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### A Rhetorician's Practical Wisdom

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# A Rhetorician's Practical Wisdom

by Linda L. Berger\*

“We tell them what we have learned about the world by trying to prevent and resolve disputes through rhetoric.”<sup>1</sup>

## *Introduction*

For three years, I had the great good fortune to work in the office next to Jack Sammons. My good fortune extended to a coincidence of timing that allowed me to work with Jack on a co-authored article, *The Law's Mystery*.<sup>2</sup> During the time I worked next door, I felt cursed by an inability to grasp concepts that to Jack appeared inevitable and essential, whether those inevitabilities and essences were to be found within the law, good lawyering, or good legal education. The curse persisted throughout the writing of *The Law's Mystery*.

For Jack, the essence of a life well lived within the law could be found in the phrase *practical wisdom* and for me, that phrase was the mystery. It's not that there were no definitions: instead, they were too simple or too many, too diverse or too abstract. Where were the living stories of

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\* Family Foundation Professor of Law, University of Nevada, Las Vegas, Boyd School of Law. University of Colorado-Boulder (B.S., 1970); Case Western Reserve University Law School (J.D., 1985). Thank you to Jack Sammons, who is the reason for this Article but not to blame for it. I very much appreciate the conversation fostered by the Rhetoric & Law Colloquium focusing on *District of Columbia v. Heller* and sponsored by the University of Alabama in Huntsville and Stetson University College of Law in April 2014. And many thanks to my research assistant, Aleem A. Dhalla.

1. Jack L. Sammons, *A Sixth Semester Conversation*, 100 DICK. L. REV. 625, 630 (1996).

2. Linda L. Berger & Jack L. Sammons, *The Law's Mystery*, 2 BRIT. J. AM. LEGAL STUD. 1 (2013). In the introduction, with reference to the notion that this was a co-authored article, Jack wrote, “What you are about to read is not what it appears to be.” *Id.* at 2. Rather than two authors offering a theory and then applying it, “the authors did not come together in this sense on either part, the theory or the practice. The theory is almost entirely the work of one; the practice almost entirely the work of the other.” *Id.* at 3.

practical wisdom at work within the law?<sup>3</sup> Where were the concrete images of the practically wise?<sup>4</sup> I understood that practical wisdom grew out of practice and grew into action. But when I attempted to seize upon it for study and description, I chased an *elusion*. For this Symposium honoring Jack's scholarship, I decided to see again if I could catch a glimpse.

*What is Practical Wisdom?*

Although substituting "reason" for "wisdom," here is a concise beginning: "Practical reason is the general human capacity for resolving, through reflection, the question of what one is to do."<sup>5</sup> This kind of wisdom is practical because it grows out of the need to act and because it results in action. And it is wisdom because it resolves the question and because it does so through reflection. Practical reason asks "what one ought to do, or what it would be best to do" and it does so "from a distinctively first-personal point of view, one that is defined in terms of a practical predicament in which [we] find ourselves."<sup>6</sup> In contrast with theoretical reason, practical reason "is concerned not with the truth of propositions but with the desirability or value of actions. . . . Theoretical reflection about what one ought to believe produces changes in one's overall set of beliefs, whereas practical reason gives rise to action."<sup>7</sup>

As with so many things, Aristotle classified practical wisdom. First, he divided the virtues into two types, moral virtue and intellectual virtue.<sup>8</sup> Moral virtue is concerned with feelings, desires, choices, and decisions.<sup>9</sup> "Moral virtue is a state of character concerned with choice"<sup>10</sup> and is learned through habit and repetition.<sup>11</sup> Intellectual virtue is developed

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3. At a time when I was more critical of the story of King Solomon's wisdom, Jack told me to look closely there.

4. In the context of describing the "virtues carried by the practice by which we identify good lawyering when we see it," Jack noted that these "are observable characteristics of the person—of what he or she has become—rather than of performances of particular tasks—of what he or she can do." Jack L. Sammons, *Traditionalists, Technicians, and Legal Education*, 38 GONZ. L. REV. 237, 246-47 n.28 (2003) [hereinafter Sammons, *Traditionalists*].

5. *Practical Reason*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Mar. 26, 2014, <http://plato.stanford.edu/entries/practical-reason/>.

6. *Id.*

7. *Id.*

8. ARISTOTLE, NICOMACHEAN ETHICS 28 (David Ross trans., Oxford Univ. Press ed. 1980) (c. 350 B.C.E.).

9. *Id.* at 38.

10. *Id.* at 138-39.

11. *Id.* at 28.

not only through practice but also requires instruction.<sup>12</sup> Through teaching and instruction, intellectual virtue develops as a type of wisdom.<sup>13</sup>

Within the category of intellectual virtue, Aristotle divided once again.<sup>14</sup> Here, he distinguished wisdom from practical wisdom.<sup>15</sup> While “wisdom” combined scientific knowledge and intuitive thought, “practical wisdom . . . is concerned with things human and things about which it is possible to deliberate.”<sup>16</sup> The person who is practically wise not only makes wise decisions, but recognizes the best ways in which to act to fulfill the desired outcome.<sup>17</sup>

Practical wisdom thus fills in the gaps left by theoretical wisdom. In Book VI of the *Nicomachean Ethics*, Aristotle writes,

This is why we say Anaxagoras, Thales, and men like them have philosophic but not practical wisdom, when we see them ignorant of what is to their own advantage, and why we say that they know things that are remarkable, admirable, difficult, and divine, but useless; viz. because it is not human goods that they seek.<sup>18</sup>

For Aristotle, practical wisdom encompassed practical knowledge about living well.<sup>19</sup> According to Aristotle,

Now it is thought to be a mark of a man of practical wisdom to be able to deliberate well about what is good and expedient for himself, not in some particular respect, e.g. about what sorts of thing conduce to health or to strength, but about what sorts of thing conduce to the good life in general.<sup>20</sup>

So the possessor of practical wisdom is able not only to solve concrete and specific human problems but also to do so within the larger context of “the good life in general.”

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12. *Id.*

13. *Id.*

14. Many contemporary philosophers have attempted to classify intellectual virtues into more specific categories. See, e.g., JASON BAEHER, *THE INQUIRING MIND: ON INTELLECTUAL VIRTUES AND VIRTUE EPISTEMOLOGY* (2011); James A. Montmarquet, *Epistemic Virtue and Doxastic Responsibility*, 29 *Am. Philos. Q.* 331 (1992).

15. ARISTOTLE, *supra* note 8, at 144-51.

16. *Id.* at 146.

17. *Id.*

18. *Id.*

19. *Id.* at 38.

20. *Id.* at 142.

*Reading Justice Breyer in the District of Columbia*

My second reading of Justice Breyer's dissent in *District of Columbia v. Heller*<sup>21</sup> began as an effort to capture an example of practical wisdom. The dissent seemed written especially for a specific audience faced with a concrete problem at a particular time. It appeared to be an implicit guidebook for the lower court judges who would find little to help them in the majority's decision, but who would nonetheless be required to exercise judgment to make decisions in the real world.

From the outset, my instinct that Justice Breyer's dissent might be an example of practical wisdom did not depend on Justice Breyer's own explicit conclusion that his opinion is about the "practicalities, the statute's rationale, the problems that called it into being, its relation to those objectives—in a word, the details."<sup>22</sup> Nor did it rely on his argument that the decisions of state cases "provide some comfort regarding the practical wisdom of following [his preferred] approach."<sup>23</sup>

Unlike Justice Breyer, who disputes the claim that his approach is "judge-empowering,"<sup>24</sup> this assessment will conclude that it is. If Justice Breyer's opinion is judge-empowering, however, it is because he appears to be empowering judges (and perhaps state and city lawmakers) at decision-making levels below the United States Supreme Court.

Although he refuses to accept the characterization that his approach empowers judges, Justice Breyer acknowledges that his approach "requires judgment."<sup>25</sup> He claims that "the very nature of the approach—requiring careful identification of the relevant interests and evaluating the law's effect upon them—limits the judge's choices."<sup>26</sup> Moreover, he claims, "the method's necessary transparency lays bare the judge's reasoning for all to see and to criticize."<sup>27</sup> The task of determining how the Second Amendment should apply to modern-day circumstances requires judgment, Justice Breyer writes, "judicial judgment exercised within a framework for constitutional analysis that guides that

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21. 554 U.S. 570, 681 (2008) (Breyer, J., dissenting). The first reading was in preparation for the Rhetoric & Law Colloquium, *supra* note \*.

22. *Heller*, 554 U.S. at 687.

23. *Id.* at 691.

24. *Id.* at 634 (majority opinion). The criticism is voiced first in Justice Scalia's opinion for the court. *Id.* Justice Scalia concludes that the Second Amendment is the product of prior interest balancing by the people, which "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

25. *Id.* at 719 (Breyer, J., dissenting).

26. *Id.*

27. *Id.*

judgment and which makes its exercise transparent.”<sup>28</sup> That, he asserts, is preferable to “inconclusive historical research” combined with “judicial ipse dixit.”<sup>29</sup>

From a rhetorical perspective, Justice Breyer begins the dissent with an approach designed to move the audience from agreement on “easy” starting points to agreement on the conclusion.<sup>30</sup> He lists four points upon which all can agree, and of those four, moves at once to the last, the practical one that gets you to the somewhere else he apparently wants to go, the premise that the Second Amendment right is not absolute.<sup>31</sup> He quickly justifies that premise by juxtaposing it with the proposition that he implies is the majority’s unprovable claim—“that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars.”<sup>32</sup>

Justice Breyer delves into the historical evidence that preoccupied Justices Scalia and Stevens in their majority and dissenting opinions,<sup>33</sup> but concludes that the historical proof is only the beginning of the constitutional question.<sup>34</sup> He moves to the “process-based question: How is a court to determine whether a particular firearm regulation . . . is consistent with the Second Amendment?”<sup>35</sup>

And here lies the heart of any claim that Justice Breyer’s opinion—if it does not actually exemplify practical wisdom—may empower others to exercise it. *How should a trial court judge decide a lawsuit challenging a gun regulation on Second Amendment grounds after Heller?* This question—not the question of what the Second Amendment means—is the question that preoccupies Justice Breyer, both explicitly and implicitly.

Justice Breyer stakes the first claim to this opinion being an exemplar of practical wisdom. Posing the question of what constitutional standard the court should use, a question that was brushed aside by the majority, Justice Breyer states, and seeks to persuade us, that “[t]he question

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28. *Id.* at 721-22.

29. *Id.* at 722.

30. *See id.* at 682-83 (“I take as a starting point the following four propositions, based on our precedent and today’s opinions, to which I believe the entire Court subscribes.”).

31. *Id.* at 682-83.

32. *Id.* at 683.

33. *Id.* at 573 (majority opinion); *id.* at 636 (Stevens, J., dissenting). Sanford Levinson writes that “[n]either Scalia nor Stevens would earn more than a D were they ‘real’ historians; indeed, they would have been thrown out of any self-respecting graduate seminar in American legal history” in part because they ignored secondary scholarship and cherry-picked from the primary sources. Sanford Levinson, *Assessing Heller*, 7 INT’L J. CONST. L. 316, 326 (2009).

34. *Heller*, 554 U.S. at 687 (Breyer, J., dissenting).

35. *Id.*

matters.”<sup>36</sup> Responding to the majority’s argument that the D.C. law is unconstitutional under any standard, Justice Breyer asks the practical question that would occur to any lower court judge trying to apply the correct framework: “How could that be?”<sup>37</sup>

From there, he sets forth a process for judgment.<sup>38</sup> Any state gun control regulation, he argues, would pass the rational basis standard because it would bear a rational relationship to a legitimate objective of seeking to prevent gun-related accidents.<sup>39</sup> On the other hand, he continues, no strict scrutiny standard would work because every gun control regulation seeks to advance a compelling state interest, a primary concern for the safety and lives of citizens.<sup>40</sup> As a result, as a practical matter, Justice Breyer concludes, “any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry.”<sup>41</sup>

If that’s the case, Justice Breyer argues, the Court should go ahead and say so, that is, the Court should explicitly adopt an interest-balancing test.<sup>42</sup> His support for this argument is experience. Not the experience of the Supreme Court, which has little prior experience making decisions on this subject.<sup>43</sup> Instead, he writes, the Court should attend to the experience of the state courts, the “[c]ourts that *do* have experience in these matters.”<sup>44</sup> These courts, he contended, “have uniformly taken an approach that treats empirically based legislative judgment with a degree of deference.”<sup>45</sup>

Moving back to his role of providing guidance for lower courts, Justice Breyer reviews the results of a test that would evaluate whether the statute achieves its objective of saving lives.<sup>46</sup> First, from the point of view of the legislature (in this case, the D.C. City Council) that adopted the statute thirty years earlier, Justice Breyer points to the committee report finding that handguns—whose registration was restricted under

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36. *Id.*

37. *Id.*

38. *Id.* at 687-88.

39. *Id.*

40. *Id.* at 688-89.

41. *Id.* at 689.

42. *Id.*

43. *Id.* at 691.

44. *Id.*

45. *Id.*

46. *Id.* at 693.

the law at issue—had “a particularly strong link to undesirable activities in the District’s exclusively urban environment.”<sup>47</sup>

Taking on the role of the fact-finding trial court reviewing such a gun control regulation today, Justice Breyer assesses the statistics presented by the District and supporting amici in their briefs, and concludes that “they present nothing that would permit us to second-guess the Council.”<sup>48</sup> Again, his emphasis is on the specific context: “[U]rban areas, such as the District, have different experiences with gun-related death, injury, and crime than do less densely populated rural areas.”<sup>49</sup>

Having presented his case, Justice Breyer presents his view of the other side’s main quarrel, which as he sees it, is not with the statistics, but with “the District’s *predictive judgment* that a ban on handguns will help solve the crime and accident problems” that the statistics indicate exist.<sup>50</sup> In keeping with his reasonable tone, Justice Breyer acknowledges that these arguments by the challenger might have convinced a legislature not to adopt a handgun ban.<sup>51</sup> But that is not the question here:

[T]he question here is whether they are strong enough [arguments] to destroy judicial confidence in the reasonableness of a legislature that

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47. *Id.* at 695-96. This is one of many similar references to the “urban danger” theme that Katie Rose Guest Pryal of the University of North Carolina pointed to in her analysis of Breyer’s dissent as being preoccupied by images of urban violence. Rhetoric & Law Colloquium, *supra* note \*.

Justice Breyer also described the District’s law as “tailored to the life-threatening problems it attempts to address” in an area that is “totally urban” and suffers from “a serious handgun-fatality problem.” *Heller*, 554 U.S. at 714. In his conclusion, he emphasized that “there simply is no untouchable constitutional right guaranteed by the Second Amendment to keep loaded handguns in the house in *crime-ridden urban areas*.” *Id.* at 722 (emphasis added).

Images of urban violence permeate later opinions on the District’s subsequent gun regulations:

The District of Columbia knows gun violence. Notorious for a time as the “murder capital” of the United States, it recorded over 400 homicides annually in the early 1990s—more than one for every 1500 residents. While safety in the District has improved markedly in this millennium, residents will not soon forget the violence of the more recent past: the wounding of seven children outside the National Zoo on Easter Monday in 2000, the triple murder at Colonel Brooks’ Tavern in 2003, the five killed in the South Capitol Street shootings in 2010, and the twelve shot to death inside the Washington Navy Yard only a few months ago.

*Heller v. District of Columbia*, No. 08-1289 (JEB), 2014 U.S. Dist. LEXIS 66569, \*1 (D.D.C. May 15, 2014).

48. *Heller*, 554 U.S. at 696 (Breyer, J., dissenting).

49. *Id.* at 698.

50. *Id.* at 699.

51. *Id.* at 702.



rejects them. And that they are not. For one thing, they can lead us more deeply into the uncertainties that surround any effort to reduce crime, but they cannot prove either that handgun possession diminishes crime or that handgun bans are ineffective. The statistics do show a soaring District crime rate. And the District's crime rate went up after the District adopted its handgun ban. But, as students of elementary logic know, *after it* does not mean *because of it*.<sup>52</sup>

Justice Breyer concludes this first section of the dissenting opinion by writing that a judge might well feel uncertain about the proper conclusion.<sup>53</sup> In such circumstances, Justice Breyer writes that the Court has said that all that is necessary is that the legislature “has drawn reasonable inferences based on substantial evidence.”<sup>54</sup> That standard is satisfied here: “the District’s judgment, while open to question, is nevertheless supported by ‘substantial evidence.’”<sup>55</sup>

Moreover, Justice Breyer suggests that this is the long-established standard: “There is no cause here to depart from the standard . . . for the District’s decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make.”<sup>56</sup> And because this is a decision by a “local legislature,” it is even more appropriate to defer.<sup>57</sup>

Having determined the first requirement in the District’s favor—the statute seeks to further compelling interests—Justice Breyer turns to the burdens. First, addressing what he calls the primary objective of the Second Amendment, “the preservation of a ‘well regulated Militia,’” the statute burdens the primary objective “hardly at all.”<sup>58</sup> Second, addressing the secondary objective, an interest in hunting, “any inability of District residents to hunt near where they live has much to do with the jurisdiction’s exclusively urban character and little to do with the District’s firearms laws.”<sup>59</sup> Third, Justice Breyer concedes that the law burdens “to some degree an interest in self-defense” because it prevents residents from keeping loaded handguns in the home.<sup>60</sup>

When Justice Breyer looks for other potential measures that might further the same ends with fewer restrictions, “I see none.”<sup>61</sup> The

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52. *Id.*

53. *Id.* at 704.

54. *Id.* (quoting *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997)).

55. *Id.* at 704-05.

56. *Id.* at 705.

57. *Id.*

58. *Id.* at 706.

59. *Id.* at 709-10.

60. *Id.* at 710.

61. *Id.* at 710-11.

reason, he writes, is that the goal of the handgun ban “is to reduce significantly the number of handguns in the District” and “there is no plausible way to achieve that objective other than to ban the guns.”<sup>62</sup> To support the claim that there are no equally effective alternatives, Justice Breyer cites “the empirical fact that other States and urban centers prohibit particular types of weapons.”<sup>63</sup>

Because the District’s goals are compelling; its judgment about whether the law would achieve those objectives is well supported; the law imposes a burden on a constitutionally protected right; and there is no clear less-restrictive alternative, Justice Breyer turns to the final question: “Does the District’s law *disproportionately* burden Amendment-protected interests?”<sup>64</sup> Justice Breyer thinks not, but because he was unable to persuade the Court, he turns to other, equally “unfortunate consequences” of the majority decision.<sup>65</sup>

The decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time.<sup>66</sup>

And there is yet another danger of the majority’s decision: while it encourages a proliferation of lawsuits, the decision will “severely [] limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems.”<sup>67</sup>

*Is this Wisdom?*

Wise or not, partisans view Justice Breyer’s *Heller* dissent as representing something beyond the ordinary. One law review article declared that the lower courts’ response post-*Heller* represents “*Justice Breyer’s Triumph in the Third Battle over the Second Amendment*.”<sup>68</sup> Another commentator, Alan Gura, blamed Justice Breyer’s dissent for the emergence of a “two-step rubberstamping process” by lower court

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62. *Id.* at 711.

63. *Id.* at 712.

64. *Id.* at 714.

65. *Id.* at 718.

66. *Id.* (citation omitted).

67. *Id.* at 719.

68. Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 703 (2012).

judges who “can be counted upon to resist” *Heller* and *McDonald v. City of Chicago*,<sup>69</sup> the later decision that applied *Heller* to the states.<sup>70</sup> In contrast to those lower courts that had followed Justice Breyer’s dissent and second-guessed the Framers, Mr. Gura (who has represented the plaintiffs in a number of challenges to gun regulations) praised the Ninth Circuit’s decision in *Peruta v. County of San Diego*.<sup>71</sup> “Contrary to the prevailing approach, the Ninth Circuit took seriously the question of what conduct the Framers understood the Second Amendment to protect.”<sup>72</sup>

In the *Triumph* article, Professor Allen Rostron (who worked as a Senior Staff Attorney at the Brady Center to Prevent Gun Violence) concluded that most lower court decisions post-*Heller* have applied a form of intermediate scrutiny “that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.”<sup>73</sup> Being both “cautious and practical,” lower courts have tried to follow the Supreme Court’s holding, but “they have not mimicked its approach.”<sup>74</sup> According to Professor Rostron, this result did not come about because of judicial intransigence, but instead because Justice Scalia relied on approaches that were much more difficult for the lower courts to follow: historical disputes about the original meaning and traditional understandings of the Second Amendment right.<sup>75</sup> Not only had intermediate scrutiny carried the day, according to Professor Rostron, but also the early results had overwhelmingly been to declare gun regulations to be constitutional.<sup>76</sup> Rather than massive resistance, the lower courts had “conscientiously” tried to follow Justice Scalia’s lead, but had nonetheless “ineluctably followed an analysis that fulfills Justice Breyer’s forecast.”<sup>77</sup>

Partisans of Second Amendment rights consider deference to legislative determinations to constitute judicial activism when it comes

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69. 561 U.S. 742 (2010).

70. Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223, 224-25 (2014). In Gura’s assessment, this is because “judges doubtless understand the advantage of Justice Breyer’s approach in sanctioning just about any result they would like to reach.” *Id.* at 228. Another recent law review article contended that the result was the product of either simple or “massive resistance.” Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court’s Second Amendment Decisions*, 81 TENN. L. REV. 673, 673 (2014).

71. Gura, *supra* note 70, at 223 & n.\*; *see also* 742 F.3d 1144 (9th Cir. 2014).

72. Gura, *supra* note 70, at 224.

73. Rostron, *supra* note 68, at 703 n.\*, 707.

74. *Id.* at 706.

75. *Id.* at 708.

76. *Id.* at 707.

77. *Id.* at 756.

to firearm regulations.<sup>78</sup> Characterizing such deference instead as judicial restraint, Professor Rostron endorsed Fourth Circuit Judge Harvey Wilkinson's perspective that, given the danger of miscalculation about Second Amendment rights, "[i]f ever there was an occasion for restraint, this would seem to be it."<sup>79</sup>

*Reading (with and through) Jack Sammons*

To return to the puzzle of practical wisdom, I will start with Jack's description of the "virtues carried by the practice by which we identify good lawyering when we see it."<sup>80</sup> What observable characteristics of the person distinguish the lawyer from others in the conversation?<sup>81</sup> What "habits of thought and manners of being" are acquired through rhetorical practice,<sup>82</sup> so that by looking at them, we can see what constitutes the kind of specific good judgment developed through the practice and the study of law?<sup>83</sup>

Describing the virtues of the practice, Jack listed the following:

- the ability to recognize what is shared in competing positions;
- an attentiveness to detail, especially linguistic detail;
- an attentiveness as well to the ambiguities of language;
- a use of these ambiguities both for structuring the conversation and analyzing the issue;
- a focus on text and a markedly different sense of its restraint;
- a rhetorical awareness of the reactions of potential audiences to each competing position and even to each argument;
- an imaginative anticipation of future disputes;
- a realistic assessment of the situation even as a partisan in it;
- a recognition of the persuasive elements of all positions . . .;
- a very particular form of honesty;
- an insistence on practicality combined with an acceptance of complexity;
- a shying away from broad principles and "proud words";
- a concern with the procedures by which decisions are to be made;
- an equal concern with the quality of the roundtable conversation itself including a concern that all voices round the table be well heard and considered; [and]

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78. *Id.* at 758.

79. *Id.* (quoting *United States v. Masciandaro*, 638 F.3d 458, 476 (4th Cir. 2011) (Wilkinson, J., concurring)).

80. Sammons, *Traditionalists*, *supra* note 4, at 246 n.28.

81. *See id.* at 238.

82. Jack L. Sammons, *The Georgia Crawl*, 53 *MERCER L. REV.* 985, 985 (2002).

83. Sammons, *Traditionalists*, *supra* note 4, at 248 n.31.

- an evaluation of positions in terms of an objective hypothetical authoritative decision-maker who serves as stand-in for social judgment . . . .<sup>84</sup>

When lawyers are called upon for counseling, for a rhetorician's practical wisdom, "[w]e tell them what we have learned about the world by trying to prevent and resolve disputes through rhetoric."<sup>85</sup> Even though this may seem both too vast and too small a claim, Jack fences it in: "At least that is all we can offer legitimately, by which I mean as lawyers."<sup>86</sup>

If Jack's characteristics are the virtues of the practice, it will be helpful to see them in action. To illustrate her description of practical wisdom, for example, Professor Daisy Floyd provided stories of its exercise.<sup>87</sup> She explained that if wisdom is acquired by cultivating such virtues as loyalty, courage, fairness, generosity, and truthfulness, practical wisdom goes farther and is the ability to use the virtues in concrete and personal ways.<sup>88</sup> Thus,

[p]ractical wisdom is nuanced and contextual; it depends upon an understanding of the particular. It is not just the right way to do the right thing, but is the right way to do the right thing in this situation and for this person. [Other authors] use the example of how a doctor delivers a bad prognosis to a patient. The question is: How does this doctor deliver this bad prognosis to this patient at this moment? The answer might be different when the patient is a sufferer of acute depression whose wife begs the doctor to withhold the truth of the prognosis to prevent a suicidal episode than with a different patient, or for this patient at a different time, or with a different diagnosis. Recognizing differences and acting appropriately in the face of them requires practical wisdom.<sup>89</sup>

Practical wisdom involves a "circuit of thinking" from the particular to the general, the concrete to the abstract, the story to the analysis, and back again.<sup>90</sup>

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84. Sammons, *The Georgia Crawl*, *supra* note 82, at 985-86.

85. Sammons, *A Sixth Semester Conversation*, *supra* note 1, at 630.

86. *Id.*

87. Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195, 202-03 (2013).

88. *Id.* at 203.

89. Daisy Hurst Floyd, *Pedagogy and Purpose: Teaching for Practical Wisdom*, 63 MERCER L. REV. 943, 944-45 (2012) (footnote omitted).

90. *Id.* at 945.

Through the acquisition and practice of virtues in a circuit of thinking, the possessor of practical wisdom develops her sense of “fit.”<sup>91</sup> In her exploration of whether our relations with others come before reason, Linda Meyer suggested that rather than universal rules, the model for our understanding of “law” is “the common law, working itself out from case to case, each case trailing threads of significance that can be caught up in new webs of analogies, forging new patterns, or left adrift.”<sup>92</sup> Justice is fittingness, the key judgments resulting from analogy rather than deduction.<sup>93</sup> When judgment is seen as relying on the ability to see one thing as another, to judge is to find “an elusive sense of ‘fit’ or relevance that cannot be specified in a rule but is ‘perceived’ by judgment.”<sup>94</sup> Even though finding the right fit is essential, the good judge also has “the sense of unease that makes customs or practices that ‘used to fit’ chafe, bother, and vaguely nauseate us.”<sup>95</sup>

*Preventing and Resolving Disputes Through Rhetoric*

The “judges below” deliberate in contemplation of action, act in the wake of restraints set by law, and decide in the face of constraints of real consequences. While other commentators have traced the development of the law post-*Heller*, perhaps distinctive patterns will emerge from the rhetorical working out of disputes in judgments across the land.

*Without ambiguity, there is no space for judgment.*<sup>96</sup>

In the words of one appellate court grappling with the need to decide the constitutionality of a specific gun regulation, “*Heller* [] left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations.”<sup>97</sup> And when it came to extending *Heller* beyond some of the easier territory, Judge

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91. LINDA ROSS MEYER, *THE JUSTICE OF MERCY* 45 (2010).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. See Sammons, *The Georgia Crawl*, *supra* note 82, at 986 (“[A]n attentiveness as well to the ambiguities of language; a use of these ambiguities both for structuring the conversation and analyzing the issue.”).

97. *United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (Davis, J., concurring). Judge Davis criticized the majority for looking to First Amendment doctrine as a guide to analysis, saying the analogies “muddle, rather than clarify.” *Id.* at 687. But he endorsed the majority’s explicit adoption of intermediate scrutiny because the statute restricting gun possession by those convicted of domestic violence did not burden the core right established in *Heller* as Chester was not a law-abiding responsible citizen. *Id.* at 690.

Wilkinson cautioned that the question of the extent of the Second Amendment's reach beyond the home is "a vast *terra incognita* that courts should enter only upon necessity and only then by small degree."<sup>98</sup>

Given the opening of ambiguity, courts made "common sense" adjustments. In the Seventh Circuit, Judge Easterbrook adjusted the framework because "an attempt to operationalize the *Heller* Court's 'longstanding' language would lead to 'weird' results unconnected even to any court's divination of the ratifiers' original intent."<sup>99</sup> So he read the Court's language to mean that categorical exclusions from Second Amendment protection "need not mirror limits that were on the books in 1791."<sup>100</sup> Similarly, rather than explicitly adopt a level of constitutional scrutiny, Judge Easterbrook simply picked up the government's concession "that some form of strong showing ('intermediate scrutiny,' many opinions say) is essential, and that § 922(g)(9) is valid only if substantially related to an important governmental objective."<sup>101</sup>

Judge Easterbrook's opinion is noteworthy for other reasons related to its attentiveness to the ambiguities of language and its use of those ambiguities. After setting out the two sides' arguments, Judge Easterbrook explained,

We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid. They are precautionary language. Instead of resolving questions such as the one we must confront, the Justices have told us that the matters have been left open. The language we have quoted warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense. What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open. The opinion is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes, and general

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98. *Masciandaro*, 638 F.3d at 475 (Wilkinson, J., concurring).

99. *Chester*, 628 F.3d at 689 (quoting *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010)).

100. *Skoien*, 614 F.3d at 641.

101. *Id.* Because of the concession by the United States, the court "need not get more deeply into the 'levels of scrutiny' quagmire, for no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective [and both] logic and data establish a substantial relation between § 922(g)(9) and this objective." *Id.* at 642; see also 18 U.S.C. § 922(g)(9) (2012).

expressions must be read in light of the subject under consideration.<sup>102</sup>

As for Judge Easterbrook's conclusion, based on dicta in *Heller*, that the Justices must have meant that some exclusions could be acceptable even if not on the books in 1791, "[t]his is the sort of message that, whether or not technically dictum, a court of appeals must respect, given the Supreme Court's entitlement to speak through its opinions as well as through its technical holdings."<sup>103</sup>

*The exercise of judgment is practical while accepting of complexity.*<sup>104</sup>

In addition to these common-sense adjustments and efforts to discern what the Supreme Court had in mind, lower courts looked for familiar safe harbors. Many circuits adopted a two-step approach early on and refined it over time. For example, the Fourth Circuit explained that first, the court would ask whether the regulation burdens "conduct falling within the scope of the Second Amendment's guarantee."<sup>105</sup> If not, the regulation would be valid. But if it does, the court would apply "an appropriate form of means-end scrutiny," with the government bearing the burden of justification.<sup>106</sup>

As for the level of scrutiny to be applied, the courts reasoned by elimination: "Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional."<sup>107</sup> In other cases, the lower courts are to choose "from among the heightened standards of scrutiny the Court applies to governmental actions alleged to infringe enumerated constitutional rights," and the government must satisfy whatever standard of means-end scrutiny is held to apply.<sup>108</sup>

The Seventh Circuit's explanation became more precise by 2011.<sup>109</sup> "First, the threshold inquiry in some Second Amendment cases will be

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102. *Skoien*, 614 F.3d at 640.

103. *Id.* at 641.

104. See Sammons, *The Georgia Crawl*, *supra* note 82, at 986 ("[A]n insistence on practicality combined with an acceptance of complexity.").

105. *Chester*, 628 F.3d at 680.

106. *Id.* In *Chester*, the court determined that although the government had offered reasons for "disarming" domestic violence misdemeanor offenders, it had not offered sufficient evidence to establish a substantial relationship between the statute and an important government goal. *Id.* at 681, 683.

107. *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011).

108. *Id.*

109. See *id.* at 701–04.



a ‘scope’ question: Is the restricted activity protected by the Second Amendment in the first place?”<sup>110</sup> This question focuses on a “textual and historical inquiry into original meaning,” and when state or local government action is challenged, “the original-meaning inquiry is carried forward in time . . . [to] how the right was understood when the Fourteenth Amendment was ratified.”<sup>111</sup> If the regulation falls outside the scope at the relevant historical moment, the activity is “categorically unprotected.”<sup>112</sup>

Second, if the regulated activity is not categorically unprotected, “there must be a second inquiry into the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.”<sup>113</sup> The scrutiny applied “will depend on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right.”<sup>114</sup>

As for application of this two-step approach, here is Judge Posner determining that two Illinois statutes were unconstitutional:

The parties and the amici curiae have treated us to hundreds of pages of argument, in nine briefs. The main focus of these submissions is history. The supporters of the Illinois law present historical evidence that there was no generally recognized private right to carry arms in public in 1791, the year the Second Amendment was ratified—the critical year for determining the amendment’s historical meaning, according to *McDonald v. City of Chicago*. Similar evidence against the existence of an eighteenth-century right to have weapons in the home for purposes of self-defense rather than just militia duty had of course been presented to the Supreme Court in the *Heller* case.<sup>115</sup>

Noting that the Supreme Court had rejected the similar evidence submitted in *Heller*, Judge Posner wrote that the Seventh Circuit could not “repudiate the Court’s historical analysis . . . . Nor can we ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one’s home.”<sup>116</sup>

In other words, despite the uncertainty, “There is no turning back by the lower federal courts, though we need not speculate on the limits that Illinois may in the interest of public safety constitutionally impose on the carrying of guns in public; it is enough that the limits it *has* imposed

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110. *Id.* at 701.

111. *Id.* at 701-02.

112. *Id.* at 702-03.

113. *Id.* at 703.

114. *Id.*

115. *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (citation omitted).

116. *Id.*

go too far.”<sup>117</sup> Preferring the more familiar failure-to-meet-its burden analysis to another textual and historical inquiry, Judge Posner concluded:

We are disinclined to engage in another round of historical analysis to determine whether eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home. The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside. The theoretical and empirical evidence (which overall is inconclusive) is consistent with concluding that a right to carry firearms in public may promote self-defense. Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden. The Supreme Court’s interpretation of the Second Amendment therefore compels us to reverse the decisions in the two cases before us and remand them to their respective district courts for the entry of declarations of unconstitutionality and permanent injunctions.<sup>118</sup>

*A very particular form of honesty and concern that all voices be well heard and considered.*<sup>119</sup>

As the lower courts worked out these disputes through rhetoric, the judges periodically reminded one another to engage the arguments fairly and to hear and consider all the voices around the table. In the Seventh Circuit, Judge Sykes dissented from both the decision and Judge Easterbrook’s characterization of *Heller* as not being a “code” for lower courts to follow, but constituting instead more of an explanation.<sup>120</sup> Calling for a fair reading of the prior opinions:

I appreciate the minimalist impulse, but this characterization of *Heller* is hardly fair. It ignores the Court’s extensive analysis of the original public meaning of the Second Amendment and understates the opinion’s central holdings: that the Amendment secures (not “creates”) an individual natural right of armed defense not limited to militia service, and at the core of this guarantee is the right to keep and bear arms for defense of self, family, and home. *Heller* was “the biggest Second Amendment case ever decided,” a “landmark ruling [that] merits our attention for its method as well as its result,” “the most extensive consideration of the Second Amendment by the Supreme Court in its history,” and “the most explicitly and self-consciously

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117. *Id.* at 942.

118. *Id.*

119. Sammons, *The Georgia Crawl*, *supra* note 82, at 986.

120. *Skoien*, 614 F.3d at 646 (Sykes, J., dissenting).

originalist opinion in the history of the Supreme Court.” It is true that *Heller* left many issues open, but that is not an invitation to marginalize the Court’s holdings or disregard its decision method.<sup>121</sup>

*When does it take a lawyer?*

When the Ninth Circuit considered a version of California’s concealed-carry gun regulation, Judge O’Scannlain wrote that “[i]t doesn’t take a lawyer to see that straightforward application” of *Heller* does not resolve the question or “that neither *Heller* nor *McDonald* speaks explicitly or precisely to the scope of the Second Amendment right outside the home or to what it takes to ‘infringe’ it.”<sup>122</sup> Characterizing the question as whether *Heller* should be extended to include Second Amendment protection for “a responsible, law-abiding citizen . . . to carry a firearm in public for self-defense,”<sup>123</sup> the Ninth Circuit decided the answer was yes.<sup>124</sup>

After describing its lengthy historical and textual analysis of the question it posed, the majority concluded that tracing the scope of the right was dispositive: “Put simply, a law that destroys (rather than merely burdens) a right central to the Second Amendment must be struck down.”<sup>125</sup> If the regulation prohibits the exercise of a core right, “no amount of interest-balancing . . . can justify [the] policy.”<sup>126</sup> The Ninth Circuit majority thus endorsed the Seventh Circuit’s interpretation (in *Moore*) and criticized the decisions of the Second, Third, and Fourth Circuits.<sup>127</sup> All three of the latter Circuits had “declined to

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121. *Id.* at 647 (second alteration in original) (footnotes omitted) (citations omitted) (quoting various law review articles). Judge Sykes continued: “The court declines to be explicit about its decision method, sends doctrinal signals that confuse rather than clarify, and develops its own record to support the government’s application of [the challenged statute] to this defendant.” *Id.*

122. *Peruta*, 742 F.3d at 1150.

123. *Id.* at 1181 (Thomas, J., dissenting).

124. *Id.* at 1178-79 (majority opinion). The Ninth Circuit held that San Diego County’s “good cause” permitting requirement impermissibly infringed on the Second Amendment right to bear arms in lawful self-defense. *Id.* at 1179. The dissenting judge objected to the majority’s characterization of the regulation, writing that the lawsuit instead involved California’s “longstanding restrictions” on carrying concealed weapons in public and, more specifically, the constitutionality of San Diego County’s policy of allowing only those persons who show good cause to carry concealed firearms in public. *Id.* (Thomas, J., dissenting).

125. *Id.* at 1167 (majority opinion).

126. *Id.*

127. *Id.* at 1173-74, 1175.

undertake a complete historical analysis of the scope and nature of the Second Amendment right outside the home.”<sup>128</sup>

Once the historical analysis was complete, the question of unconstitutionality was determined. “Because our analysis paralleled the analysis in *Heller* itself, we did not apply a particular standard of heightened scrutiny.”<sup>129</sup> The majority nonetheless disagreed with the reasoning of other courts when it came to their methods of applying a form of heightened scrutiny.<sup>130</sup> These analyses, the majority wrote, are nearly identical “to the freestanding ‘interest-balancing inquiry’ that Justice Breyer proposed—and that the majority explicitly rejected—in *Heller*.”<sup>131</sup> Moreover, the other circuits erred in deferring too much to state legislatures in their decisions about “the fit between the challenged regulations and the asserted government interest they served.”<sup>132</sup>

*The common law working itself out through “incremental change, elaboration, and improvisation.”*<sup>133</sup>

Six years after *Heller* and only a few months apart, two federal district courts—one in Idaho and one in Georgia—faced the same question: does the Second Amendment protect the rights of visitors to carry loaded firearms on recreational property administered by the Army Corps of Engineers? In both states, plaintiffs filed Second Amendment challenges to the same Army Corps of Engineers regulations. Those regulations barred the possession of loaded firearms (with certain exceptions) on all property operated and maintained by the Corps. This property includes

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128. *Id.* at 1173.

129. *Id.* at 1175.

130. *Id.* at 1176.

131. *Id.*

132. *Id.* at 1177. The dissenting judge complained further that the majority had answered questions that were not posed. *Id.* at 1179-80 (Thomas, J., dissenting). “In this changing landscape, with many questions unanswered, our role as a lower court is ‘narrow and constrained by precedent,’ and our task ‘is simply to apply the test announced by *Heller* to the challenged provisions.’” *Id.* at 1180 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1285 (D.C. Cir. 2010)). The dissent agreed that the historical inquiry was conclusive, but found that the answer was different. *Id.* at 1191. “[T]he answer to the historical inquiry is clear: carrying a concealed weapon in public was not understood to be within the scope of the right protected by the Second Amendment at the time of ratification.” *Id.* If the right was not protected then, the regulation is constitutional. *See id.*

133. MEYER, *supra* note 91, at 45.

not only dams and other water control projects but also nearby recreational areas open to the public.<sup>134</sup>

In the Idaho challenge, where the plaintiffs first sought and won a preliminary injunction and then followed up with a motion for summary judgment, Judge B. Lynn Winmill focused first on the scope of the regulations: they govern more than 700 dams and surrounding recreation areas visited by more than 300 million visitors each year.<sup>135</sup> Judge Winmill concluded that the *Heller* decision had determined one pre-existing core right: the right of a law-abiding individual to possess a handgun in his home for self-defense.<sup>136</sup> That core right was at issue in the Army Corps regulations:

The same analysis [as in *Heller*] applies to a tent. While often temporary, a tent is more importantly a place—just like a home—where a person withdraws from public view, and seeks privacy and security for himself and perhaps also for his family and/or his property. Indeed, a typical home at the time the Second Amendment was passed was cramped and drafty with a dirt floor—more akin to a large tent than a modern home. Americans in 1791—the year the Second Amendment was ratified—were probably more apt to see a tent as a home than we are today.<sup>137</sup>

Because the Army Corps' regulations amounted to a flat ban on carrying a firearm for self-defense purposes, they were invalid.<sup>138</sup>

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134. *Morris v. U.S. Army Corps of Eng'rs*, 994 F. Supp. 2d 1082, 1084 (D. Idaho 2014) (seeking a preliminary injunction) [hereinafter *Morris I*]; *Morris v. U.S. Army Corps of Eng'rs*, No. 3:13-CV-00336-BLW, 2014 U.S. Dist. LEXIS 147541, at \*1-2 (D. Idaho Oct. 13, 2014) (dealing with motions for summary judgment) [hereinafter *Morris II*]; *Georgia Carry.-Org v. U.S. Army Corps of Eng'rs*, No. 4:14-CV-00139-HLM, 2014 U.S. Dist. LEXIS 116662, at \*1-2 (N.D. Ga. Aug. 18, 2014).

135. *Morris II*, 2014 U.S. Dist. LEXIS 116662, at \*1-2; *Morris I*, 990 F. Supp. 2d at 1084.

136. *Morris I*, 990 F. Supp. at 1086.

137. *Id.*

138. *Id.* at 1086-88. Judge Winmill distinguished *Masciandaro*, 638 F.3d at 475, in which the Fourth Circuit upheld a regulation that banned loaded firearms in a National Park, on the basis that the regulation there contained an exception for self-defense. *Morris I*, 990 F. Supp. 2d at 1087. He said that the Corps' ban was more similar to the regulation struck down in *Moore*. *Id.* Judge Posner had described the Illinois law as "the most restrictive gun law of any of the 50 states," and held that it violated the Second Amendment because it "flat[ly] ban[ned] . . . carrying ready-to-use guns outside the home" with no self-defense exception. *Id.* (alteration in original) (quoting *Moore*, 702 F.3d at 940-41). Similarly, Judge Winmill wrote that the Corps' regulation "contains a flat ban on carrying a firearm for self-defense purposes. By completely ignoring the right of self-defense, the regulation cannot be saved by the line of cases, like *Masciandaro*, that upheld gun restrictions accommodating the right of self-defense." *Id.*

Later, deciding on summary judgment, Judge Winmill employed the Ninth Circuit's two-step analysis, but with a twist, as the analysis had most recently been enunciated in *Peruta*.<sup>139</sup> The former sliding scale for scrutiny—depending on how close the law comes to the core of the right and the severity of the burden—“is not used when instead of merely burdening the right to bear arms, the law ‘destroys the right.’”<sup>140</sup> When a law destroys the Second Amendment right, the sliding scale analysis is no longer used because “the law is unconstitutional ‘under any light.’”<sup>141</sup> The Corps' regulation was a “complete ban” and was unconstitutional under any degree of scrutiny.<sup>142</sup> This result is “dictated by the law of the Ninth Circuit, namely *Peruta*.”<sup>143</sup>

In between the two Idaho decisions, in the Northern District of Georgia, Judge Harold Murphy decided against issuing a preliminary injunction to GeorgiaCarry.Org, a non-profit corporation whose “mission is to support its member[s'] rights to keep and bear arms.”<sup>144</sup> Judge Murphy opened with the ambiguity surrounding “the extent to which the Second Amendment protects individuals seeking to carry firearms outside the home, and the framework in which courts are to evaluate laws regulating firearm possession.”<sup>145</sup> Like other circuits, the Eleventh Circuit had adopted a two-step approach and Judge Murphy followed it: (1) “[i]s the restricted activity protected by the Second Amendment,” and (2) if so, does the regulation survive the appropriate level of scrutiny?<sup>146</sup>

*A focus on text and a markedly different sense of its restraint.*<sup>147</sup>

As required by the framework adopted by the nation's appellate courts, Judge Murphy began with a textual and historical analysis focusing on the original meaning of the Second Amendment: “[w]hether, in 1791, there was a widely accepted right to carry firearms on Defendant Army Corps' property?”<sup>148</sup> First reviewing the history of the Army Corps of Engineers and then comparing his case with the available precedent, Judge Murphy concluded that the conduct regulated by the challenged

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139. *Morris II*, 2014 U.S. Dist. LEXIS 147541, at \*3-4.

140. *Id.* at \*4 (relying on *Peruta*, 742 F.3d at 1168).

141. *Id.* (quoting *Peruta*, 742 F.3d at 1168).

142. *Id.* at \*5-6.

143. *Id.* at \*12.

144. *GeorgiaCarry.Org.*, 2014 U.S. Dist. LEXIS 116662, at \*2.

145. *Id.* at \*8-9 (citing *Heller*, 554 U.S. at 718 (Breyer, J., dissenting)).

146. *Id.* at \*10.

147. Sammons, *The Georgia Crawl*, *supra* note 82, at 985-86.

148. *GeorgiaCarry.Org*, 2014 U.S. Dist. LEXIS 116662, \*11.

regulation fell outside the scope of the Second Amendment, but “out of an abundance of caution” went on to apply intermediate scrutiny and found it “likely that the Firearms Regulations is [sic] reasonably suited to advance a substantial government interest.”<sup>149</sup>

*An insistence on practicality combined with an acceptance of complexity.*<sup>150</sup>

As Judge Murphy put it, “[I]t is difficult, if not impossible, for a district court faced with an emergency motion for preliminary injunction to evaluate the contours of Second Amendment rights in colonial America.”<sup>151</sup> He nonetheless performed the analysis, describing the history of the Army Corps, which was established in 1775 when Congress organized the Continental Army and which was given the job of overseeing fortifications and drawing maps.<sup>152</sup> The Corps was permanently established about twenty years later, continuing to perform similar tasks during the War of 1812.<sup>153</sup> Judge Murphy noted that although the Corps began to work on civil projects early in its history, it was still a branch of the U.S. military, and it was not until 1944 that the Corps was authorized to construct public park and recreational facilities at water resource development projects.<sup>154</sup> Because the Corps is still part of the Armed Forces and the recreational facilities are “merely a byproduct” of dam construction projects, Judge Murphy concluded that it was unlikely the Framers would have recognized a civilian’s right to carry firearms on property owned and operated by the military that was close to sensitive infrastructure projects.<sup>155</sup>

Seemingly unable to resist the criticism, he noted that the Idaho court, in *Morris*, “appears to skip this step” of historical and textual analysis and instead held that the Second Amendment protects a right to carry firearms *everywhere* for self-defense purposes.<sup>156</sup> “Respectfully,” Judge Murphy disagreed, citing *Heller* for the proposition that “the pre-existing right encompassed by the Second Amendment was not free from locational restrictions.”<sup>157</sup>

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149. *Id.* at \*24, 31.

150. Sammons, *The Georgia Crawl*, *supra* note 82, at 985-86.

151. *GeorgiaCarry.Org.*, 2014 U.S. Dist. LEXIS 116662, at \*11 n.4.

152. *Id.* at \*12-13.

153. *Id.* at \*13.

154. *Id.* at \*14-15.

155. *Id.* at \*15-16.

156. *Id.* at \*12 n.4.

157. *Id.*

*A concern with the procedures by which decisions are to be made.*<sup>158</sup>

Although this outcome surely depended as well on his assessment of the merits, Judge Murphy justified his denial of the preliminary injunction on the basis that it made sense within the particular situation to maintain the status quo.<sup>159</sup> This is especially true, he wrote, because the law governing Second Amendment rights is “in its infancy” and many of the arguments and counterarguments are “relatively untested.”<sup>160</sup>

*An evaluation of positions in terms of an objective hypothetical authoritative decision maker who serves as a stand-in for social judgment.*<sup>161</sup>

In Jack’s formulation, the rhetorician’s concern for the quality of the conversation, including a concern that all voices be well heard and considered, does not preclude judgment, for he identifies as well the characteristic of an evaluation of positions as an objective and authoritative decision maker.<sup>162</sup> This judgment Judge Murphy provided.<sup>163</sup> After his description of the Army Corps’ history of building recreational facilities as a byproduct of “sensitive dam construction projects nearby,” Judge Murphy concluded that he simply “cannot fathom that the framers of the Constitution would have recognized a civilian’s right to carry firearms on property owned and operated by the United States Military, especially when such property contained infrastructure products central to our national security and well being.”<sup>164</sup> In rejecting the *Morris* court’s position that when a plaintiff pitches a tent on the Army Corps of Engineers’ property, the tent becomes a home where the plaintiff has a right to a loaded firearm for self-defense purposes, Judge Murphy pointed out that plaintiffs “have no constitutional or statutory right to pitch a tent in the first place.”<sup>165</sup> So, he concluded, it would be “irrational” to determine that because the Corps allows tents, it must also allow firearms in those tents.<sup>166</sup>

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158. Sammons, *The Georgia Crawl*, *supra* note 82, at 985-86.

159. *GeorgiaCrawl.Org*, 2014 U.S. Dist. LEXIS 116662, at \*33-35.

160. *Id.* at \*35.

161. Sammons, *The Georgia Crawl*, *supra* note 82, at 985-86.

162. Sammons, *The Georgia Crawl*, *supra* note 82, at 985-86.

163. *Georgia Carry.Org*, 2014 U.S. Dist. LEXIS 116662, at \*15.

164. *Id.* at \*16.

165. *Id.* at \*19-20 & n.6.

166. *Id.* at \*20 n.6.



*Conclusion*

While finishing this Article, I read a series of articles containing stories about lawyers. These articles contrasted the story of the fictional Atticus Finch with the history of real-life lawyers, both those who were on the right side of civil rights struggles and those who were not, including the lawyers who actively authorized or passively allowed the disenfranchisement of blacks and the imposition of systems of white supremacy.<sup>167</sup>

It is easy to agree that if my students acquire practical wisdom, they will become better judges of the right thing to do when they are confronted with the daily tasks and challenges of good lawyers. But how will practical wisdom help the lawyer who finds herself working within a historical and social setting that tells her that supporting an unequal status quo is the right thing to do? Where does the lawyer find the wherewithal to offer *good* judgment from within that context?

What I call wherewithal, Linda Meyer might call a “judgment of the sublime—a sudden awareness that there is something we have missed, something we do not yet know, a responsibility we have not yet fully encompassed or articulated.”<sup>168</sup> This awareness “may be the first signal of a sea change in the law . . . [or] it may remain isolated.”<sup>169</sup> Professor Meyer argues that the importance of this judgment explains the “otherwise inexplicable deference we give to trial courts [and others] making ‘discretionary’ decisions on the front lines of the legal system.”<sup>170</sup>

If I had to count on such a judgment of mercy, where would I look? My vote goes to Judge Murphy, not least because of my reading of his opinion in *GeorgiaCarry.Org*. As we circle to the individual, the particular, and the story, let me tell you a little more about Judge Murphy. Born in 1927, he grew up in a Georgia town of 200 where the public school was open only five months a year. So he went to elementary school and high school in a neighboring town. Near the end of World War II, after high school and a few years of college, he entered the Navy.

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167. See generally Mary Ellen Maatman, *Justice Formation From Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children*, 14 J. LEGAL WRITING INST. 207 (2008); Mary Ellen Maatman, *Lawyering in the Lion’s Mouth: The Story of S.D. Redmond and Pruitt v. State*, 83 MISS. L.J. 459 (2014); Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L. J. 1 (2006).

168. MEYER, *supra* note 91, at 47.

169. *Id.*

170. *Id.*

The Navy helped finance the rest of his college education and his nine quarters of law school (all he needed to graduate) at the University of Georgia. Judge Murphy began practicing law at the age of twenty-two; he was elected to the Georgia House; he was later appointed to the state bench, and, in 1977, to the federal bench. Since 1991, he has actively supervised *Knight v. Alabama*,<sup>171</sup> the federal lawsuit challenging racially discriminatory policies by Alabama's colleges and universities.<sup>172</sup> His father was a farmer, a rural mail carrier, and a businessman; his mother was a teacher and school principal. The Murphy family is full of Georgia legislators, lawyers, and judges.

After decades on the federal bench, Judge Murphy said in a 2008 interview that the best part of being a judge is “the mental exercise.”<sup>173</sup> The worst part? “The difficulty of sentencing [defendants]” while trying to be fair and responsible.<sup>174</sup> Showing “respect [for] every individual with whom you deal” is one of the most important qualities of a good judge (along with knowledge of the law and the evidentiary rules).<sup>175</sup> And so, when a judge is sentencing a criminal defendant to prison, “[a]t least you can treat them like a decent human being.”<sup>176</sup> In the end, and I imagine this must be true, “There is a loneliness” to being a judge.<sup>177</sup>

If all we can offer as lawyers is the good judgment that comes from our continuing trials—the trials we undergo as we seek to resolve and solve problems through rhetoric—Judge Murphy might seem a fitting end to my puzzle of practical wisdom. Still, an essay honoring Jack Sammons cannot end without an allusion to baseball and to his own role as a model of the *excellence of the sport* and of a *particular form of practical wisdom*:

Through the playing of baseball, we come to know that disciplined attention by a fielder to each batter is an excellence of the sport requiring certain knowledge, skills, and virtues, some of which are the abilities to maintain a calm temperament, to forget prior bad plays quickly, to avoid criticism of teammates for mistakes, and so forth. For

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171. 787 F. Supp. 1030 (N.D. Ala. 1991), *aff'd in part, rev'd in part, vacated in part*, 14 F.3d 1534 (11th Cir. 1994).

172. *See generally id.*

173. Harold Murphy, *Reflections on Georgia Politics Oral History Collection*, RICHARD B. RUSSELL LIBRARY FOR POLITICAL RESEARCH AND STUDIES, UNIV. OF GA. LIBRARIES (2008), available at <https://www.youtube.com/watch?v=b658KYB8mSY> (transcript available at [podcaster.gcsu.edu/podcastdata/UGA/Channel\\_14896/podcast\\_21392997/21392997.pdf](http://podcaster.gcsu.edu/podcastdata/UGA/Channel_14896/podcast_21392997/21392997.pdf)).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

lawyers, specific excellences of textual analysis, attention to detail, consideration of opposing arguments, sympathetic detachment, and general excellences of counseling, of persuasion, and of a particular form of practical wisdom are much the same.<sup>178</sup>

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178. Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 VAL. U. L. REV. 93, 93 (1997).