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Briefing the Second Amendment before the Supreme Court

Alan Gura

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Briefing the Second Amendment Before the Supreme Court

*Alan Gura**

Fifteen thousand words could not encompass every last scrap of support for the individual rights model of the Second Amendment. Nor could fifteen thousand words suffice to contain the wealth of material debunking the so-called collective right or public-purpose theories of the right to keep and bear arms. And no word limit could adequately absorb the various public policy arguments relating to the private ownership of firearms, none of which, in the end, are relevant to the *legal* question of the Second Amendment's meaning. But on February 4, 2008, fifteen thousand words is what we had to work with briefing *District of Columbia v. Heller*—the case that would, as designed, determine whether the Second Amendment to the Constitution secures a meaningful individual right.

More often than not, word limits improve rather than cramp legal writing. Word limits force counsel to cut distracting verbiage and impose sometimes difficult but necessary choices about which material to include so as to distill a focused and persuasive argument. Such was the case in *Heller*, where a brief twice as long might not have been half as good. And while we welcomed the truly excellent amicus curiae briefs exploring useful angles beyond the scope of our effort, the necessarily broader mission of a respondent's brief was still accomplished in the space allotted.

The editors of *Duquesne Law Review* have asked me to comment on the Respondent's Brief in *Heller* and offer insight into the rationale underlying its contents. I'm happy to oblige.

* * *

* Lead Counsel for Respondent in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008). The brief excerpted in this article benefitted greatly from the co-authorship of Clark Neily and Robert Levy, two of the sharpest minds in the liberty-business. Any shortcoming in the final product is rooted in my stubbornness.

No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA
AND MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

STATEMENT OF THE CASE 235
SUMMARY OF ARGUMENT 236
ARGUMENT 239
I. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP ORDINARY FIREARMS, UNRELATED TO GOVERNMENT MILITARY SERVICE 239
A. Preambles Cannot Negate Operative Text 239
B. The Second Amendment's Plain Text Secures an Individual Right 242
C. The Framers Secured an Individual Right to Keep and Bear Arms in Reaction to the British Colonial Experience 248
II. WASHINGTON, D.C.'S HANDGUN BANS ARE UNCONSTITUTIONAL 263
III. WASHINGTON, D.C.'S FUNCTIONAL FIREARMS BAN IS UNCONSTITUTIONAL 270
IV. THE STANDARD OF REVIEW IN SECOND AMENDMENT CASES IS STRICT SCRUTINY 272
V. THE GOVERNMENT OF THE NATION'S CAPITAL MUST OBEY THE CONSTITUTION. 277
CONCLUSION 279

TABLE OF AUTHORITIES

Cases

Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002)..............264
Aymette v. *State*, 21 Tenn. 154 (1840) 268
Bolling v. *Sharpe*, 347 U.S. 497 (1954).......................................277
Bsharah v. *United States*, 646 A.2d 993 (D.C. 1994)..................235
Burdick v. *Takushi*, 504 U.S. 428 (1992) 274
Cases v. *United States*, 131 F.2d 916 (1st Cir. 1942)..................267
Castellon v. *United States*, 864 A.2d 141 (D.C. 2004)..................271
Chem. Mfrs. Ass'n v. *EPA*, 673 F.2d 507 (D.C. Cir. 1982)..........271
Copeman v. *Gallant*, 1 P. Wms. 314 (Ch. 1716)..........................240
Curtis v. *Loether*, 415 U.S. 189 (1974)...266
Eldred v. *Ashcroft*, 537 U.S. 186 (2003) 241
Fiscal v. *City and County of San Francisco*, ___ P.3d ___,
2008 Cal. App. LEXIS 21 (Cal. Ct. App. Jan. 9, 2008)............269
Gibbons v. *District of Columbia*, 116 U.S. 404 (1886) 278
Gideon v. *Wainwright*, 372 U.S. 335 (1963)...............................264
Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 273
Hepburn v. *Ellzey*, 6 U.S. (2 Cranch) 445 (1805) 278
Houston v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820) 262
Jacobson v. *Massachusetts*, 197 U.S. 11 (1905) 241
King v. *Athos*, 8 Mod. Rep. 136 (K.B. 1723) 240
Kneedler v. *Lane*, 45 Pa. 238 (1863) 263
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)....................................266
Luther v. *Borden*, 48 U.S. (7 How.) 1 (1849) 263
Mace v. *Cadell*, 1 Cowp. 232 (K.B. 1774)....................................240
Mallock v. *Eastly*, 87 Eng. Rep. 1370, 7 Mod. Rep. 482
(C.P. 1744) 243
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).....................241
Martin v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827)............................263
McIntosh v. *Washington*, 395 A.2d 744 (D.C. 1978) 271, 272
McMann v. *Richardson*, 397 U.S. 759 (1970)..............................271
Muscarello v. *United States*, 524 U.S. 125 (1998).......................243
Nunn v. *State*, 1 Ga. 243 (1846)..269
O'Donoghue v. *United States*, 289 U.S. 516 (1933).............277, 278
Ortiz v. *Commonwealth*, 681 A.2d 152 (Pa. 1996) 245
Palmore v. *United States*, 411 U.S. 389 (1973) 277, 278
Patsone v. *Pennsylvania*, 232 U.S. 138 (1914) 267
Patton v. *United States*, 281 U.S. 276 (1930)..............................242
Pernell v. *Southall Realty*, 416 U.S. 363 (1974)..........................277
Perpich v. *Dep't of Def.*, 496 U.S. 334 (1990).......................246, 263
Planned Parenthood v. *Casey*, 505 U.S. 833 (1992).....................271

Presser v. *Illinois*, 116 U.S. 252 (1886)....................................278
Quilici v. *Village of Morton Grove*, 695 F.2d 261
(7th Cir. 1982)..267, 269
San Antonio Indep. Sch. Dist. v. *Rodriguez*,
411 U.S. 1 (1973)..272
Schnapper v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981)....................241
Scott v. *Sandford*, 60 U.S. (19 How.) 393 (1857)........................244
Selective Draft Law Cases, 245 U.S. 366 (1918)..........................262
Silveira v. *Lockyer*, 328 F.3d 567 (9th Cir. 2003)................256, 278
Simon & Schuster, Inc. v. *Members of the N.Y. State
Crime Victims Bd.*, 502 U.S. 105 (1991)....................................264
Somerville v. *United States*, 2008 U.S. Dist. LEXIS 412
(W.D. Mich. Jan. 3, 2008)..269
Stanley v. *Georgia*, 394 U.S. 557 (1969)....................................269
State v. *Andrews*, 50 Tenn. 165 (1871)....................................268
Timmons v. *Twin Cities Area New Party*, 520 U.S. 351 (1997)...274
Ullman v. *United States*, 350 U.S. 422 (1956)............................276
United States v. *Carolene Prods. Co.*, 304 U.S. 144 (1938).........272
United States v. *Cruikshank*, 92 U.S. 542 (1875)........................248
United States v. *Emerson*, 270 F.3d 203
(5th Cir. 2001)..263, 267, 274, 278
United States v. *Kirschenblatt*, 16 F.2d 202
(2d Cir. 1926)..248
United States v. *Miller*, 307 U.S. 174 (1939)......................passim
United States v. *Moreland*, 258 U.S. 433 (1922)..........................277
United States v. *Patterson*, 431 F.3d 832 (5th Cir. 2005)...........274
United States v. *South-Eastern Underwriters Ass'n*,
322 U.S. 533 (1944)..243
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990)............243
Washington v. *Glucksberg*, 521 U.S. 702 (1997)..........................272
Williams v. *Florida*, 399 U.S. 78 (1970)....................................242

Statutes

1 W. & M., Sess. 1, c. 15, § 4 (1689)..243
10 U.S.C. § 311..247
10 U.S.C. § 312..247
10 U.S.C. § 313..247
18 U.S.C. § 922(g)..273
18 U.S.C. § 922(o)..269
18 U.S.C. § 922(t)..273
26 U.S.C. § 5801..270
27 C.F.R. § 478.98..270
27 C.F.R. § 479.84..270

32 U.S.C. § 109(c) 263
4 Hening's Statutes at Large (Va.) 131 243
9 Geo. I Chap. 26 (1724), 15 Statutes at Large 246-47 (1765) 244
Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 241
Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218 250
Cal. Penal Code § 11460 255
D.C. Code § 11-101 278
D.C. Code § 22-4504(a) 235
D.C. Code § 22-4514(a) 269
D.C. Code § 49-401 247
D.C. Code § 7-2502.02(a)(4) 235
D.C. Code § 7-2502.14 264
D.C. Code § 7-2507.02 .... 235, 236, 238, 271
Va. Code § 18.2-433.2 255

Other Authorities

ACTS AND LAWS OF THE STATE OF CONNECTICUT (1784) 267
Allen, Ira, THE NATURAL AND POLITICAL HISTORY OF THE STATE OF VERMONT (reprint 1969) 255
Amar, Akhil, THE BILL OF RIGHTS (1998) 246
ANNALS OF CONGRESS (1834) 258
ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS (J.C. Campbell ed., 2d ed. 2007) 275
BARNETT, RANDY, *WAS THE RIGHT TO KEEP AND BEAR ARMS CONDITIONED ON SERVICE IN AN ORGANIZED MILITIA?*, 83 TEX. L. REV. 237 (2004) 244
BATF, *Statistics Listing of Registered Weapons*, Apr. 19, 1989 269
BATFE Report, http://www.atf.treas.gov/firearms/stats/afmer/afmer2006.pdf 267
Beccaria, Cesare, ON CRIMES AND PUNISHMENTS (1764) 276
BOSTON EVENING POST, Nov. 21, 1768 246
BOSTON GAZETTE, Dec. 5, 1774 273
BOSTON GAZETTE, Oct. 17, 1774 250
BOSTON GAZETTE, Sept. 5, 1774 249
Bureau of Justice Statistics, *Selected Findings: Guns Used in Crime* 4 (July 1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf 269
Campbell, Jacquelyn, et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM. J. PUB. HEALTH 1089 (2003) 275
COLONIAL RECORDS OF THE STATE OF GEORGIA,

PART 1 (1911) 268
Cooley, Thomas, *The Abnegation of Self-Government*, 12 PRINCETON REV. 209 (1883) 256
Cramer, Clayton & Olson, Joseph, *What Does "Bear Arms" Imply?*, GEO. J.L. & PUB. POL'Y (forthcoming 2008), http://papers.ssrn.com/abstract=1021201 .... 244, 276
Cramer, Clayton and Olson, Joseph, *Pistols, Crime, and Public Safety in Early America*, WILLAMETTE L. REV. (forthcoming 2008), http://ssrn.com/abstract=1081403 268
DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS (1856) 262
DOCUMENTS RELATING TO THE COLONIAL HISTORY OF NEW JERSEY (William Whitehead ed., 1882) 246
Drayton, John, MEMOIRS OF THE AMERICAN REVOLUTION (1821) 251
EARLY CENSUS MAKING IN MASSACHUSETTS, 1643-1765 (1902) 252
Elliot, Jonathan, DEBATES IN THE SEVERAL STATE CONVENTIONS (2d ed. 1836) 246, 261
FBI UCR Data compiled by Rothstein Catalog on Disaster Recovery and The Disaster Center, available at http://www.disastercenter.com/crime/dccrime.htm 276
Frothingham, Richard, HISTORY OF THE SIEGE OF BOSTON (1851) 252
Frothingham, Richard, LIFE AND TIMES OF JOSEPH WARREN (1865) 250
Halbrook, Stephen, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS (2008) 250, 251, 253
Hearings on H.R. 641 and Related Bills, House Judiciary Committee Subcommittee on Crime, 98th Congress 111 (1986) 270
Hoyt, William, THE MECKLENBURG DECLARATION OF INDEPENDENCE (1907) 253
Jefferson, Thomas, COMMONPLACE BOOK (1926) 276
Johnson, Samuel, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) 244
JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA (1820) 257
JOURNALS OF THE CONTINENTAL CONGRESS (1905-1922) 252, 267

Kent, James, COMMENTARIES ON AMERICAN LAW (9th ed. 1858) 239
Kleck, Gary, TARGETING GUNS: FIREARMS AND THEIR CONTROL (1997) 269
LEGAL PAPERS OF JOHN ADAMS (L. Wroth & H. Zobel eds., 1965) 249, 276
LETTERS OF DELEGATES TO CONGRESS (Paul Smith ed., 1976) 255
LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON, 1772-1776 (Winthrop Sargent ed., 1866) 268
Levy, Leonard, ORIGINS OF THE BILL OF RIGHTS (1999) 245, 262
Loftin, Colin, et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 23 (1991) 275
MASSACHUSETTS GAZETTE, Dec. 29, 1774 255
Meade, R.D., PATRICK HENRY (1969) 255
N.C. GAZETTE (NEWBURN), July 7, 1775 276
NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, Jan. 13, 1775 251
NEW YORK JOURNAL, Feb. 2, 1769 249
NEW YORK JOURNAL, May 11, 1775 247
NEW YORK JOURNAL, Supplement, Apr. 13, 1769 249
NEW YORK PACKET AND AMERICAN ADVERTISER, Apr. 4, 1776 246
NEWPORT MERCURY (Rhode Island), Apr. 10, 1775 251
OXFORD ENGLISH DICTIONARY (1933) 247
PAPERS OF BENJAMIN FRANKLIN (Leonard Labaree ed., 1961) 254
PAPERS OF JAMES MADISON (C. Hobson et al. eds., 1979) 257
PAPERS OF THOMAS JEFFERSON (J. Boyd ed., 1950) 245
PARLIAMENTARY REGISTER, 14TH PARLIAMENT, 1ST SESSION (1802) 253
PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY (1866) 251
Ramsay, David, HISTORY OF THE AMERICAN REVOLUTION (1789) 252
Rowland, Kate Mason, LIFE OF GEORGE MASON (1892) 247, 248
Shepherd, William, HISTORY OF PROPRIETARY GOVERNMENT IN PENNSYLVANIA (1896) 254
Singer, Norman, SUTHERLAND ON STATUTORY CONSTRUCTION (7th ed. 2007) 240

Sprecher, Robert, *The Lost Amendment*, 51 AM. BAR ASS'N J. 554 (1965) 260
St. George Tucker, BLACKSTONE'S COMMENTARIES (1803) 242, 245
STATUTES OF THE STATE OF NORTH CAROLINA (1791) 267
Story, Joseph, A FAMILIAR EXPOSITION ON THE CONSTITUTION OF THE UNITED STATES (1847) 257
Story, Joseph, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (2d ed. 1851) 240, 256
THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (N. Cogan ed., 1997) 257
THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) 255
THE FEDERALIST (Carey & McClellan eds., 1990) 246, 256
U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES 275
Vernon Stumpf, JOSIAH MARTIN 112 (1986) 253
Volokh, Eugene, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1 (2007) 273
Volokh, Eugene, *The Commonplace Second Amendment*, 73 N.Y.U.L. Rev. 793 (1998) 241
Webster, Noah, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) 244, 265
Wilberforce, Edward, STATUTE LAW: THE PRINCIPLES WHICH GOVERN THE CONSTRUCTION AND OPERATION OF STATUTES (1881) 240
Winkler, Adam, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793 (2006) 273
WORKS OF BENJAMIN FRANKLIN (Jared Sparks ed., 1882) 254
WORKS OF JOHN ADAMS (1865) 254
WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson ed., 1804) 244
WRITINGS OF GEORGE WASHINGTON (Worthington Ford ed., 1889) 253
WRITINGS OF SAMUEL ADAMS (Harry Cushing ed., 1904) 249, 252

WRITINGS OF THOMAS JEFFERSON 45
(A.A. Lipscomb ed., 1907) 245
Young, David, THE FOUNDERS' VIEW OF THE
RIGHT TO BEAR ARMS (2007) 246, 250, 252, 254
Young, David, THE ORIGIN OF THE SECOND
AMENDMENT (2d ed. 2001) 259

Constitutional Provisions

PA. CONST. OF 1776, art. X 244
PA. CONST. OF 1776, art. XIII 244
PA. CONST. OF 1790, art. IX, sec. XXI 244
U.S. CONST. amend. I 258
U.S. Const. amend. II 269
U.S. CONST. amend. II 243
U.S. CONST. amend. V 246, 257, 258
U.S. CONST. amend. VI 243
U.S. CONST. amend. VIII 243
U.S. CONST. art. I, § 4, cl. 1 274
U.S. CONST. art. I, § 8, cl. 17 .... 277, 278
U.S. CONST. art. I, § 8, cl. 3 241
U.S. CONST. art. I, § 8, cl. 8 241
U.S. CONST. art. I, § 9 257
U.S. CONST. art. VI, cl. 1 277
VT. CONST. OF 1777, Ch. 1, art. XV 244

STATEMENT OF THE CASE

Respondent Dick Anthony Heller successfully challenged the Nation's three most draconian infringements of Second Amendment rights. D.C. Code section 7-2502.02(a)(4) forbids registration of handguns, thereby effecting a ban on the possession of handguns within the home. D.C. Code section 7-2507.02 forbids the possession of any functional firearms within the home, without exception. D.C. Code section 22-4504(a) forbids the carrying of a handgun without a license. This section was amended in 1994 to criminalize the unlicensed carrying of a handgun within one's home. "It is common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable." *Bsharah* v. *United States*, 646 A.2d 993, 996 n.12 (D.C. 1994). Respondent challenges this provision only as it relates to his home.

No state, and only one other major city (Chicago), bans handguns outright. The other two provisions appear unique to Washington, D.C.

[Strategic civil rights litigation depends on crafting a narrow case, one which forces the courts to answer the fewest number of questions. Our objective was to have the Second Amendment defined as securing a meaningful individual right—not resolve the constitutionality of every possible gun regulation. No other right is defined once and forever in all its possible manifestations by a single Supreme Court opinion, and there is no logical reason why the Second Amendment should differ in this respect.

The courts would naturally be aware that a decision in our favor might have consequences beyond the challenged provisions, but nonetheless, the more laws challenged, the greater the risk that the case becomes unglued as the analysis grows ever-more complex. There is also a practical limit to the scope of any litigation. Saving the Second Amendment was ambitious enough.

Accordingly, we limited the case to the most far-reaching, least-defensible, and absolute prohibitions. We were well-aware of other serious constitutional flaws in the D.C. Code, but this was simply not the time and place to litigate them. A healthy result for the Second Amendment would build the steps for future litigation against other unconstitutional laws, which could then be given

more careful consideration by the courts. Indeed, within months of the Supreme Court's decision, the D.C. City Council repealed the city's ban on semi-automatic weapons, doubtless realizing that such a blanket ban on most firearms would not survive the common-use test announced by the Court.]

In reviewing the handgun ban, the D.C. Circuit correctly applied this Court's test for determining which "arms" are constitutionally protected. *United States* v. *Miller*, 307 U.S. 174 (1939). The court found that handguns pass the *Miller* test, as they are arms of the type in common use by individuals, the possession of which can contribute to the common defense. PA53a.

The D.C. Circuit further held, correctly, that as home possession of handguns is constitutionally protected, Petitioners may not prohibit their movement within the home. The court struck down the license provision for carrying handguns as applied to home possession. PA54a-55a.

Finally, the D.C. Circuit correctly found that the literal text of section 7-2507.02 "amounts to a complete prohibition on the lawful use of handguns for self-defense," PA55a, and is thus unconstitutional.

SUMMARY OF ARGUMENT

The Second Amendment plainly protects "the right of the people"—an individual right—"to keep and bear arms."

[We wrestled with the question of whether to add a claim alleging the laws violated an unenumerated Ninth Amendment right to self-defense. The Supreme Court would find, as we urged, that the Second Amendment codified the pre-existing right to arms at English law, itself a corollary to Blackstone's inherent right of self-defense and self-preservation. But we concluded that an unenumerated right approach would bite off far too much.

The Second Amendment question was complex enough without venturing into the murky landscape of unenumerated rights. The Ninth Amendment, our preferred textual source of unenumerated rights, deserves its own focused revival effort. And the D.C. Circuit had recently rejected efforts to fashion an unenumerated right to arms, owing to the Second Amendment's actual enumeration of that very right. *Fraternal Order of Police v. United States*, 173 F.3d 898, 905-06 (D.C. Cir. 1999). The wisdom of our decision to

avoid a separate self-defense right claim was regrettably verified during *Heller's* pendency by *Abigail Alliance v. Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (en banc), rejecting claims that terminally ill patients had an inherent self-preservation claim to potentially life-saving treatment. The result in *Abigail Alliance* should be reconsidered in light of *Heller's* confirmation that there does exist an inherent right of self-defense.]

However else Petitioners might regulate the possession and use of arms, their complete ban on the home possession of all functional firearms, and their prohibition against home possession and movement of handguns, are unconstitutional.

The Amendment's structure and etymology are not overly mysterious. The first clause, referencing the importance of "[a] well regulated Militia," provides a non-exclusive yet perfectly sensible justification for securing the people's right to keep and bear arms. In any event, the Second Amendment's preamble cannot limit, transform, or negate its operative rights-securing text.

The Second Amendment was engendered by the Framers' bitter experience with the King's disarmament of the population. That disarmament was especially pernicious to the colonists, who fervently believed they possessed an individual right to arms. In resisting British tyranny, the militia were not directed by the government officials they sought to overthrow, but certainly depended on the citizenry's familiarity with, and private possession of, firearms.

The Second Amendment's text thus reflects two related, nonexclusive concerns: it confirms the people's right to arms and explains that the right is necessary for free people to guarantee their security by acting as militia.

[Extremists on either side of the gun issue place undue emphasis on the Second Amendment's preamble. Gun prohibitionists wrongly believe that the preamble transforms "the right of the people" into a right to do as one is told within the confines of a state-sanctioned military organization, notwithstanding any contrary federal authority. But to the extent I have received hate mail, it is largely from the lunatic fringe that believes the Second Amendment entitles individual Americans to all manner of modern military equipment. This latter construction not only ignores the Second Amendment's roots in the right of self-defense, but also it would narrow the practical use of the right to arms. If the Second Amendment guaranteed only a right to

arms with which to resist tyrannical government, almost any restriction on the right to arms would be constitutional as not immediately impeding resistance to tyranny—including a law mandating all guns be stored in a non-functional condition with no exception for home self-defense, and perhaps a law that bars the possession of guns useful for self-defense but not militarily practical, such as Heller's .22 revolver.

This is not to suggest that the Second Amendment has no power-checking aspect—the militia clause confirms that it does, and the brief argues the point at some length. But power-checking is a (non-exclusive) reason for securing the right to arms, not a defining feature or source of the right.]

The Second Amendment's drafting and ratification history demonstrates it was designed to secure individual rights, consistent with the demands of the Anti-Federalists, whom the Bill of Rights was intended to mollify. Petitioners' militia theory was specifically addressed—and rejected—by the Framers, and that rejection is confirmed by centuries of precedent. Precedent likewise confirms the individual nature of Second Amendment rights.

Under this Court's precedent, the arms whose individual possession is protected by the Second Amendment are those arms that (1) are of the kind in common use, such that civilians would be expected to have them for ordinary purposes, and (2) would have military utility in time of need. A weapon that satisfies only one of these requirements would not be protected by the Second Amendment. Handguns indisputably satisfy both requirements.

Petitioners concede that a functional firearms ban would be inconsistent with an individual right to arms. The dispute surrounding D.C. Code section 7-2507.02 thus merely concerns statutory interpretation. The D.C. Circuit's interpretation of this section's language is correct.

Although this case does not call upon the Court to determine the standard of review applicable to regulations of Second Amendment rights, Respondent observes that the right to arms protects two of the most fundamental rights—the defense of one's life inside one's home, and the defense of society against tyrannical usurpation of authority. Petitioners' casual use of social science sharply underscores the importance of securing Second Amendment rights with a meaningful standard of review.

[Outcome-determinative standards of review have apparently fallen out of fashion. In *Lawrence v. Texas*, 539

U.S. 558 (2003), for example, the Supreme Court announced a liberty interest in engaging in consensual intimate relationships without announcing any particular standard of review. Ultimately, more important in this case than any particular standard of review would be the mere act of striking down the challenged provisions, demonstrating that the Second Amendment is enforceable. Presenting the case as dependent on a standard of review would unduly complicate matters, risking the outcome if the Court found it easier to rule in our favor than agree on a rationale for doing so. But we could not ignore the standard of review issue entirely, and so, in the alternative, we argued for strict scrutiny.

This approach to the standard of review issue was vindicated. The Court wisely left the matter for another day, but agreed with our observation that any standard of review would be robust, consistent with the treatment of other enumerated rights. *Heller*, 128 S. Ct. at 2818 n.27.]

Finally, Petitioners' contention that the Second Amendment is not binding law within the Nation's capital is spurious.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP ORDINARY FIREARMS, UNRELATED TO GOVERNMENT MILITARY SERVICE.

A. Preambles Cannot Negate Operative Text.

By its own terms, the rationale of the Second Amendment's preamble is not exclusive. The operative rights-securing clause is grammatically and logically independent of the preamble. Skilled diplomacy, a powerful army, or adherence to the constitution may sufficiently provide for "the security of a free state," and still the people would enjoy their right to arms. Most critically, the preamble cannot contradict or render meaningless the operative text.

As Petitioners note, preambles are examined only "[i]f words happen to still be dubious." Pet. Br. 17 (quotation and citation omitted). "[B]ut when the words of the enacting clause are clear and positive, recourse must not be had to the preamble." James Kent, 1 COMMENTARIES ON AMERICAN LAW 516 (9th ed. 1858). "The preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, it cannot be used to create doubt or

uncertainty." Norman Singer, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 47.04, at 295 (7th ed. 2007).

The Framers were familiar with these rules of construction. One influential English precedent held:

> I can by no means allow of the notion that the preamble shall restrain the operation of the enacting clause; and that, because the preamble is too narrow or defective, therefore the enacting clause, which has general words, shall be restrained from its full latitude, and from doing that good which the words would otherwise, and of themselves, import; which (with some heat) his Lordship said was a ridiculous notion.

Copeman v. *Gallant*, 1 P. Wms. 314, 320 (Ch. 1716); see also Edward Wilberforce, STATUTE LAW: THE PRINCIPLES WHICH GOVERN THE CONSTRUCTION AND OPERATION OF STATUTES 288-89 (1881).

> [G]eneral words in the enacting part, shall never be restrained by any words introducing that part; for it is no rule in the exposition of statutes to confine the general words of the enacting part to any particular words either introducing it, or to any such words even in the preamble itself.

King v. *Athos*, 8 Mod. Rep. 136, 144 (K.B. 1723); see also *Mace* v. *Cadell*, 1 Cowp. 232, 233 (K.B. 1774) ("if the statute meant to comprehend nothing more than is contained in the preamble, it means nothing at all").

[Georgetown Law Professor James Oldham taught my Contracts class in 1992-93. A fan of ancient and obscure English law, Prof. Oldham frequently regaled the class with stories of his favorite English jurist, Lord Mansfield. Citing Lord Mansfield's decision in *Mace* as authority before the Supreme Court validated my 1L experience.]

Preambles are "properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble." 1 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 326-27 (2d ed. 1851). Accordingly, the Constitution's other preambles are given no weight. "Although that [opening] Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the

source of any substantive power. . . ." *Jacobson* v. *Massachusetts*, 197 U.S. 11, 22 (1905).

The Copyright and Patent Clause preamble would arguably possess greater operative force than that of the Second Amendment, as it begins with the infinitive that introduces most powers of Congress. The power "[t]o promote the Progress of Science and the useful Arts," U.S. CONST. art. I, § 8, cl. 8, viewed with the same breadth as the power "[t]o regulate Commerce," U.S. CONST. art. I, § 8, cl. 3, could stand alone absent the text that follows. In contrast, the Second Amendment's preamble merely declares a concept. Yet "Congress need not 'require that each copyrighted work be shown to promote the useful arts.' " *Schnapper* v. *Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981) (citations omitted). And this Court does not question whether copyright and patent laws serve the preambular purpose of promoting progress, though some laws might fail such examination. *Eldred* v. *Ashcroft*, 537 U.S. 186, 212 (2003).

That the Second Amendment contained a declaration of purpose was not unusual for its day. But such declarative language was never given the transformative effect urged by Petitioners. E.g., Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U.L. Rev. 793, 794-95 (1998). The same Congress that passed the Second Amendment also reauthorized the Northwest Ordinance of 1787, containing this language: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52. But nobody would seriously contend that were religion, morality, or knowledge one day found unnecessary for good government, schools should no longer be encouraged in the states of the former Northwest Territory.

Petitioners argue that the preamble should be given controlling weight because " 'it cannot be presumed that any clause in the constitution is intended to be without effect.' " Pet. Br. 17 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)). But their citation to *Marbury* is incomplete—the passage concludes: "unless the words require it." *Marbury*, 5 U.S. (1 Cranch) at 174. Because Petitioners urge an interpretation of the preamble inconsistent with the plain meaning of the operative text, and considering the established rules of construction governing preambular language, the "presumption" urged by Petitioners is rebutted. Notwithstanding *Marbury*, the Court did not give force to the opening preamble in *Jacobson* or to the Copyright preamble in *Eldred*.

[I was surprised at the city's incomplete citation to *Marbury*. I was also tempted to cite the Supreme Court's admonition in *United States v. Darby*, 312 U.S. 100, 124 (1941), to the effect that the Tenth Amendment "states but a truism," but I reconsidered. Why remind the Court that entire parts of the Bill of Rights can be discarded? The only thing our opponents would have preferred to wiping out the Second Amendment's last fourteen words would be to wipe out the entire Amendment.]

No doubts or ambiguities arise from the words "the right of the people to keep and bear arms shall not be infringed." The words cannot be rendered meaningless by resort to their preamble. Any preamble-based interpretive rationale demanding an advanced degree in linguistics for its explication is especially suspect in this context. "A bill of rights may be considered, not only as intended to give law, and assign limits to government . . . , but as giving information to the people [so that] every man of the meanest capacity and understanding may learn his own rights, and know when they are violated. . . ." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES, app. 308 (1803).

[The linguistic theories always struck me as reaching. The Framers didn't have Chomsky, but they did have established canons of statutory construction. To this day, recognized legal doctrines, not late 20th century Linguistic Department research, are taught in law schools and relied upon by legislators, litigators, and judges. The various theories grounded in the placement of commas or capitalization of certain words in different versions of the Second Amendment likewise did not merit wasting much space, sounding as they do much like tax-protestor style claims. In any event, we have a rich record of what the Framers and others throughout history have said about the Second Amendment, none of which references linguistics or comma placement.]

B. The Second Amendment's Plain Text Secures an Individual Right.

"The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*." *Patton* v. *United States*, 281 U.S. 276, 298 (1930), overruled on other grounds, *Williams* v. *Florida*, 399 U.S. 78 (1970). There should be no distinction among " 'the people' protected by

the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments. . . ." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (citation omitted).

Conceding that the Second Amendment secures individual rights, Petitioners nonetheless argue that the term "bear arms" is exclusively military, such that the Second Amendment right can be exercised only under the direction of a governmental military organization. Putting aside this rather strange concept of rights—a "right" to particular weapons in an environment where the individual is obliged to obey orders, or a "right" to defend the government but not oneself or one's family—the text does not support this notion.

"Keep and bear" embody distinct concepts in the Second Amendment, just as "speedy and public" reflect separate rights in the Sixth Amendment. Had the Framers eliminated either "speedy" or "public" from the Sixth Amendment, they would have significantly narrowed the right's scope. Cf. U.S. CONST. amend. VIII (proscribing "cruel and unusual punishments").

This case concerns the right to "keep" arms in the ordinary sense of the verb: to possess at home.[1] "Keep" has no exclusive military connotation. "Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944). When the Constitution was written, English law had "settled and determined" that "a man may keep a gun for the defence of his house and family." *Mallock* v. *Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). Legislatures in England and America employed "keep" in the purely individual sense—especially when disarming minorities. See, e.g., 1 W. & M., Sess. 1, c. 15, § 4 (1689) ("no papist . . . shall or may have or keep in his house . . . any arms. . . ."); 4 Hening's Statutes at Large (Va.) 131 ("no negro, mulatto, or Indian . . . shall hereafter presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever. . . .").

Neither did the term "bear arms" have a uniquely military application. See, e.g., *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting). Johnson and Webster defined

1. See Question Presented. The "bearing" of arms implicates different interests and concerns not at issue here.

"bear" primarily as "to carry." 1 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (not paginated); Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (not paginated) (also "To wear . . . bear arms in a coat"). Accordingly, "bear arms" often had purely civilian connotations. For example, Parliament forbade Scottish Highlanders to "use or bear . . . side-pistols, or guns, or any other warlike weapons, in the fields, or in the way coming or going to, from or at any church, market, fair, burials, huntings, meetings, or any occasion whatsoever. . . ." 9 Geo. I Chap. 26 (1724), 15 Statutes at Large 246-47 (1765);[2] cf. *Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 417 (1857) (Constitution secured citizens' right "to keep and carry arms wherever they went," along with rights of speech and assembly).[3]

Eighteenth-century constitutional drafters used "bearing arms" in the individual sense. See PA. CONST. OF 1776, art. XIII ("That the people have a right to bear arms for the defence of themselves and the state. . . ."); VT. CONST. OF 1777, Ch. 1, art. XV (same). Petitioners' claim that Pennsylvania's drafters used "themselves" collectively not only defies the word's normal meaning, but would also render it redundant of "the state."[4]

Pennsylvania reiterated "the right of citizens to bear arms, in defence of themselves and the State" in its 1790 constitution. James Wilson, delegate to Pennsylvania's 1790 constitutional convention and later Associate Justice of this Court, explained:

> W]hen it is necessary for the defence of one's person or house . . . it is the great natural law of self-preservation, which . . . cannot be repealed, or superseded, or suspended by any human institution [but] is expressly recognized in the constitution of Pennsylvania.

3 WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson ed., 1804) (citing PA. CONST. OF 1790, art. IX, sec. XXI); see

2. See Clayton Cramer & Joseph Olson, *What Does "Bear Arms" Imply?*, GEO. J.L. & PUB. POL'Y (forthcoming 2008), http://papers.ssrn.com/abstract=1021201 (supplying numerous examples.)

3. That early congressional references to "bearing arms" related to military matters was a function of (1) the issues facing Congress in those years, (2) the perception that Congress did not have broad regulatory powers over private arms, and, of course (3) the Second Amendment's limitation on those powers. Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 260-62 (2004).

4. "Themselves" as otherwise used by the Pennsylvania drafters is self-evidently not collective: "[T]he people have a right to hold themselves, their houses, papers, and possessions free from search or seizure. . . ." PA. CONST. OF 1776, art. X.

also *Ortiz* v. *Commonwealth*, 681 A.2d 152, 156 (Pa. 1996). "The constitutions of most of our States assert that all power is inherent in the people; that . . . it is their right and duty to be at all times armed. . . ." *Letter from Thomas Jefferson to Justice John Cartwright* (June 5, 1824), 16 WRITINGS OF THOMAS JEFFERSON 45 (A.A. Lipscomb ed., 1907).

Perhaps the most instructive 18th-century usage of "bear arms" is that of James Madison, author of the Second Amendment. In 1785, Madison introduced in Virginia's legislature a hunting bill drafted by Jefferson. The bill stated, in part:

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

A Bill for Preservation of Deer (1785), in 2 PAPERS OF THOMAS JEFFERSON 443-44 (J. Boyd ed., 1950) (emphases added). .

Madison's usage of "bear" was no personal idiosyncrasy. St. George Tucker, the leading legal scholar of the early Republic, observed:

> The bare circumstance of having arms . . . of itself, creates a presumption of warlike force in England. . . . But ought that circumstance, of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself?

5 Tucker, BLACKSTONE'S COMMENTARIES, app. B at 19 (*Concerning Treason*).

"An individual could bear arms without being a soldier or militiaman." Leonard Levy, ORIGINS OF THE BILL OF RIGHTS 135 (1999). But even if "bear arms" had a purely military connotation, that idiomatic meaning would itself be transformed by inclusion of the word "keep." For example, "Mary knows how to stir the pot" conveys a meaning (i.e., cause trouble) very different from, "Mary knows how to hold and stir the pot" (i.e., cook).

* * *

To the extent the Second Amendment's preamble informs the nature of the operative rights-securing provision, the necessity of a "well regulated Militia" does not negate, but rather advances the individual character of the right to arms.

The Militia is constitutionally defined as a preexisting entity, separate and apart from an army or navy that might be raised. U.S. CONST. amend. V (". . . in the land or naval forces, or in the Militia"). "Congress was authorized both to raise and support a national army and also to organize 'the Militia.' " *Perpich* v. *Dep't of Def.*, 496 U.S. 334, 340 (1990). "[T]he militia" are not "troops" or "standing armies," but "civilians primarily"—"all males physically capable of acting in concert for the common defense. . . ." *Miller*, 307 U.S. at 179.

"Who are the Militia? They consist now of the whole people. . . ." 3 Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 425 (2d ed. 1836) (George Mason). That "the 'militia' is identical to 'the people,' " Akhil Amar, THE BILL OF RIGHTS 51 (1998), is evident from Madison's description of "a militia amounting to near half a million of citizens with arms in their hands," who could resist an oppressive standing army. THE FEDERALIST NO. 46, 244 (James Madison) (Carey & McClellan eds., 1990). This militia reflected "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to "governments [that] are afraid to trust the people with arms." *Id.*; BOSTON EVENING POST, Nov. 21, 1768, at 2, col. 3 ("The total number of the Militia, in the large province of New-England, is upwards of 150,000 men, who all have and can use arms. . . ."); NEW YORK PACKET AND AMERICAN ADVERTISER, Apr. 4, 1776, at 2, cols. 1-2 ("Whoever asserts that 10 or 12,000 soldiers would be sufficient to control the militia of this Continent, consisting of 500,000 brave men, pays but a despicable compliment to the spirit and ability of Americans").

That "the militia" was broadly composed of the general population, and expected to check government force, belies the notion that "militia" refers only to specific forces organized by government. The American militia's broad composition set it apart from its far narrower English counterpart. "[T]he Militia, in this country, is not a Select part of the People, as it is in England, set apart for that purpose, under Officers . . . employed and paid at the publick charge; but the Whole body of the people from sixteen years of age to fifty." *Speech of Gov. Morris*, June 29, 1744, in 6 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF NEW JERSEY 187 (William Whitehead ed., 1882). "Select militia members in England were required to have qualifications even higher than those required to be a member of the House of Commons." David Young, THE FOUNDERS' VIEW OF THE RIGHT TO BEAR ARMS 11 n.6 (2007) (citation omitted).

The broad civilian understanding of who constitutes "the Militia" continues today. Congress defines "the militia of the United States" as comprising all able-bodied males from 17 to 45, who are or intend to become citizens; and members of the National Guard up to age 64. 10 U.S.C. §§ 311, 313.[5] Excluded from this definition of Militia, among others, are "members of the armed forces, except members who are not on active duty." 10 U.S.C. § 312(a)(3); accord D.C. Code § 49-401 (District of Columbia required to enroll most able-bodied males age 18 to 45 in militia).

In order that the ordinary civilians constituting the Militia might function effectively, it was necessary that the people possess arms and be familiar with their use. After all, individuals called for militia duty were "expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Miller*, 307 U.S. at 179. Thus, the "militia system . . . implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence." *Id.* at 179-80 (citation omitted); see also NEW YORK JOURNAL, May 11, 1775, at 1, cols. 2-3 (recommending "to the inhabitants of this country, capable of bearing arms, to provide themselves with arms and ammunition, to defend their country in case of any invasion").

That a militia be "well regulated" does not mean that it must necessarily be the subject of state control. With respect to troops, "regulated" is defined as "properly disciplined." 7 OXFORD ENGLISH DICTIONARY 380 (1933). In turn, "discipline" in relation to arms is defined as "training in the practice of arms." 3 OXFORD ENGLISH DICTIONARY 416 (1933). Notably, prerevolutionary Americans forming voluntary associations for the purpose of resisting British rule, including Washington and Mason, employed the term "well regulated militia" to describe their associations. 1 Kate Mason Rowland, LIFE OF GEORGE MASON 428 (1892). These organizations were decidedly not sanctioned by any governmental authority.

George Mason succinctly explained the logic underlying the relationship of the Second Amendment's preamble to its operative text when he warned Virginia's ratifying convention that absent a Bill of Rights, "[t]he militia may be here destroyed by that method which has been practised in other parts of the world before; that

5. Congress may define that part of the Militia to which it wishes to apply its Article I powers, but Petitioners defy logic in suggesting that the protection of a right against the federal government may thus be legislated away by Congress. Pet. Br. 14 n.2.

is, by rendering them useless—by disarming them." 2 Rowland, at 408.

The Second Amendment secures the *pre-existing* right of the people to keep and bear arms.[6] And it does so, in part, because a militia—comprised of the body of ordinary people proficient in the use of their private arms—was deemed necessary. Were the people denied their right to keep and bear arms, they could not function as a well regulated militia.

C. *The Framers Secured an Individual Right to Keep and Bear Arms in Reaction to the British Colonial Experience.*

["The right to keep and bear arms" had a specific meaning to the Colonists, and it had nothing to do with a right to use guns at the direction and control of a military authority. Because the other side's arguments are so heavily rooted in historical interpretation, we dedicated a significant portion to the brief explaining how the right to arms, and the militia, were viewed by the Framers. There is simply no competing history on these points.

The brief earlier referenced the wide acceptance of the English right to arms and would now demonstrate that right's role in the Revolutionary Era. The task of providing a complete exegesis of the English right to arms was left to the very capable hands of Kevin Marshall, whose excellent brief for the Cato Institute and Professor Joyce Lee Malcolm is the gold standard of amicus support.]

"[C]onstitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past." *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (L. Hand, J.). The rights secured by the first eight amendments were not conjured at random, but in reaction to specific outrages of the King's rule. The Second Amendment is no exception. While Petitioners and their amici may not believe that English law secured an individual right to arms for self-defense, colonial Americans certainly did, and it was the repeated, wanton violation of that right that led them to demand and ratify the Second Amendment.

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6. *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1875) (right to arms "not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence").

As British troops arrived in Boston to enforce the Townshend Acts in 1768, a call went out for the people to arm themselves. Responding to British criticism of the civilian armament, Samuel Adams declared that "it is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights . . . are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs." 1 WRITINGS OF SAMUEL ADAMS 299 (Harry Cushing ed., 1904). Citing Blackstone's "right of having and using arms for self-preservation and defence," Adams added, "[h]ow little do those persons attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to *provide themselves with arms for their defence* at any time. . . ." *Id.* at 317-18 (emphasis in original).

The "Journal of the Times" concurred:

> It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.

NEW YORK JOURNAL, Supplement, Apr. 13, 1769, at 1, col. 3.

So accepted was the notion that Americans had the right to arms that Crown prosecutors of the soldiers charged in the Boston Massacre invoked the victims' right to armed resistance against abusive Redcoats. 3 LEGAL PAPERS OF JOHN ADAMS 149, 274 (L. Wroth & H. Zobel eds., 1965). John Adams, in his successful defense of the soldiers, concurred: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence. . . ." *Id.* at 248.

Nonetheless, reports of British troops disarming Americans surfaced as early as February 1769. NEW YORK JOURNAL, Feb. 2, 1769, at 2, col. 2. And much to the dismay of the colonists, the governing council newly appointed for Massachusetts came to propose "the disarming of the town of Boston, and as much of the province as might be." BOSTON GAZETTE, Sept. 5, 1774, at 3, col. 2. The following day, Lt. General Thomas Gage, commander of the British military in America and Massachusetts Royal Governor, moved the powder stored at Charlestown to Castle William and forbade the release of privately owned powder from the Boston

magazine. The ensuing unrest came to be known as "the Powder Alarm." Young, FOUNDERS' VIEW, at 37.[7]

The citizens of Suffolk County, Massachusetts promptly issued a proclamation denouncing the powder seizure (among other outrages). The Continental Congress quickly approved the "Suffolk Resolves." *Id.* at 38. In addition to the powder seizure, "[t]he Crown forcibly purchased arms and ammunition held in the inventory of merchants, and an order went out that the inhabitants must turn in their arms." Stephen Halbrook, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 45 (2008) (citation omitted).

The order to disarm was apparently ignored, but British seizure of private arms continued. "They keep a constant search for every thing which will be serviceable in battle; and whenever they espy any instruments which may serve or disserve them,— whether they are the property of individuals or the public is immaterial,— they are seized. . . ." *Letter of Joseph Warren to Samuel Adams*, Sept. 29, 1774, in Richard Frothingham, LIFE AND TIMES OF JOSEPH WARREN 381 (1865).

The colonists expressed their displeasure over firearms seizures. Worcester County complained to Gage that although "the People [are] justified in providing for their own Defense," passing through Boston Neck entailed having "many places searched, where Arms and Ammunition were suspected to be; and if found seized; yet as the People have never acted offensively, nor discovered any disposition so to do, as above related, the County apprehend this can never justify the seizure of private Property." BOSTON GAZETTE, Oct. 17, 1774, at 2, cols. 2-3. "It is said that the troops, under your

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7. Owing to the instability of black powder used in colonial times, fire safety measures of the day mandated that large stores of gunpowder, as those belonging to merchants, be stored in "powder houses" away from other structures, as were powder and other arms purchased by a community for the benefit of its citizens. The 1783 Massachusetts statute allegedly "prohibit[ing] Boston citizens from keeping loaded firearms in their homes," Pet. Br. 42, was a *fire safety* measure intended to regulate the storage of gunpowder: "An Act in Addition to the several Acts already made for the prudent storage of Gun-Powder within the Town of Boston." Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. The act opens with, "Whereas the depositing of loaded Arms . . . is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out," with no reference to firearms qua firearms being inherently dangerous. *Id.*

command, have seized a number of cartridges which were carrying out of the town of Boston, into the country; and as you were pleased to deny that you had meddled with private property . . . I would gladly be informed on what different pretence you now meddled with those cartridges. . . ." NEWPORT MERCURY (Rhode Island), Apr. 10, 1775, at 2, col. 1.

The British also prohibited importation of guns and powder, prompting further outcry. "Could they [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies?" NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, Jan. 13, 1775, at 1, col. 1 (reprinted in 1 AMERICAN ARCHIVES, 4TH SERIES 1065 (Peter Force ed., 1837)). South Carolina's General Committee protested that "by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them. . . ." 1 John Drayton, MEMOIRS OF THE AMERICAN REVOLUTION 166 (1821).

Notwithstanding the import prohibition and occasional seizure of private weapons, Gage understood that complete disarmament of the population required military domination. Halbrook, THE FOUNDERS' SECOND AMENDMENT at 49 (collecting sources). The colonists agreed: "[I]f they should come to disarming the inhabitants, the matter is settled with the town at once; for blood and carnage must inevitably ensue. . . ." *Letter of John Andrews*, Sept. 12, 1774, in PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 359 (1866).

Not surprisingly, the Revolution's first battle opened on April 19, 1775, with an ill-conceived British expedition to seize weapons from private property in Concord. Fear of arms seizures prompted Americans to transfer publicly stored weapons to their homes, and when Redcoats came to seize public and private arms alike, war erupted.

The immediate aftermath of Lexington and Concord found Boston cut off from the remainder of the province. Gage offered Bostonians free passage from the city provided they would deliver their arms for safekeeping. A vote was taken and the people agreed to Gage's terms, surrendering "1778 fire-arms, *634 pistols*, 973 bayonets, and 38 blunderbusses." Richard Frothingham,

HISTORY OF THE SIEGE OF BOSTON 95 (1851) (emphasis added).[8] Gage quickly reneged on his promise of safe passage. Young, FOUNDERS' VIEW, at 52.

Americans reacted strongly to the disarmament of Boston. Thomas Jefferson and John Dickinson drafted a "Declaration of the Causes and Necessity of Taking Up Arms," issued by the Second Continental Congress on July 6, 1775. Gage's disarmament scheme figured prominently among the "Causes" for armed revolt:

> [I]t was stipulated that the said inhabitants having deposited *their arms* . . . should have liberty to depart, taking with them their other effects. They accordingly delivered up *their arms*, but . . . the governor ordered the arms . . . seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave *their most valuable effects* behind.

2 JOURNALS OF THE CONTINENTAL CONGRESS 136-37 (1905) (emphases added).

[The more familiar Declaration of Independence also contains a reference to British disarmament, although one too oblique to explore in the brief. The Declaration's complaint that King George had "ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People," references the shelling of Falmouth, Massachusetts (now Portland, Maine) as punishment for failing to guarantee the town's good behavior with an offering of hostages and arms. *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 107-08 (2008).]

Disarmament as a grievance became a common theme among the Patriots. For example, addressing Indian tribes in search of alliance, Samuel Adams complained that the British "have told us we shall have no more guns, no powder to use. . . . How can you live without powder and guns? But we hope to supply you soon with both, of our own making." 3 WRITINGS OF SAMUEL ADAMS 212-13.

That the colonists cared little about the prospect of having their guns seized is not the only a historical concept underlying Peti-

8. Another account repeats these numbers, save for 700 fewer bayonets. 1 David Ramsay, HISTORY OF THE AMERICAN REVOLUTION 176 (1789). Boston's 1765 population totaled 15,520. EARLY CENSUS MAKING IN MASSACHUSETTS, 1643-1765, 102 (1902).

tioners' repudiation of the Second Amendment. Redcoats and Patriots alike would have puzzled at Petitioners' notion that the Revolution produced an exclusive governmental right to operate an organized militia. The "well regulated militia" of the American Revolution operated not merely beyond the control of, but in direct challenge to, the King's governors.

In Massachusetts, as in other colonies, militia officers were elected from among the militiamen. This "meant that [officers] appointed by the Royal governor would be thrown out. The Provincial Congress further usurped the Crown's militia power by appointing a Committee of Safety that could call out the militia when necessary." Halbrook, FOUNDERS' SECOND AMENDMENT at 48 (citation omitted). Gage recognized this process as a threat to British rule:

> The Officers of the Militia have in most Places been forced to resign their Commissions, And the Men choose their Officers, who are frequently made and unmade; and I shall not be surprized, as the Provincial Congress seems to proceed higher and higher in their Determinations, if Persons should be Authorized by them to grant Commissions and Assume every Power of a legal Government. . . .

1 PARLIAMENTARY REGISTER, 14TH PARLIAMENT, 1ST SESSION 58 (1802).

North Carolina's colonial governor, Josiah Martin, decried the new militias that "submit to the illegal and usurped authorities of [patriotic] Committees." William Hoyt, THE MECKLENBURG DECLARATION OF INDEPENDENCE 44 (1907); see also Vernon Stumpf, JOSIAH MARTIN 112 (1986) ("they are now actually endeavoring to form what they call independent Companies under my nose"). Virginia's Governor, Lord Dunmore, complained that "[e]very County is now Arming a Company of men whom they call an independent Company for the avowed purpose of protecting their Committee, and to be employed against Government if occasion require." *Letter to Earl of Dartmouth*, Dec. 24, 1774, in 2 WRITINGS OF GEORGE WASHINGTON 445 n.1 (Worthington Ford ed., 1889). Loyalists were horrified by the rise of extragovernmental militias, but Patriots such as John Adams would have none of the criticism:

> "The new-fangled militia," as the specious [Loyalist] calls it, is such a militia as he never saw. They are commanded through the province, not by men who procured their commissions

> from a governor as a reward for making themselves pimps to his tools, and by discovering a hatred of the people, but by gentlemen, whose estates, abilities, and benevolence have rendered them the delight of the soldiers. . . .

4 WORKS OF JOHN ADAMS 40-41 (1865).

Indeed, extra-governmental militias existed even in times of good relations with the Crown. Pennsylvania, owing to Quaker influence, was alone among the colonies in not having a governmentally organized militia for most of its history. But this did not mean that a militia was unneeded in Pennsylvania, or that the colony lacked for means of defense. Responding to the depredations of privateers on the Delaware River, Benjamin Franklin published *Plain Truth* in 1747, warning of dire consequences were the people, though well-armed, to remain unprepared. 3 WORKS OF BENJAMIN FRANKLIN 1-21 (Jared Sparks ed., 1882). Franklin quickly followed *Plain Truth* with *Form of Association*, laying out a vision of voluntary mutual self-defense "Associations" palatable to the religiously scrupulous. The Associations would be freely formed by individuals electing their own officers, with neither offensive intent nor governmental compulsion or oversight. 3 PAPERS OF BENJAMIN FRANKLIN 205 (Leonard Labaree ed., 1961).

Franklin's vision triumphed, the 1747 Association enrolling 10,000 men. William Shepherd, 6 HISTORY OF PROPRIETARY GOVERNMENT IN PENNSYLVANIA 530 (1896). But not everyone was comfortable with the arrangement:

> It strongly resembles treason. The people should have desired the president and council to appoint officers for their training, and put themselves under their direction. . . . This is erecting a government within a government, and rebelling against the king's authority.

Id. (quoting *Letter of Thomas Penn to Mr. Peters* (March 30, 1748)). The King in Council disallowed a 1755 law granting formal recognition of the voluntary associations, but Pennsylvanians continued their voluntary armed association in times of need. Young, FOUNDERS' VIEW, 20-23.

John Adams explicitly clarified that militia forces served their purpose regardless of whether they were organized pursuant to law. In the First Continental Congress, Adams proposed a resolution

> that it be recommended to all the Colonies, to establish by Provincial Laws, where it can be done, a regular well furnished, and disciplined Militia, and where it cannot be done by Law, by voluntary Associations, and private Agreements.

1 LETTERS OF DELEGATES TO CONGRESS 132 (Paul Smith ed., 1976).

[Nothing else more clearly reveals the Framers' view that people could act as well-regulated militia without government approval.]

As war approached, clashes between voluntary militias and colonial governors became not merely philosophical, but physical. When Governor Dunmore seized the powder at Williamsburg, Patrick Henry's Hanover Independent Militia Company forced restitution. R.D. Meade, PATRICK HENRY 50-51 (1969). One paper reported that as a "party of the militia being at exercise on Boston common, a party of the army surrounded them and took away their fire arms; immediately thereupon a larger party of the militia assembled, pursued the Army, and retook their fire arms." MASSACHUSETTS GAZETTE, Dec. 29, 1774, at 2, col. 2.

Militia forces operating without the government's blessing would prove critical to the American war effort. For example, the first American military offensive of the Revolution, Ethan Allen's capture of Fort Ticonderoga, was accomplished by "two hundred undisciplined men, with small arms, without a single bayonet. . . ." Ira Allen, THE NATURAL AND POLITICAL HISTORY OF THE STATE OF VERMONT 44 (reprint 1969).

Respondent does not suggest that members of private paramilitary organizations have a right to commit violent acts under the auspices of acting as a citizen militia. See, e.g., Va. Code § 18.2-433.2; Cal. Penal Code § 11460. The Framers, who organized the militia under the new constitution, doubtless agreed that citizens should not compete with legitimate government authority. "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes. . . . Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

But as expressed in the Declaration, the Framers saw no tension between accepting the lawful authority of an imperfect and even frequently unjust government, while retaining the ability to resist tyranny. The notion that independent, armed militia would

engage in the treason and insurrection forbidden by the Constitution is spurious. 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. See THE FEDERALIST NO. 46 (James Madison), *supra*; THE FEDERALIST NO. 29 (Alexander Hamilton).

> 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.

2 Story, COMMENTARIES, *supra*, at 607.
Cooley agreed, explaining that the Second Amendment "is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people." Thomas Cooley, *The Abnegation of Self-Government*, 12 PRINCETON REV. 209, 213-14 (1883). The individual use of Second-Amendment-protected arms to check despotism, "far from being revolutionary, would be in strict accord with popular right and duty." *Id.*

> The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Silveira v. *Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). The Framers intended the Second Amendment to guard against "[o]ne of the ordinary modes, by which tyrants accomplish their purposes without resistance [which is] by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia." Joseph Story, A FAMILIAR

EXPOSITION ON THE CONSTITUTION OF THE UNITED STATES 264 (1847).

Certainly Petitioners would not dispute Americans' justification for revolting against Great Britain, an event that would not have been possible without the private ownership of firearms. And should our Nation someday suffer tyranny again, preservation of the right to keep and bear arms would enhance the people's ability to act as militia in the manner practiced by the Framers.

[Here the brief veers off into legislative history, an approach I personally disfavor but which was necessary considering how heavily the other side relies upon this mode of interpretation. In any event, the Second Amendment's legislative history, fully and properly examined, fully supports the individual rights model.]

That the Second Amendment was designed to secure a personal right of the citizens is clear from Madison's notes for the speech introducing the Bill of Rights. "They [the proposed amendments] relate first to private rights," 12 PAPERS OF JAMES MADISON 193-94 (C. Hobson et al. eds., 1979). Madison thus initially proposed placing the Second Amendment alongside other provisions securing individual rights in Article I, sec. 9—following the habeas corpus privilege and the proscriptions against bills of attainder and *ex post facto* laws, together with his proposed protections for speech, press, and assembly. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (N. Cogan ed., 1997).

If "bear arms" had the exclusively military connotation urged by Petitioners, no one would have proposed qualifying the phrase with "for the common defence." But the Senate rejected just that proposal. JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 77 (1820). Some collective rights adherents speculate that "common defence" was considered redundant, but more plausibly the Senate did not wish to narrow "bear arms" to a purely military usage. After all, the first Congress knew how to condition individual rights on militia service. E.g., U.S. CONST. amend. V (no presentment or indictment right "in cases arising in . . . the Militia, when in actual service. . . .")[9]

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9. Petitioners claim that the "common defence" language was scrapped as an excessive and controversial revision to the Constitution's body, Pet. Br. At 29 n.6, contradicting their claim that the Second Amendment was intended to remedy deficiencies in the Constitution's militia clauses. E.g., Pet. Br. 22, 33.

Indeed, House debates on the Second Amendment reveal the Framers' reluctance to adopt text that might denigrate the individual character of the right to arms. Collectivists assert that a proposal to include a conscientious objector clause in the Second Amendment confirms the military character of "bear arms." But the proposal was defeated after Rep. Gerry warned "that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms." 1 ANNALS OF CONGRESS 778 (1834).

Representative Scott's objection to the conscientious objector language not only reflected the individual character of the Second Amendment, but also the distinct nature of "keep" and "bear": He said the language would "lead to the violation of another article in the constitution, which secures to the people the right of keeping arms. . . ." *Id.* at 796. Petitioners' claim that "[a]ll remarks recorded in the House's debate related to military service; none pertained to private use of weapons, including self-defense," Pet. Br. 28 (citations omitted), is conclusory—true only if one accepts that "bear arms" as used by Gerry, and the people's "right of keeping arms" as used by Scott, referred to military service. But that construction is insupportable.

Equally unpersuasive is the notion that the defeated conscientious objector clause's military nature imparted a military flavor to what remained and passed as the Second Amendment. Other amendments, as passed, contain unrelated concepts. The First Amendment secures various rights of expression and conscience, yet nobody would contend Madison intended to protect only religious speech or assembly. Likewise, the Fifth Amendment's Grand Jury Clause appears only tenuously related to the Takings Clause. No particular intent can be gleaned from a legislative combination of seemingly unrelated subjects, especially when anomalous provisions are omitted before final passage.[10]

[The conscientious objector clause is found in the 19th paragraph of Virginia's proposed Bill of Rights, not the 17th paragraph admitted by the city to be the Second Amendment's source.

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10. Notably, Madison's initial Second Amendment draft starts with the right to keep and bear arms, separated from the remaining provisions with a semicolon – the same punctuation Madison used to distinguish unrelated concepts in the First and Fifth Amendments.

> **19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.**

Proposed Declaration of Rights and other Amendments, Virginia Convention, June 27, 1788, *reprinted in* DAVID E. YOUNG, THE ORIGIN OF THE SECOND AMENDMENT 459 (2d ed. 2001).]

Petitioners claim that the Second Amendment is derived from the seventeenth of certain amendments proposed by Virginia, and that Virginia "[s]eparately . . . proposed amending the Militia Clauses directly: '11th—That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.' " Pet. Br. 26 (citation omitted). Yet both proposals originated in the same document, the Second Amendment's precursor among provisions "constituting the bill of rights," and the militia amendment among what the convention labeled "[t]he other amendments." David Young, THE ORIGIN OF THE SECOND AMENDMENT 462 (2d ed. 2001).

If guaranteeing the people's "right to keep and bear arms," with reference to a "well regulated militia" and "a free state," were intended to secure the states a right to arm their militias, the Virginia Convention would not have separately proposed an explicit reservation of the states' militia powers. That the Second Amendment's direct precursor came to Congress in a "bill of rights," alongside a state militia power among "other amendments," strongly suggests the two are not identical.

[The fact that Virginia proposed the Second Amendment source language alongside a separate state militia powers amendment that would have explicitly had such an effect should be "game, set, and match" for collectivists who would look to bolster their theory with legislative history. Here is the language of Virginia's right to arms proposal, which the city admitted to be the source of the Second Amendment, in context:

> **15th. That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.**

16th. That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

Proposed Declaration of Rights and other Amendments, Virginia Convention, June 27, 1788, *reprinted in* DAVID E. YOUNG, THE ORIGIN OF THE SECOND AMENDMENT 458-59 (2d ed. 2001).]

Indeed, if rejected language is any clue as to the meaning of that which was accepted, perhaps the most telling example was the Framers' rejection of the following proposed amendment: "That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. . . ." FIRST SENATE JOURNAL 126.

This proposal stated, in unmistakably direct and concise fashion, exactly that meaning which Petitioners would divine in the Second Amendment through tortured linguistics, fanciful explanations, and "hidden history." *And it was rejected by the Framers.* "[H]istory does not warrant concluding that it necessarily follows from the pairing of the concepts that a person has a right to bear arms solely in his function as a member of the militia." Robert Sprecher, *The Lost Amendment*, 51 AM. BAR ASS'N J. 554, 557 (1965).[11]

The Bill of Rights was never thought necessary by the Federalists, other than as a tool to placate Anti-Federalist resistance to the new constitution. While rejection of militia-powers amend-

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11. The ABA, founded in 1878, notes it has taken the opposite view "[f]or more than forty years." ABA Br. 2. Sprecher's article won the ABA's 1964 Samuel Pool Weaver Constitutional Law Essay Competition.

ments demonstrates that the Bill of Rights did not address each and every Anti-Federalist concern, the Second Amendment did at least address a different concern: the individual right to arms.

[I am always surprised when the other side dismisses clear and unmistakable individual right to arms demands made by the Anti-Federalists on grounds that the Anti-Federalists were the political losers of the day. It is common knowledge that the Bill of Rights came into being because its absence was a key Anti-Federalist objection to the Constitution. And although the Anti-Federalists failed to block the Constitution's ratification, its immediate amendment with a Bill of Rights was a testament to the fact that the new government required broader acceptance than that which was obtained in the ratifying conventions.

The other side's "Anti-Federalists As Losers" argument is also inconsistent with its claims that the Second Amendment was somehow a rearrangement of the balance of military power between the federal government and the states. We are asked to believe that explicit demands for an individual right widely accepted at the time were ignored because these demands came from political losers, but that those same losers forced Madison to have the central government immediately forfeit its new monopoly on military force. The proposition is untenable. The Anti-Federalists forced adoption of a Bill of Rights securing uncontroversial, popular individual rights, but they were in no position to re-arrange or dismantle key features of the newly-formed federal government.]

Demands for a bill of rights prevailed in five of seven constitutional ratifying conventions. The only provisions common to all were freedom of religion and the right to arms. New Hampshire's convention demanded recognition that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 Elliot, DEBATES at 326. Pennsylvania Anti-Federalists demanded

> that the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.

Levy, ORIGINS, *supra* at 143-44.[12] In Massachusetts, Samuel Adams demanded that "the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86 (1856). These were the sentiments Madison addressed in the Second Amendment. .

Petitioners' notion that the Second Amendment secures state prerogatives to control their militia free of federal interference—as a limitation or repudiation of congressional militia powers—also contradicts the substantial body of precedent interpreting Congress's authority over the militia. As early as 1820, this Court held that Congress had preempted the field of militia regulation:

> Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised.

Houston v. *Moore*, 18 U.S. (5 Wheat.) 1, 24 (1820) (Washington, J.). Dissenting from *Houston*'s conclusion that state courts had concurrent jurisdiction over militia courts-martial, Justice Story (joined by Chief Justice Marshall) nevertheless observed that "a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress. . . ." *Houston*, 18 U.S. (5 Wheat.) at 52 (Story, J., dissenting). The Second Amendment "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id.* at 52-53.

This Court would later make clear that with the adoption of the Constitution, "[t]here was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies." *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918). And just as Congress may pre-empt the regulation of

12. As did the Virginia majority, the Anti-Federalist Pennsylvania minority proposed a separate state-militia-powers amendment. *Id.*

the states' militias under Article I, it likewise enjoys the exclusive power to call the states' militias into federal service, which has been delegated to the President since 1795. *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 43-44 (1849). Indeed, while Congress permits the states to maintain a voluntary defense force immune from federal conscription, 32 U.S.C. § 109(c), that part of the militia organized into the National Guard is under plenary federal control, such that a state's governor may not object to the President's training of Guard units overseas. *Perpich*, 496 U.S. 334. Petitioners' Second Amendment theory defies each of these precedents.

Petitioners are not the first to make this mistake. In 1863, Pennsylvania's Supreme Court enjoined the conscription of Union soldiers, theorizing that the Civil War draft violated the state's militia powers. *Kneedler* v. *Lane*, 45 Pa. 238, 259 (1863). One Justice invoked Petitioners' view of the Second Amendment to support the decision. *Id.* at 271-72 (Thompson, J., concurring). The court quickly reversed itself. *Id.* at 295. If Petitioners' derision of the individual right to arms as proposing treason or insurrection, Pet. Br. 15 n.3, questions the legitimacy of America's Revolution, their view of the Second Amendment's impact on the allocation of federal-state power would threaten the Union itself.

Petitioners' collective-purpose interpretation is also at odds with this Court's only direct Second Amendment opinion in *Miller*. In examining whether Miller had a right to possess his sawed-off shotgun, this Court never asked whether Miller was part of any state-authorized military organization. "Had the lack of [militia] membership or engagement been a ground of the decision in *Miller*, the Court's opinion would obviously have made mention of it. But it did not." *United States* v. *Emerson*, 270 F.3d 203, 224 (5th Cir. 2001) (footnote omitted). Indeed, the government advanced the collectivist theory as its first argument in *Miller*, PA40a, but the Court ignored it. The Court asked only whether the gun at issue was of a type Miller would be constitutionally privileged in possessing.

II. WASHINGTON, D.C.'S HANDGUN BANS ARE UNCONSTITUTIONAL.

To determine whether a particular weapon falls within the Second Amendment's protection, the Court need not apply any particular standard of review. The question is categorical, identical in kind to the questions courts routinely answer in determining what

constitutes "religion" or "speech" under the First Amendment, or what constitutes a "search" or "seizure" under the Fourth.

Answering such questions is often a requisite first step in evaluating the constitutionality of governmental action. Only if protected speech is found will a court examine the permissibility of a particular burden on it; only if an officer has searched or seized a citizen will the reasonableness of the action be examined.

With respect to Petitioners' handgun ban, answering the threshold question resolves the case. If the possession of handguns is protected by the Second Amendment, handguns cannot be completely banned, however else the government may regulate their possession and use.[13] The fact that a type of arm is protected by the Second Amendment defeats Petitioners' attempt to position this case as a "standard of review" question, such that the government may ban any arms it deems too dangerous even if such arms are traditionally used for lawful civilian purposes. After all, Petitioners can conjure a rationale for banning *any* "arm."[14] Certainly the government may ban arms that are not protected by the Second Amendment and regulate those that are, but the threshold question of whether an arm falls into the former or latter category cannot be avoided.

Nor may the government justify a ban on a particular firearm simply by claiming to allow the possession of others. While it is a dubious proposition that Petitioners allow individuals *any* firearms for private home use, the government's compliance with the Constitution by allowing rifles would not permit the government to violate the Constitution by banning handguns—any more than the government could prohibit books because it permits newspapers and considers them an "adequate substitute." The court below properly termed this argument "frivolous." PA53a.[15]

[The argument works equally well for freedom of worship. The government cannot limit one's choice of religion

13. Petitioners' claim that no "per se" categorical restrictions exist within the Bill of Rights, Pet. Br. at 44, is false. Cf. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 244 (2002) ("a law imposing criminal penalties on protected speech is a stark example of speech suppression"); cf. *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment) (noting that "traditional legal categories" are "preferable to . . . ad hoc balancing").

14. Indeed, until 1993, the city even banned mace. Now legal, "self-defense sprays" must be registered with the police. D.C. Code § 7-2502.14.

15. Petitioners implicitly concede the point in admitting that "banning all gun possession"—presumably without impacting the possession of other "arms"—would violate the Second Amendment. Pet. Br. 43.

on grounds that the approved faiths sufficiently satisfy one's spiritual needs. The concept of having a right means that the government presumably cannot dictate or limit the manner in which that right is exercised. To ban a gun, a book, a medical procedure, or a faith, the government must show one has no right to these things—not point to the availability of other options. A right to only that which is permitted is not much of a right.]

The test for whether a particular weapon is or is not within the Second Amendment's protection was established in *Miller*. For all the claims that the D.C. Circuit failed to follow *Miller*, it is Petitioners and their amici—including the Solicitor General—who reject that precedent.

Miller's conceptual framework is plain. First, this Court inquires whether a weapon "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia," meaning that the weapon is "any part of the ordinary military equipment or that its use could contribute to the common defense." *Miller*, 307 U.S. at 178. Second, the Court explained that when fulfilling the Second Amendment's militia rationale, people "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179. The assumption is that at least some arms of the kind people would use for ordinary civilian purposes— arms in "common use at the time"—would also be the arms used in militia service. This is fully consistent with the historical record, *supra* at 29.[16] It is also consistent with the understanding of "arms" at the time. "In law, arms are any thing which a man takes in his hand in anger, to strike or assault another." WEBSTER'S DICTIONARY, *supra* at 11 ("Arms").

In sum, an "arm" is protected under the *Miller* test if it is of the type that (1) civilians would use, such that they could be expected to possess it for ordinary lawful purposes (in the absence of, or even despite, legal prohibition), and (2) would be useful in militia service. The latter requirement may be in tension with the preexisting right to keep and bear arms, which is not always related

16. *Miller*'s earlier use of "at this time," *id.* at 178, makes clear that the relevant time period is the present, not 1791. The Framers clearly intended to preserve people's ability to act as militia, and would not have expected future generations to have obsolete weapons in "common use" any more than the Framers would have expected to secure only 18th-century religions or media. The lineal descendents of personal arms of the type in predictable civilian usage are thus protected, but modern weapons of the type that serve no ordinary civilian function are not.

to militia service.[17] In that respect, *Miller* may be in tension with itself. There is no justification to limit the Second Amendment's protection to arms that have military utility.

But as a practical matter, the second prong adds nothing to the analysis in virtually all cases, including this one. Categorically, firearms "in common use" for civilian purposes—rifles, shotguns, and handguns—are plainly "part of the ordinary military equipment," and their "use could contribute to the common defense." *Miller*, 307 U.S. at 178. The D.C. Circuit's opinion is thus compatible with *Miller*, because handguns meet both *Miller* criteria. Arms that may have great military utility but which are inappropriate for civilian purposes are still sensibly excluded from the Second Amendment's protection, as civilians would not commonly use them.

The *Miller* test for whether a particular arm is constitutionally protected is hardly "unworkable." Pet. Br. 44. To the contrary, *Miller* presents a straightforward constitutional question, lending itself to practical application far more readily than questions of whether a search is "reasonable" under the Fourth Amendment, or at what point "government entanglement" with religion becomes so "excessive" as to violate the First Amendment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971). To the extent *Miller* can be read as establishing a "lineal descent" rule, this Court already applies precisely that framework in its Seventh Amendment jurisprudence. For example, parties in discrimination lawsuits are not denied access to civil juries simply because discrimination claims were unknown in 1791. *Curtis* v. *Loether*, 415 U.S. 189, 193-94 (1974).

In cases of unusual or exotic arms, or where the court lacks familiarity with a particular weapon, e.g., *Miller*, 307 U.S. at 178, courts may wish to receive evidence regarding whether a weapon has ordinary civilian application and can be traced to a form historically used by militia forces. But in most cases, as here, the answer will be clear.

No court has questioned that a handgun, generally, is an arm "of the kind in common use" by the public and is either "ordinary military equipment" or otherwise useful in a manner that "could

17. "Attempting to draw a ling between the ownership and use of 'Arms' for *private* purposes and the ownership and use of 'Arms' for *militia* purposes would have been an extremely silly exercise on the part of the First Congress if indeed the very survival of the militia depended on men who would bring their commonplace, *private* arms with them to muster." PA43a (emphasis in original).

contribute to the common defense." *Miller*, 307 U.S. at 178. As below, the Fifth Circuit experienced no difficulty applying the *Miller* test to handguns. *Emerson*, 270 F.3d at 227 n.22. Even courts hostile to the Second Amendment's individual nature likewise accept that handguns are the type of arms referenced in the Amendment. In adopting the collective-rights theory "without further analysis or citation of authority," *Emerson*, 270 F.3d at 224, the First Circuit conceded that a revolver would fall within the Miller test's ambit, as a handgun "may be capable of military use [and] familiarity with it might be regarded as of value in training a person to use a comparable weapon of military type and caliber." *Cases* v. *United States*, 131 F.2d 916, 922-23 (1st Cir. 1942); see also *Quilici* v. *Village of Morton Grove*, 695 F.2d 261, 266 (7th Cir. 1982) ("Handguns are undisputedly the type of arms commonly used for recreation or the protection of person and property") (internal citations omitted).

Indeed, this Court has not required any evidentiary hearing to determine that "pistols . . . may be supposed to be needed occasionally for self-defence." *Patsone* v. *Pennsylvania*, 232 U.S. 138, 143 (1914). That handguns are appropriate tools for lawful self-defense and are a class of weapon "of the kind in common use," *Miller*, 307 U.S. at 179, has been within the judicial notice of this Court and lower federal courts for nearly a century. Nearly forty percent of firearms produced today are handguns. See BATFE Report, http://www.atf.treas.gov/firearms/stats/afmer/afmer2006.pdf.

Congress's specific description of pistols as militia weapons in the Second Militia Act, so soon following passage of the Second Amendment, offers conclusive proof that handguns are within the Second Amendment's protection. PA50a-51a. In defining handguns as militia weapons, Congress broke no new ground. The Continental Congress likewise reported pistols as acceptable militia weapons, 25 JOURNALS OF THE CONTINENTAL CONGRESS 741-42 (1922), as had the various states. See, e.g., ACTS AND LAWS OF THE STATE OF CONNECTICUT 150 (1784); STATUTES OF THE STATE OF NORTH CAROLINA 592 (1791).

Eighteenth-century American governments recognized handguns as militia arms not only due to their military utility, but also owing to the deep roots of civilian handgun ownership from the dawn of the Nation's settlement. Thirteen percent of firearms listed in the Plymouth Colony's probate records from the 1670s were pistols, "and 54.5 percent of lead projectiles recovered from Plymouth Colony digs were pistol ammunition." Clayton Cramer and Joseph Olson, *Pistols, Crime, and Public Safety in Early*

America, WILLAMETTE L. REV. (forthcoming 2008), http://ssrn.com/abstract=1081403 (citation omitted). Two weeks before the Boston Tea Party, John Andrews observed " 'twould puzzle any person to purchase a pair of p___ls [pistols] in town, as they are all bought up, with a full determination to repell force by force." *Letter of December 1, 1773* in LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON, 1772-1776, 12 (Winthrop Sargent ed., 1866).

Some of those pistols might have been purchased by the Tea Party Indians, "each arm'd with a hatchet or axe, and pair pistoles." Id. *Letter of December 18, 1773.* The 634 pistols confiscated by General Gage constituted a full 18.25% of the firearms whose seizure the Continental Congress declared a *causus belli.*

Petitioners and their amici greatly overstate our Nation's history of handgun regulation. Washington, D.C.'s complete handgun ban was the first such prohibition on American soil since the Revolution. The fact that "never before in the more than two hundred years of our Republic has a gun law been struck down by the federal courts as a violation of the Second Amendment," Brady Br. 29, is a testament to the extreme nature of Petitioners' enactments. Notably, Petitioners' state amici do not defend or endorse a total handgun ban, which none of them maintains. New York Br. 1, 2.

The oft-cited case of *Aymette* v. *State*, 21 Tenn. 154 (1840), upheld prohibition of carrying certain knives and daggers, *not* guns, as suggested by some. E.g., ABA Br. 9; Chicago Br. 14 n.15, 32; LDF Br. 15-16.[18] When Tennessee's Supreme Court considered the constitutionality of banning (as opposed to regulating) the carrying of handguns, it struck down the law. *State* v. *Andrews*, 50 Tenn. 165 (1871). On occasion, the carrying of guns has been *required* in this country. See, e.g., 19 COLONIAL RECORDS OF THE STATE OF GEORGIA, PART 1, 138 (1911) (churchgoer "shall carry with him a gun, or a pair of pistols, in good order and fit for service, with at least six charges of gun-powder and ball, and shall take the said gun or pistols with him to the pew or seat").

Various briefs invoke Georgia's 1837 ban on the sale of certain pistols, Appleseed Br. 13; Law Professors Br. 18; Chicago Br. 14, but none mentions that the act was struck down—on Second Amendment grounds—in an as-applied challenge by a man who openly wore a prohibited pistol. *Nunn* v. *State*, 1 Ga. 243 (1846).

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18. *Aymette* expressly upheld the "unqualified right to keep" arms. he "unqualified right to keep" arms. *Aymette*, 21 Tenn. At 160.

Oakland does not ban all handguns, LDF Br. 20, a measure that would be impermissible under California law. *Fiscal* v. *City and County of San Francisco*, ___ P.3d ___, 2008 Cal. App. LEXIS 21 (Cal. Ct. App. Jan. 9, 2008). The cited measure addressed a specific type of handgun thought unsuitable for legitimate purposes. Major Cities Br. 9.

No trial is required to establish that handguns continue to be in common use for legitimate purposes and that their possession can contribute to the common defense. Handguns are therefore protected arms under *Miller*, and the right to "keep" them "shall not be infringed." U.S. Const. amend. II.

That the "keeping" at issue here relates to the home is significant. Even obscene materials not otherwise protected by the First Amendment may be viewed in the privacy of one's home. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). The exercise of Second Amendment rights within the home is entitled to no less protection. "The government bears a heavy burden when attempting to justify an expansion, as in gun control, of the 'limited circumstances' in which intrusion into the privacy of a home is permitted." *Quilici*, 695 F.2d at 280 (Coffey, J., dissenting).

* * *

The Solicitor General greatly overstates the D.C. Circuit decision's implications for laws governing machineguns. Courts understand that the decision below striking down the handgun bans "address[es] only the possession of handguns, not machine guns." *Somerville* v. *United States*, 2008 U.S. Dist. LEXIS 412 at *4 (W.D. Mich. Jan. 3, 2008). And unlike the laws at issue here banning handguns,[19] federal law *does not* ban the private possession of machineguns, of which approximately 120,000 are in lawful civilian possession. Bureau of Justice Statistics, *Selected Findings: Guns Used in Crime* 4 (July 1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf (240,000 registered machineguns); Gary Kleck, TARGETING GUNS: FIREARMS AND THEIR CONTROL 108 (1997) (half of registered machineguns are in civilian use) (citing BATF, *Statistics Listing of Registered Weapons*, Apr. 19, 1989).[20]

"ATF's interest is not in determining why a law-abiding individual wishes to possess a certain firearm or device, but rather in ensuring that such objects are not criminally misused." Testimony

19. This case does not address Petitioners' machinegun ban, D.C. Code § 22-4514(a).

20. Title 18 U.S.C. § 922(o) prohibits the civilian transfer or possession of machineguns not lawfully possessed by May 19, 1986, exempting previously authorized machineguns.

of Stephen Higgins, BATF Director, in *Hearings on H.R. 641 and Related Bills, House Judiciary Committee Subcommittee on Crime*, 98th Congress 111 (1986). To that end, federal law subjects machinegun possession to the same stringent regulatory regime considered in *Miller*. 26 U.S.C. § 5801, *et seq.*; 27 C.F.R. §§ 478.98, 479.84, *et seq*. These regulations work: "it is highly unusual—and in fact, it is very, very rare," that legally owned machineguns are criminally misused. Higgins, *supra*, at 117.

Had Miller possessed a machinegun, this Court would presumably have had little trouble finding that the weapon had militia utility. The Court might nonetheless have held that machineguns fall outside the scope of the Second Amendment's protection as they were not "in common use at the time" such that civilians could be expected to have possessed them for ordinary lawful purposes. *Miller*, 307 U.S. at 179.

And even if this Court had accepted that some machineguns are protected by the Second Amendment, their current tight regulation under federal law could well pass any level of scrutiny devised by this Court for the regulation of protected arms. Of course, Respondent's simple revolver is no machinegun, and the types of restrictions imposed by the National Firearms Act—including an FBI background check, $200 tax, authorization from one's local chief law enforcement officer, and a statement of "reasonable necessity"—would be inappropriate to apply to a common handgun.

But this case is not about what regulations ought to govern machineguns. The question is whether the arms at issue—including handguns—are protected at all. They are.

[The Solicitor General did not invoke the word "machinegun" ten times in his brief in order to help us. I am constantly amazed by the machine gun afficionados who think that a viable theory of the Second Amendment would protect the private ownership of machine guns. There is not one federal judge in the land who would agree with such a proposition.]

III. WASHINGTON, D.C.'S FUNCTIONAL FIREARMS BAN IS UNCONSTITUTIONAL.

Petitioners concede that if the Second Amendment protects an individual right, "a law that purported to eliminate that right—for instance, by banning all gun possession, or allowing only a firearm

that was so ineffective that the law effected functional disarmament," would be unconstitutional. Pet. Br. 43-44.[21] The only dispute is whether D.C. Code section 7-2507.02 "effects functional disarmament."

Determining whether section 7-2507.02 effects functional disarmament requires no fact-finding. And as Petitioners concede, a functional firearms ban would be unconstitutional "whatever [a Legislature's] reasons" might be for enacting it. Pet. Br. 43. Making matters easier, Petitioners agree that section 7-2507.02 "would be unreasonable" if it offered no provision for home self-defense. Pet. Br. 56.

The statutory language is unequivocal: without exception, individuals may never possess a functional firearm at home. If Petitioners had wished to create an exception for home self-defense, they knew how to do so. Section 7-2507.02 permits functional firearms "at [a] place of business, or while being used for lawful recreational purposes." Petitioners cannot "turn a few passages in the legislative history that are partially contrary to the statutory language into a justification for this court to rewrite the statute," *Chem. Mfrs. Ass'n* v. *EPA*, 673 F.2d 507, 514 (D.C. Cir. 1982), and thereby add a saving exemption for home self-defense. "[T]his court will not read into a statute language that is clearly not there. . . . The express inclusion of one (or more) thing(s) implies the exclusion of other things from similar treatment." *Castellon* v. *United States*, 864 A.2d 141, 148-49 (D.C. 2004) (internal quotations and citations omitted).

Indeed, the city successfully asserted a reason for "distinguish[ing] between a home and a business establishment in the Act." *McIntosh* v. *Washington*, 395 A.2d 744, 755 (D.C. 1978). Petitioners cannot now be heard to argue for judicial alteration of the home-business distinction, especially as they can offer no guidelines as to when, exactly, a citizen might render her firearm operational to respond to a perceived threat. Resp. to Pet. for Cert. at 19-21.

Respondent would not quarrel with a true "safe storage" law, properly crafted to address Petitioners' stated concerns. But as *McIntosh* reveals, the city said what it meant and meant what it

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21. Cf. *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970) ("the right to counsel is the right to the effective assistance of counsel") (citation omitted); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 878 (1992) (O'Connor, Kennedy, and Souter, JJ.) ("undue burden exists" if law's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability").

said in prohibiting armed self-defense inside private homes. The law, as written and defended by the city, is unconstitutional.

IV. THE STANDARD OF REVIEW IN SECOND AMENDMENT CASES IS STRICT SCRUTINY.

Although Petitioners "do[ ] not suggest that gun regulations should be subject to mere rational basis review," Pet. Br. 43, the true nature of their proposed "reasonableness" standard is exposed by their claims that the Nation's most draconian gun laws are constitutional. The Solicitor General's supposed "heightened" scrutiny standard is scarcely better, demanding that judges weigh conflicting and disputable scientific claims to determine the constitutionality of disarming law-abiding individuals, apparently on an as-applied basis.[22]

As explained *supra* and accepted by the court below, this case does not require the application of any standard of review, because it involves a ban on a class of weapons protected under *Miller*, and a statutory interpretation dispute concerning whether a particular provision enacts a functional firearms ban.

Nonetheless, should the Court venture to comment on the standard of review governing the regulation of Second Amendment rights, it should do so consistent with well-established precedent. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); cf. *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 33 (1973) (fundamental rights are those "explicitly or implicitly guaranteed by the Constitution"). Fundamental rights are those "so rooted in the traditions and conscience of our people as to be ranked as fundamental [and] implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (citations and quotation marks omitted). Justice Story's "palladium of the liberties" ought to qualify, whether the Second Amendment entails the right to defend one's life, the right to resist tyrannical usurpation of constitutional authority, or even, as Petitioners would have it, a right guaranteeing states freedom and

22. The Solicitor General's "reasonable alternative" test would demand that individuals wishing to exercise a fundamental constitutional right demonstrate their need to do so, subject to the skeptical review of officials hostile to the right. For example, a would-be handgun owner might have to show that she was physically incapable of using a rifle or shotgun. The *Miller* test anticipates this problem: Because handguns are in common use they are constitutionally protected, meaning an individual has the right to choose a handgun as the type of weapon she would keep at home for lawful purposes.

security. See Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1 (2007).

Today the Court is told that private gun ownership is too dangerous to be counted among first-tier enumerated rights. Americans who suffered British rule might disagree. BOSTON GAZETTE, Dec. 5, 1774, at 4, col. 1 ("But what most irritated the People next to seizing their Arms and Ammunition, was the apprehending [of] six gentlemen . . . who had assembled a Town meeting. . . ."). As our Nation continues to face the scourges of crime and terrorism, no provision of the Bill of Rights would be immune from demands that perceived governmental necessity overwhelm the very standard by which enumerated rights are secured. Exorbitant claims of authority to deny basic constitutional rights are not unknown. See, e.g., *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004).

Demoting the Second Amendment to some lower tier of enumerated rights is unwarranted. The Second Amendment has the distinction of securing the most fundamental rights of all—enabling the preservation of one's life and guaranteeing our liberty. These are not second-class concerns. Yet preservation of human life is also the government's chief regulatory interest in arms. Constitutional review of gun laws thus finds both individual and governmental interests at their zenith.

If a gun law is to be upheld, it should be upheld precisely because the government has a compelling interest in its regulatory impact. Because the governmental interest is so strong in this arena, applying the ordinary level of strict scrutiny for enumerated rights to gun regulations will not result in wholesale abandonment of the country's basic firearm safety laws. Strict scrutiny is context-sensitive and is "far from the inevitably deadly test imagined by the Gunther myth." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793, 795 (2006). The prohibition on possession of guns by felons, 18 U.S.C. § 922(g), and the requirement that gun buyers undergo a background check for history of criminal activity or mental illness, 18 U.S.C. § 922(t), would easily survive strict scrutiny.

Searching for a lower level of review, the Solicitor General would look to "the practical impact of the challenged restriction," U.S. Br. 8, 24, as courts do at the outset of examining the constitutionality of election regulations. But voting is a poor analog to gun possession. Each exercise of the right to vote burdens state resources and implicates a direct interest in operating an election,

which states have an express grant of authority to regulate. U.S. CONST. art. I, § 4, cl. 1.

And not all election laws are subject to the government's endorsed level of scrutiny. If the Court finds the burden to be "severe," then strict scrutiny is applied. *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). The Solicitor General assumes that no gun regulations—including those at issue here— can impose "severe" burdens on Second Amendment rights. But no such presumption exists in the election field. Considering the severity of the challenged gun laws, the correct standard, per the Solicitor General's precedent, would be strict scrutiny.

[The Solicitor General's brief was pernicious. I would have preferred the Court adopt the city's view, defining the Second Amendment right as one that can only be exercised for a governmental purpose, than have a fraudulent conception of an individual right that exists in theory but which in practice is erased by complete deference to legislative will.

Notably, the Solicitor General's approach was unique among our opponents—a fact I attribute to its weakness. The election law cases cited by the Solicitor General on behalf of his theory did not support it. We were also grateful for the excellent amicus brief filed by Sidley & Austin on behalf of the Goldwater Institute, which demolished the Solicitor General's position in a manner that we had neither the space nor time to do.

The Solicitor General's deft ability to be on both sides of the issue—paying the individual right a good amount of lip service while working assiduously to ensure that no operative Second Amendment right would come out of the case—may have impressed some observers. But such cynical spin failed to garner a single vote on the Supreme Court.]

The government's fears of a meaningful Second Amendment standard are unfounded. Seven years ago, the Fifth Circuit announced a version of strict scrutiny to evaluate gun laws under the Second Amendment, permitting regulations that are "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." *Emerson*, 270 F.3d at 261; *United States* v. *Patterson*, 431 F.3d 832, 836 (5th Cir. 2005) (applying *Emerson*, restrictions are "limited" and "narrowly

tailored" but "[p]rohibiting unlawful drug users from possessing firearms is not inconsistent with the right to bear arms guaranteed by the Second Amendment"). Large cities in the Fifth Circuit remain generally more peaceful than Washington, D.C.

The careless handling of social science by Petitioners and their amici underscores the impropriety of adopting anything but the highest level of scrutiny for regulations implicating Second Amendment rights. The matter is only peripheral to the case, but some remarks are in order.

The ABA asserts that "the most notable risk factor for mortality among abused women is the presence of a gun," and argues that "[h]ow to weigh these risks against the desire to own a gun for self defense is a policy judgment, not a constitutional one." ABA Br. 21 n.8 (citing Jane Koziol-McLain, et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results From a Multisite Case Control Study*, in ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 143 (J.C. Campbell ed., 2d ed. 2007)) (other citation omitted). Putting aside the likelihood that the Constitution embodies at least some policy choices the ABA finds uncongenial, the cited study does not support the conclusion. The study reports an adjusted odds ratio of 13.0 for "abuser gun access," not *victim* gun access. The study does not address, much less refute, "the desire to own a gun for self defense."[23]

Petitioners also persist in relying upon a deeply flawed study claiming their handgun ban reduced deaths. Colin Loftin, et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 23 (1991).[24] Putting aside that correlation does not equal causation, even the correlative relationship is dubious. The study measures death with raw numbers rather than rates, thus ignoring the city's dramatic depopulation through the studied period. Between the two ten-year periods examined in the study, Washington's average annual population declined 15%. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES. When one examines homicide *rates*, the supposed benefits disappear. The suicide prevention benefits are likewise overstated. Moreover, the study ends in 1988, a year in which the murder rate doubled

23. A different study indicates that women living alone with a gun face a statistically insignificant odds ratio for increased femicide of 0.22. Jacquelyn Campbell, et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM. J. PUB. HEALTH 1089, 1090-92 (2003).

24. The study constituted the builk of Petitioners' evidence on summary judgment.

pre-ban levels, and one year before a severe crime increase. In 1991, the peak year, the homicide rate tripled pre-ban levels. FBI UCR Data compiled by Rothstein Catalog on Disaster Recovery and The Disaster Center, available at http://www.disastercenter.com/crime/dccrime.htm.

Gun crimes, suicides, and accidents were not unknown in early America. E.g., Cramer & Olson, *Pistols*, *supra*. The same newspaper containing admonishments from Continental Congress representatives that "It is the Right of every English Subject to be prepared with Weapons for his Defense," N.C. GAZETTE (NEWBURN), July 7, 1775, at 2, col. 3, also reported that "a Demoniac" shot three and wounded one with a sword before being shot by others. *Id.* at 3, col. 1.

Petitioners' sophistic "reasonableness" arguments were likewise familiar to the Framers—and rejected. Colonial Americans were conversant with the works of Cesare Beccaria, whose 1764 treatise ON CRIMES AND PUNISHMENTS founded the science of criminology. John Adams cited Beccaria to open his argument at the Boston Massacre trial. 3 LEGAL PAPERS OF JOHN ADAMS 242. In a passage Jefferson copied into his "Commonplace Book" of wise excerpts from philosophers and poets, Beccaria decried the "False Utility" of laws that

> disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code . . . will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty. . . . Such laws make things worse for the assaulted and better for the assailants. . . . [These] laws [are] not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree. . . .

Thomas Jefferson, COMMONPLACE BOOK 314 (1926).

"If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion." *Ullman* v. *United States*, 350 U.S. 422, 427-28 (1956) (citation omitted).

Petitioners plainly disagree with the Framers' Second Amendment policy choices. Petitioners' remedy must be found within the Constitution's Fifth Article, not with linguistic sophistries or an anemic standard of review that would deprive the right of any real force.

V. THE GOVERNMENT OF THE NATION'S CAPITAL MUST OBEY THE CONSTITUTION.

The Constitution, and its Bill of Rights—including the Second Amendment—are the supreme law of the land. U.S. CONST. art. VI, cl. 1. "That the Constitution is in effect . . . in the District has been so often determined in the affirmative that it is no longer an open question." *O'Donoghue* v. *United States*, 289 U.S. 516, 541 (1933).

Petitioners' legislative authority is not above the Constitution, but derived from it; a delegation of Congress's authority to legislate for the District. U.S. CONST. art. I, § 8, cl. 17. That power "is plenary; but it does not . . . authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable." *O'Donoghue*, 289 U.S. at 539. "If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void." *Id.* at 541 (citation omitted).

Accordingly, Congress can exercise general police powers within the District, "so long as it does not contravene any provision of the Constitution of the United States." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973) (citation omitted). For example, Congress may operate public schools in the District of Columbia, a power otherwise reserved to the states. But such schools cannot be segregated. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

Indeed, because the Constitution with its Bill of Rights applies directly to the federal government, of which the city is a creature, Petitioners are bound to respect even those rights that are not incorporated as against the states through the Fourteenth Amendment. See *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) (Seventh Amendment right to civil jury trial); *United States* v. *Moreland*, 258 U.S. 433 (1922) (Fifth Amendment right to grand jury indict-

ment).[25] Even were the pre-incorporation holding of *Presser* v. *Illinois*, 116 U.S. 252 (1886) still good law, which is doubtful,[26] the fact remains that the District of Columbia is not a state. *Hepburn* v. *Ellzey*, 6 U.S. (2 Cranch) 445 (1805). The question of incorporation is therefore not before the Court.

Nothing in Petitioners' precedent suggests that the District is free to ignore constitutional restrictions. The judges of the District's local court system do not merit Article III protection because they are Article I judges. D.C. Code § 11-101; *Palmore*, 411 U.S. at 398. When the District's judges were Article III judges, they enjoyed Article III protection. *O'Donoghue*, *supra* (Congress could not reduce pay of District of Columbia judges). And pre-Sixteenth Amendment tax limitations did not apply within the District of Columbia because Article I's District Clause grants Congress the broad power of "exclusive Legislation" for the city, including the power to tax "in like manner as the legislature of a State may tax the people of a State for State purposes." *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407 (1886).

Washington was not planned as a "Forbidden City" in which federal officials would be shielded from the hazards of interaction with the otherwise-free people of the United States. Quite the contrary:

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution. . . . [I]t is not reasonable to assume that the cession stripped them of these rights. . . .

O'Donoghue, 289 U.S. at 540.

Finally, there is no logic to Petitioners' extraordinary claim that gun control "is the most important power of self-protection" for the seat of government. Pet. Br. 38. The District Clause, after all, allows Congress to "[erect] Forts, Magazines, Arsenals, dock-Yards and other needful Buildings." U.S. CONST. art. I, § 8, cl. 17. Con-

25. Petitioners distinguish the Second Amendment as relating only to federal authority over the states, rather than securing individual rights; but that argument assumes their conclusion. Pet. Br. 38.

26. As Judge Reinhardt recognizes, "*Presser* rest[s] on a principle that is now thoroughly discredited," *Silveira* v. *Lockyer*, 312 F.3d 1052, 1067 n.17 (9th Cir. 2002) (citing *Emerson*, 270 F.3d at 221 n.13).

gress surely has the power to regulate firearms in Washington; but if Congress felt that disarming Americans at home were necessary for its security, it might have attempted to do so in the first 177 years of the city's service as the seat of government. As recent history demonstrates, those who would attack our capital are hardly deterred by Petitioners' ban on handguns and functional firearms in the home.

CONCLUSION

The decision below is correct with respect to the merits of Respondent's substantive claims, and should be affirmed in that regard.

Respectfully submitted,

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