, or otherwise seeking lasting solutions for these social dilemmas, rights must be a precise and well-defined concept. Duties—though essential and very real—are often generally an afterthought. As a result the nature of this essential relationship is obscured and fuzzy at best.

Replicating the uncertainty and indeterminacy of the rights concept within an analysis is simply a recipe for intellectual confusion, and conflict. The purpose of scholarship is to simplify and make sense out of a complex world—it is not to simply reproduce its complexity on paper. Therefore, within the study of rights, it is crucial to employ an analytic framework that is faithful, not to the discourse of rights or the political interests of those fighting for them, but to the underlying reality, itself.

Taking stock: a conceptually precise and methodologically rigorous framework for the empirical study of rights that approximates what lawyers already do quite unconsciously requires several elements. It would (1) have to permit empirical engagement with rights in a way that, (2) distinguishes between the distinct ontological representations that signifiers tend to conflate, and (3) focus on the relevant unit of analysis that in the case of enforceable rights is a dyadic association between rights and duty holders. Such a framework would offer an approach for accessing the distinct countenances of a single object. It therefore would afford the opportunity to look at the same thing—e.g., a rights claim—from several different, yet entirely correct, perspectives. In concert, they should provide a holistic, nuanced, and hopefully comprehensive depiction of the object in question.

A useful analogy is to think in terms of the system of airport screening that is now commonplace throughout the world. To determine potential threats airport screening—in a very similar fashion—relies on a host of analytic methods. Used in conjunction with one another, identification screening, behavior profiling, metal detectors, back-scatter machines, pat-downs, and puff-detection for explosives are complementary analytic techniques that work in concert with one another to provide a holistic depiction of an airline

81. There also exists a temporal dimension that is distinct from the other dimensions. For reasons of space and clarity, the temporal dimension is the subject of future inquiry.

passenger that would be impossible using a single approach. Looking for molecular traces of explosives in no way suggests it is incorrect to employ a different analytic technique such as metal detection or pat down. Evidence of harmful intent exists at all of these different levels of analysis. So similarly, an analytic framework for the study of rights should at the very least be able to access relevant meaning from each of the aforementioned dimensions of rights.

B. *Individual and Natural Rights*

Ascertaining the truth of the claim that individual rights originate in the state of nature, one's own inherent traits, or the field of morality, as Holmes suggests, is best left to philosophers.⁸² This admonition applies equally to empirical legal scholars and social scientists. This is not to dismiss such natural rights claims, belittle their relevance, or question their power. Quite the contrary—natural rights are unassailable. The historical record certainly shows that natural rights possess exceptional capacity to achieve various political ends. Indeed, the idea of universal, natural, individual rights was emancipatory and exerted great force on behalf of those on the winning sides of the French and American Revolutions. Recall Jeremy Bentham's disdain for natural rights discourse (referring to them as "a bastard brood of monsters, 'gorgons and chimaeras dire'").⁸³ The ferociousness of Bentham's anti-natural rights diatribe shows that much more than philosophical ideas was at stake. Indeed, natural rights permitted the destruction of the social and political arrangements that were both created and protected by existing positive law. For regardless of what is decreed in positive law, under a natural rights orientation, the final source of authority exists above and beyond the sovereign authority of the state. Though "only" philosophical ideas, these structures are potent, very real, and potentially transformative.

If natural rights pose such problems for opponents, kings, and despots alike, the empirical researcher is certainly adrift in this realm—ill-equipped (and ill-advised) to engage with them head on. Within the empirical domain, natural rights are in fact entirely unassailable in the first instance—they cannot be known nor challenged by fact. Such is their entire purpose. These natural rights are the legal equivalent to *a priori*s, or theoretical presuppositions; they are foundational to the argument, yet entirely unchallengeable. One either accepts the argument along with the

82. HOLMES, JR., *supra* note 4, at 219.

83. Jeremy Bentham, *Anarchical Fallacies: Being An Examination of the Declarations of Rights Issued During the French Revolution*, in 2 THE WORKS OF JEREMY BENTHAM 491, 523 (John Bowring ed., 1843).

presuppositions or dismisses the entire argument along with the presuppositions.

Due to the historical circumstances through which the United States came into being (not to mention the longer history of Western civilization), the choice to dismiss the natural and individual foundations of rights is not an option—they are too ingrained within the legal, political and social institutions of Western society. Moreover, they actually do serve a purpose and can accomplish great good if wielded correctly. This does not mean one needs to accept it as true.⁸⁴ It does mean that as a discourse and a practice it is an empirical reality that must be approached on its own terms. So, if the empirical researcher, however, wishes to study these natural rights claims empirically, this can certainly be done—just not at this level of analysis.⁸⁵

C. *Enforceable Rights*

As mentioned above, to a large degree conventions peculiar to doctrinal analyses possess internal mechanisms and methods that differentiate between natural rights and legally enforceable rights.⁸⁶ Doctrinal conventions also have the capacity to distinguish the correlative relationship between rights and duties without necessarily providing explicit mention. Once a researcher leaves this field of doctrinal analysis for the empirical analysis of the law, however, semantic indeterminacy reigns. Though linguistically identical, the enforceable “right” that implies a duty bearer, for example, exists in a universe entirely separate from the natural, moral, aspirational, or otherwise non-legally binding “right” discussed in the previous section. This natural and individual understanding of rights no doubt bleeds into understandings of enforceable rights. So even when talking about an enforceable right in colloquial usage, the individual notion prevails. The commonly invoked phrases, “right holder,” a “right bearer,” or one’s “bundle of rights,” tend to imply that those enforceable rights are exclusive to the individual and exist independent and apart from anything else in the legal or social world. The doctrinal conventions that parse through such murkiness need to be elevated, adapted and transposed into a framework for the empirical study of rights.

In strict analytic terms, when an enforceable right is invoked, its most meaningful referent is a dyadic relationship, rather than the individual monads that comprise it. Because the pre-political and natural notions of rights that were foundational and so important above, have little or no bearing

84. That is, true in the sense of referencing an ultimate reality.

85. This part of the discussion will be picked up within the context of social positioning below. *See infra* Part III.D.

86. *See supra* pp. 18–19.

at the level of enforcement, the important object of study becomes the *relationship* between the right and duty holder, rather than the individual attributes of the right or duty holder. Put slightly differently, duties *together with* rights define the individual units they connect—not the other way around. Thus, it is the nature and quality of the interaction that becomes the unit of analysis.⁸⁷ At this analytic level, the focus falls on the *relationship* as the explanatory variable as opposed to the individual entities named as right and duty holders.

Within the present framework, the analytic focus would not be on either District of Columbia or *Heller*, but the correlative relationship that exists in between the two. The nature of the correlative relationship then tells us about the individual units within the relationship. Reality, however, is always much more complex. For as soon as the District of Columbia was named as a legally bound duty holder vis-à-vis those parties claiming their Second Amendment rights, a complex network of actual and hypothetical legal relationships between gun owners in the District (or prospective gun owners, as the case may be) suddenly emerged. In this regard, a much more complex map of associative networks is needed to depict these relationships. Again, it is the connecting strands that are of relevance here—by examining the nature of the contours and parameters of the correlative relationship, the nature, obligations and identities of the nodes are revealed. The individual right to bear arms—as articulated in *Heller*—can also be diagrammed with respect to previous laws that, for example, limit or prevent felons, drug users, those who have renounced their U.S. citizenship.

The strands connecting such prohibited individuals with the D.C. government depict a very different relationship. At this level of analysis, however, these interlacing strands are much more than just the connections between important nodal objects of study. These pathways *are* the objects of study.⁸⁸ Their nature, strength, duration, intensity, directionality, and so forth represent the crucial legal pathways along which flow the resources, obligations, claims, goods, services, and so forth that characterize this correlative relationship. These structural pathways of legal rights and duties are, in a sense, the invisible backbone of our society.

87. Somers & Roberts, *supra* note 17, at 413.

88. See generally Margaret R. Somers, *Rights, Relationality, and Membership: Rethinking the Making and Meaning of Citizenship*, 19 LAW & SOC. INQUIRY 63 (1994).

D. Membership Rights

In any empirical study—whether analyzing planets, childhood development, or Second Amendment rights claims—it is always necessary to place the object under investigation within a frame of reference. It is impossible to infer any meaning without situating the object of study within appropriate and recognizable frames of reference. One can only answer, for example, whether the earth is a small or a large sphere if it is situated within a particular frame of reference in which distinctions can be drawn amongst categorically like objects. Within our solar system, the earth is a relatively small sphere, as when compared to Jupiter or the sun. But relative to an apple or an orange, it is quite large.

The same applies for rights claims—they only make sense when they are situated within a particular frame of reference. Being able to identify where the rights claim exists within the greater legal or social whole is therefore essential. Within the law, this situated meaning is gleaned through legal concepts and conventions such as jurisdiction, standing, controlling law, and so forth. For the empirical analysis of such claims it is still necessary to situate them as individual units within a broader legal, social, political, or cultural frame of reference, for instance. By situating or positioning the claims within a relevant frame of reference, the empirical researcher is able to locate meaning, identify power differentials, and access social identities—all of which are a function of positioning.

For empirical analyses, whether a rights claim is legally binding or not is not analytically relevant—the relevant meaning to be extracted from the claim is where it positions the claimant within the particular sphere of relevance that it invokes. This is not to say that whether the claim is legally binding or aspirational is unimportant—it is in fact extremely important in the broader context of an analysis. But for the empirical aspects of the analysis of a rights claim, questions of legality must be bracketed while the meaning that accrues by virtue of the claimant's social location is assessed.

For instance, in its amicus brief the Eagle Forum Education and Legal Defense Fund claimed there existed a pre-political, natural right to bear arms and to defend oneself.⁸⁹ As a non-binding normative statement, a doctrinal approach or strict legal analysis reveals very little, if anything. But on the other hand there is a universe of meaning within this claim—it just needs to be accessed within an empirical framework that can position and situate it

89. Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Respondent at 8–10, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

within relevant frames of reference. Here the social scientific ideas of *positionality* and *subject positioning* come to the fore.

A right claim—whether it is legally enforceable or merely an aspirational, non-legal, moral statement—reveals a particular “subject position” for its claimant.⁹⁰ A subject position is a location within a “complex configuration of relationships and institutional arrangements. Rights—whether human or citizenship rights or other kinds—are the label we use to characterize certain kinds of social arrangements.”⁹¹ By referencing the “laws of nature,” or the inherent and basic human qualities that make man who he is, the amici are situating their claims (and their own existence) under a broad umbrella of nature, science, a Creator, culture, or man’s inherent traits. Importantly, other individuals also exist under the same umbrella(s). The higher order principles that define such domains govern not only the rights claimant’s existence, but other individuals’ existence as well. Therefore, the rights claim possesses an associative and relational dimension that identifies the claimant’s location vis-à-vis other individuals. This associative dimension—depending on the nature and essence of the specific claim—situates the claimant and others like him within a very particular social location. In this context, a right is understood not as a “thing” an individual possesses (as implied by the commonly used phrase “an individual’s bundle of rights”), but rather in terms of how it defines that “individual’s *position* in a fluid network of social relations” and institutional configurations.⁹² In a similar manner, the ubiquitous historical arguments that appear in the *Heller* briefs and that serve to ground the arguments of the pre-political right to bear arms also position these rights claims within a common historical setting. So Holmes’s assertion that moral and aspirational rights claims are best left to philosophers is only partially correct.⁹³ If the source of rights is assumed to reside within the individual, the state of nature, God, or any other non-empirical realm, then yes, this is work for philosophers and theologians. But, if the rights claims originate within society, or any other empirical realm (which they always do), then this is surely the work of empirical researchers.

While situating an object within a relevant frame of reference may provide meaning, the terms “positionality” and “subject position” are neutral analytic categories, and therefore are devoid of the very social meaning that is sought here.⁹⁴ To apply them to the social, political and cultural setting they are being used to explain (and thereby locate the social meaning that inheres within the

90. Somers & Roberts, *supra* note 17, at 413.

91. Somers & Roberts, *supra* note 17, at 413.

92. *Id.* (emphasis added).

93. *Cf. supra* note 82 and accompanying text.

94. *See* Somers & Roberts, *supra* note 17, at 413.

claim), one needs to look at what positioning translates to in a social setting. In social terms, the idea of “positioning” translates to the concept of *membership*. The claimant is thus asserting membership within this class or group of individuals that exists under the same natural, historical, cultural or social umbrella, for instance. As discussed at length above, a certain set of duties is always associated with membership.⁹⁵ The preceding discussion of subject positioning applies to identifying correlative duties of membership just as it does for membership rights. Below, **Figure 1** categorizes four discrete dimensions of rights, along with their distinct empirical and normative foci.

Figure 1

	Analytic Plane	Unit(s) of Analysis	Normative Elements
First Analytic Level	Individual Rights	Monads	<i>A Priori</i> Rights; Self Interest
Second Analytic Level	Rights – Duties Relationship	Dyadic Associations	Enforcement; Guarantees; Cooperation
Third Analytic Level	Membership	Positionality; Social Location	Social Inclusion; Social Embeddedness; Interdependency
Fourth Analytic Level ⁹⁶	Temporal Transformation	Process; Concept Formation	Redefining Concepts; Toward Justice

IV. IMPLICATIONS & PRINCIPLES

The rights claims from *Heller* show just how foundational and entrenched the individual, natural notion of rights is within contemporary society. Even when the rights claimants are talking specifically about social relationships the individual conception of rights prevails. While this is fine for philosophical musings or political debates, for the empirical study of rights,

95. See *supra* Part II.C.

96. Although this temporal dimension is not discussed in the present Article, it is the subject of a future piece.

it is necessary to approach these separate dimensions of rights independently of one another, as they actually exist. Toward the goal of analytic precision and nuance, the most important step is for researchers to take duties more seriously; for duties and rights within the relational dimensions are logically and legally (as well as in practice) inseparable.⁹⁷ An analysis of the right to bear arms under the present framework that looks at both duties and rights—and importantly the duties that a rights claimant owes the rest of society by virtue of her own membership—might produce a determination that is entirely consistent with Justice Scalia’s majority opinion. Then again, there is a likelihood that it may not. Importantly, this type of framework identifies the legal pathways that link the individual with society. When used in conjunction with a doctrinal approach, it provides a much more nuanced and robust understanding of how the law courses through society. Mapping these connections shows how individual actions, judicial decisions, and policy regimes impact not only the individual rights claimant, but also through relations of duties and rights, how they affect the society at large.

The gun supporters’ briefs in *Heller* focus solely on individual rights claims (rather than claims that invoke associative rights and duties).⁹⁸ Thus, as opposed to founding their arguments on what their associated duties to the society are, they attempt to divine the source of their rights within the fictitious state of nature, to somehow identify inherent “human qualities,” or resort to recounting illustrious (though somewhat mythological) civic histories. Natural, individual rights claims are a wonderful subject for philosophical debate. They are also powerful and persuasive political weapons. But legal or social creatures they are not.

Rights claims as they exist within the law and within society (as opposed to within the state of nature, let’s say) are founded on relationships and membership within a broader community. Relationships are associative and work in two directions. The law maps these relations through rights and duties. But when separated from duties, the associative *quid pro quo* that is central to any legal or social relationship is lost. Legal rights are reduced to mere politics—one-way paths directed toward individual interests, restricted purposes, and exclusive ends. The only way a group or society can sustain itself is through the individuals that comprise it. As members, individuals gain protection while the collectivity sustains itself through the individuals’ duties. But without duties—that is, if rights claimants ask for more from society than they return—society as a whole is bound to suffer.

97. Assessing *Heller* in light of this new analytic framework is beyond the scope of this Article. There are a few brief, yet important, points worth noting, however.

98. See *supra* note 27.

One of the most important consequences of distinguishing between the individual and associative dimensions relates to the identity of the rights claimant. The ideal typical depiction of the autonomous, individual, natural rights bearer that was so foundational to the gun supporters in the *Heller* briefs (not to mention Western liberal democracies), is not constant across each of the dimensions. For instance, in the relational context of enforceable rights, when the correlative duty holder is brought into the picture and the explicit focus becomes the relationship between the bearer of individual rights and the duty holder, the identity of the rights holder shifts. He is no longer the autonomous, independent, individual rights bearer that he was in the state of nature. Indeed, his identity is no longer solely a function of his inherent attributes, pre-political characteristics, and natural rights. Now, removed from the state of nature and existing in society, it is not the inherent nature or characteristics or qualities of the individual actors that defines his enforceable rights—it is the relationship he enjoys with the state.⁹⁹ His rights are subject to and enabled by a legal relationship with the duty holder—which he, almost paradoxically, is dependent on for his rights. It is important to note that the assertion of integration and dependence does not in any way refute or deny the arguments or claims of autonomy and independence that were outlined by the gun rights supporters above. The two types of rights—moral, aspirational, or natural on the one hand, and legally enforceable on the other—exist within two separate and entirely distinct universes.

Similarly, within the relational dimension of membership, the rights claimant is not merely a pre-political, autonomous, individual unit in society. He (who now is just as likely to be a “she”), through a rights claim, is asserting her fundamental embeddedness within society. She exists not alone, autonomous, or existentially detached from society or its institutions. She is an integrated, socially embedded member of society. The society on the one hand, and the integrated duty and rights holders, on the other hand, depend on the other for identity and protection, existing together in a relationship of mutual necessity.

Along with the shift in the identity of the rights claimant, comes an inversion of the type of rights she values most. The supposed longing for autonomy, freedom from attachments, and independence from the state is turned on its head. Those who are removed and independent from the government, institutions, and other members of society are the most *disadvantaged* in society. Conversely, it is those in strong associative relationships with the government (and other social, cultural, economic, and

99. This is the very state that the individual, natural rights holder sought to be free from. In private law it is typically other individuals (rather than just the state) that become duty holders.

political entities) who are the most advantaged and secure in their rights. Indeed, without membership (or at the very least a claim to membership) it is logically *impossible* for one to assert her rights at all—since all rights claims possess an explicit or implied membership claim that serves as the foundation of the very right in question. The rights claim, in turn, receives its force by virtue of the individuals in the greater community acting out their duties of membership in concert.

Under this perspective, the rights worth having are not those that keep an individual autonomous and independent. In reality, they never were. Any claims of independence by those who are well off are in fact false. For lying just beneath the surface of such claims one invariably finds strong associations with powerful segments of society that establish even stronger dyadic relationships with the state, political representatives, lobbying groups, and so forth. The most important rights are those that ensure that everyone has a guaranteed place in society. They are the rights that allow one to enjoy the protection that comes with a robust network of associations and attachments with other individuals and institutions. Rights and the protections they provide are only attainable through such social attachments and embeddedness.

CONCLUSION

By reuniting the concepts of rights and duties within a precise analytic framework, scholars and lawmakers can access, interpret, and understand rights claims in a much more nuanced and methodologically rigorous context. When paired with a doctrinal approach, the contours of the law and associated rights claims appear in much greater relief. The framework outlined above should be viewed as a “research program.” As with all research programs, this framework is not in any way a final statement. This approach represents a particularized orientation for studying rights that other scholars can hopefully use for their own research while contributing their own insights, helping to refine it along the way.

Much has changed over the past two hundred years. Nevertheless, in the United States the underlying social equation remains the same as it has always been. For those who in the course of events confront forces too great to fight alone (which is everyone), it is both a duty and a right to defend and to seek the defense of oneself and others. The tyranny of illness, the frailties of age, and the specter of poverty are certainly such forces that no one wishes to have the “independence” to confront alone. In this sense social relationships—including relations with the state—are constructive, rather than destructive entities. Starting an analysis, a legal argument, or a judicial

opinion with individual, natural rights, obscures this crucial reality. In the twenty-first century, the deepest problem for the individual who has been wrenched from social attachments, civic membership, and government protection (or never had it to begin with) is how to renew the bonds of membership to gain inclusion and in doing so benefit from the protective capacity of such relations. Researchers, law and policy makers can (and will) find appropriate and lasting solutions. But somewhere along the way, we forgot about our duties. With a simple conceptual adjustment—elevating duties to be on par with rights—the world will look very different.