

# Casenote

## *District of Columbia v. Heller*: Firing Blanks?

### I. INTRODUCTION

In 2008, after much anticipation, the United States Supreme Court confronted a split between the circuits as to the proper interpretation of the Second Amendment<sup>1</sup> right “to keep and bear Arms.”<sup>2</sup> In *District of Columbia v. Heller*,<sup>3</sup> both the majority and the dissenters rejected the theory that the Second Amendment solely protects a state right,<sup>4</sup> and a narrow 5-4 majority held that the amendment guarantees an individual right to bear arms for traditionally lawful purposes, such as self-defense in the home.<sup>5</sup> Sustaining the first successful Second Amendment challenge before the Court,<sup>6</sup> the majority struck down two of the country’s strictest gun control laws.<sup>7</sup> However, *Heller* serves as

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1. U.S. CONST. amend. II.

2. *Id.*

3. 128 S. Ct. 2783 (2008).

4. *Id.* at 2791, 2822 (Stevens, J., dissenting).

5. *Id.* at 2797. Importantly, the majority did not condition this right upon militia service. *Id.* at 2801-02.

6. Cameron Desmond, Comment, *From Cities to Schoolyards: The Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones*, 39 MCGEORGE L. REV. 1043, 1044 (2008).

7. *Heller*, 128 S. Ct. at 2821-22.

only an introduction to clarifying this area of constitutional law as the majority left key questions concerning the scope of the right and its implications for future judicial determination.<sup>8</sup>

## II. FACTUAL BACKGROUND

In *District of Columbia v. Heller*,<sup>9</sup> the United States Supreme Court reviewed Second Amendment challenges to firearms restrictions enacted by the District of Columbia (District).<sup>10</sup> The District's restrictions effectively banned handgun possession by prohibiting the registration of handguns while, at the same time, making it a crime to carry an unregistered firearm.<sup>11</sup> Further, District residents were required to keep other lawfully owned firearms "unloaded and disassembled or bound by a trigger lock or similar device" in their homes.<sup>12</sup>

The respondent, Dick Heller, as a special police officer, was authorized to carry a handgun while on duty. However, the District denied Heller's application to register a handgun that he intended to keep at home.<sup>13</sup> In response, Heller filed suit in the United States District Court for the District of Columbia "seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibit[ed] the carrying of a firearm in the home without a license, and the trigger-lock requirement" to the extent that it outlawed possession of operable firearms in the home.<sup>14</sup>

The district court dismissed Heller's complaint based on a lack of standing, finding that the Second Amendment did not secure a right to bear arms outside of militia service. In a 2-1 decision, the United States Court of Appeals for the District of Columbia Circuit reversed, concluding that the Second Amendment protects an individual right to possess firearms and that the District's complete prohibition on handguns and the requirement that firearms be kept inoperable in the home, even when necessary for self-defense, violated that right.<sup>15</sup> Accordingly, the

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8. *Id.* at 2821.

9. 128 S. Ct. 2783 (2008).

10. *Id.* at 2788.

11. *See id.*

12. *Id.* (quoting D.C. CODE § 7-2507.02 (2008)). The majority did not address Heller's challenge to the District's requirement that a license issued by the District's chief of police be obtained in order to carry a handgun. *Id.* at 2789. Heller conceded that the licensing requirement was facially constitutional so long as it was not enforced arbitrarily or capriciously. *Id.*

13. *Id.* at 2788.

14. *Id.*

15. *Id.*

court of appeals ordered the district court to enter summary judgment in favor of Heller.<sup>16</sup>

The Supreme Court granted certiorari and affirmed.<sup>17</sup> In a 5-4 decision, the Court struck down the District's firearm regulations, holding that the Second Amendment protects an individual right to keep and bear arms for traditionally lawful private purposes, including personal self-defense, which is not necessarily tied to militia service.<sup>18</sup>

### III. LEGAL BACKGROUND

After the English Revolution in 1689, King William III and Queen Mary II adopted the English Bill of Rights which was prepared by the English Parliament in response to abuses of the crown by Kings Charles II and James II.<sup>19</sup> Prompted by the Kings' maintenance of a standing army during peaceful times and the disarmament of the protestant people, section seven of the Declaration of Rights stated, "the subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law."<sup>20</sup> This provision in the English Bill of Rights has been proffered as the predecessor of the Second Amendment<sup>21</sup> to the United States Constitution.<sup>22</sup>

Similar fears of a standing army and tyranny surrounded the adoption of the Second Amendment.<sup>23</sup> After much debate between federalists and anti-federalists, the amendment was adopted in its final form, providing that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>24</sup>

In interpreting this amendment, courts and scholars have subscribed to three schools of thought: (1) the "traditional individual rights" model, (2) the "limited individual rights" model, and (3) the "collective rights" model.<sup>25</sup> The traditional individual rights model interprets the

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16. *Id.*

17. *Id.* at 2788, 2822.

18. *Id.* at 2787, 2801-02, 2821-22.

19. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 8-10 (1996).

20. English Bill of Rights, 1689, 1 W. & M., Sess. 2, c. 2; see *Aymette v. State*, 21 Tenn. 154, \*2-3 (1840).

21. U.S. CONST. amend. II.

22. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 467 (1995); see *Aymette*, 21 Tenn. at \*2-3.

23. Reynolds, *supra* note 22, at 468.

24. U.S. CONST. amend. II.

25. *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2003); *United States v. Emerson*, 270 F.3d 203, 218-20 (5th Cir. 2001).

amendment to protect the right of individual citizens to possess and use firearms for private purposes.<sup>26</sup> In contrast, the limited individual rights model interprets the amendment to protect an individual right to possess arms when tied to militia service.<sup>27</sup> Finally, the collective rights model rejects the notion that the amendment protects an individual right at all.<sup>28</sup> Instead, followers of this model propose that the amendment protects a right of the several states to maintain an effective state militia as a means to check the power of the federal government.<sup>29</sup>

In the nineteenth century, the United States Supreme Court limited its analysis of the Second Amendment to its applicability to state or local governments.<sup>30</sup> In 1875, in *United States v. Cruikshank*,<sup>31</sup> the Court dismissed an indictment charging two individuals with denying their fellow citizens' Second Amendment right to keep and "bear[] arms for a lawful purpose."<sup>32</sup> The Court announced that the Second Amendment "means no more than that it shall not be infringed by Congress, [and] has no other effect than to restrict the powers of the national government."<sup>33</sup> According to the Court, citizens must turn to the state's police power for protection against violations of the right by other parties.<sup>34</sup> Thus, the faulty indictment failed to assert criminal charges indictable under the laws of the United States.<sup>35</sup>

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26. *Silveira*, 312 F.3d at 1060; *Emerson*, 270 F.3d at 220. Notably, no circuit court prior to *Emerson* subscribed to the individual rights model. *Emerson*, 270 F.3d at 220.

27. *Silveira*, 312 F.3d at 1060; *Emerson*, 270 F.3d at 219. The limited individual rights view has also been referred to as the "sophisticated collective rights" or "quasi-collective rights" model. *Emerson*, 270 F.3d at 219. Within this model, there is a great deal of variation as to the requisite militia connection. *Silveira*, 312 F.3d at 1060; *Emerson*, 270 F.3d at 219. According to some adherents of this view, the right to bear arms may only be exercised by "members of a functioning, organized state militia" as part of active participation in militia service in the event that state or federal governments fail to provide necessary arms. See *Emerson*, 270 F.3d at 219. More liberal adherents only require a "reasonable relationship to militia service." See *Silveira*, 312 F.3d at 1060.

28. *Silveira*, 312 F.3d at 1060; *Emerson*, 270 F.3d at 218-19.

29. *Silveira*, 312 F.3d at 1060; *Emerson*, 270 F.3d at 218-19.

30. Notably, these decisions preceded the incorporation era—before the majority of the provisions in the Bill of Rights were incorporated to the states via the Fourteenth Amendment—and are thus of limited value in determining whether the Second Amendment would apply to states post-*Heller*.

31. 92 U.S. 542 (1875).

32. *Id.* at 553, 556-57.

33. *Id.* at 542.

34. *Id.* at 553.

35. *Id.* at 556-57.

Eleven years later, in *Presser v. Illinois*,<sup>36</sup> the Court confirmed the holding in *Cruikshank*—that the Second Amendment only limits the federal government—and upheld a state prohibition against participation in an unauthorized militia.<sup>37</sup> Interestingly, the Court asserted that the reserve militia of the states and the United States is composed of “all citizens capable of bearing arms”<sup>38</sup> and that, regardless of the Second Amendment, the states cannot disarm the people so as to deprive the United States of this military resource and prevent the people from upholding their duties to the federal government.<sup>39</sup> In noting the transcendence of the right, the Court implicitly suggested that the right belonged to all Americans, not the states.<sup>40</sup>

It was not until 1939, however, that the Court offered its first significant analysis of the amendment.<sup>41</sup> In *United States v. Miller*,<sup>42</sup> the Court examined a Second Amendment challenge to the National Firearms Act of 1934<sup>43</sup> which prohibited transportation of an unregistered short-barreled shotgun in interstate commerce.<sup>44</sup> Declaring that the amendment’s “obvious purpose [was] to assure the continuation and render possible the effectiveness of [militia] forces,” the Court held such firearms did not qualify as “arms” protected by the amendment absent evidence showing that “possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia” or judicial notice that such weapons are standard military equipment or otherwise contribute to the common defense.<sup>45</sup> In short, the Court required that the Second Amendment be interpreted and applied with preservation of the militia in mind and

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36. 116 U.S. 252 (1886).

37. *Id.* at 264-65. Further, the Court posited that such a prohibition would not violate the Second Amendment even if it did apply to the states. *Id.*

38. *Id.* at 265.

39. *Id.*

40. *See id.*

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

42. 307 U.S. 174 (1939).

43. National Firearms Act, Pub. L. No. 90-618, 48 Stat. 1236 (1934) (codified as amended in scattered sections of 28 U.S.C.).

44. *Id.*; *Miller*, 307 U.S. at 175-76. The National Firearms Act of 1934 was the “first federal regulation of private firearms.” Steven G. Bradbury et al., U.S. Dep’t of Justice, Memorandum Opinion for the Attorney General, *Whether the Second Amendment Secures an Individual Right*, p. 3 (Aug. 24, 2004).

45. *Miller*, 307 U.S. at 178. Understanding the term militia to mean “all males physically capable of acting in concert for the common defense,” the Court explained that these men would typically supply their own customary arms when called for service. *Id.* at 179-80.

upheld a ban on an entire class of weapons having no connection to the militia or common defense.<sup>46</sup>

Although *Miller* became a leading case in Second Amendment jurisprudence, subsequent courts have described the opinion as “cryptic” and criticized it for its lack of guidance.<sup>47</sup> In focusing on the type of weapon at issue, the Court did not address whether the Second Amendment right belonged to individuals or to the state;<sup>48</sup> nor did the Court discuss the defendants’ membership in a militia or lack thereof.<sup>49</sup> Despite these ambiguities, in the seventy years following *Miller*, a majority of federal courts cited *Miller* in support of a collective rights view, while the remainder relied on *Miller* for the proposition that the amendment protects a limited individual right conditioned on membership in a militia or other militia service.<sup>50</sup>

In 1997, in *Printz v. United States*,<sup>51</sup> Justice Thomas acknowledged that the Court in *Miller* did not “attempt to define, or otherwise

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46. *Id.* at 178, 183. Since *Miller* (and prior to *Heller*), the Court’s only reference to the Second Amendment’s scope appeared in 1980 in a footnote in *Lewis v. United States*, 445 U.S. 55, 65-66 n.8 (1980). In that footnote, the Court cited the *Miller* holding for the proposition that “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia’” as support for its dismissal of a Second Amendment challenge to a felony-in-possession conviction. *Id.* (quoting *Miller*, 307 U.S. at 178).

47. *E.g.*, *Silveira*, 312 F.3d at 1061; *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999).

48. Arguably, if the Court believed that the Second Amendment right protected a state right, it would have dismissed the defendant’s argument due to a lack of standing and never addressed the type of weapon at issue.

49. If the Court believed that the right belonged only to individual militia members, the Court could have dismissed the complaint based on the petitioner’s nonmembership in the militia and never inquired further. *See Emerson*, 270 F.3d at 224.

50. *United States v. Haney*, 264 F.3d 1161, 1165 (10th Cir. 2001) (citing *Miller* in support of its holding that a “federal criminal gun-control law does not violate the Second Amendment unless it impairs the state’s ability to maintain a well-regulated militia”); *Gillespie*, 185 F.3d at 710 (declaring that “*Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia”); *United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997) (reasoning that in *Miller* the Court did not examine whether the actual possession or use of the short-barreled shotguns bore a reasonable relationship to the militia only because no evidence showed that the shotgun itself could have been used for the common defense and requiring that the defendant show a reasonable relationship between his possession of the firearm and the furtherance of a well-regulated militia); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (stating that “the *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its ‘possession or use’ and militia-related activity”) (quoting *Miller*, 307 U.S. at 178).

51. 521 U.S. 898 (1997).

construe, the substantive right protected by the Second Amendment” and that the Court lacked a recent opportunity to evaluate the nature of the same.<sup>52</sup> However, the Court has hinted in several past decisions that the Second Amendment protects an individual right to bear arms by listing it as one of the individual liberties protected by the Due Process Clause.<sup>53</sup> Further, in *United States v. Verdugo-Urquidez*,<sup>54</sup> the Court suggested that the Second Amendment right belongs to individuals:

“[T]he people” protected by . . . the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.<sup>55</sup>

Yet the Court’s dicta in these cases failed to quell the Second Amendment debate.

In recent years, a wave of academic scholarship has advocated the view that the Second Amendment protects an individual right to bear arms independent of militia service.<sup>56</sup> The traditional individual rights view was adopted by a circuit court for the first time in 2001.<sup>57</sup> In *United States v. Emerson*,<sup>58</sup> the United States Court of Appeals for the Fifth Circuit held that the Second Amendment protects an individual right to keep and bear arms for private purposes, even though the Court ultimately upheld the challenged statute that banned firearm possession by persons subject to a court order for domestic violence.<sup>59</sup> Following the Fifth Circuit’s example, in 2004 the United States Department of Justice embraced the traditional individual rights view for the first

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52. *Id.* at 938 n.1 (Thomas, J., concurring).

53. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (asserting that the first eight amendments guarantee rights to the individual against federal interference); *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977); *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968) (stating that the first eight amendments, including the right to keep and bear arms, secure and guarantee “personal rights”); *see also* Kenneth A. Klukowski, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON. U. CIV. RTS. L.J. 167, 171 (2008).

54. 494 U.S. 259 (1990) (holding that Fourth Amendment protection extends to persons lawfully present in the United States).

55. *Id.* at 265.

56. *See Silveira*, 312 F.3d at 1065-66; *see also Emerson*, 270 F.3d at 220.

57. *Emerson*, 270 F.3d at 260. Following the Fifth Circuit, the D.C. Circuit was the second to adopt the traditional individual rights approach. *Parker v. Dist. of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

58. 270 F.3d 203 (5th Cir. 2001).

59. *Id.* at 259-60, 264-65.

time.<sup>60</sup> These new developments invited a surge of Second Amendment challenges in federal district courts.<sup>61</sup>

However, not all federal courts embraced the trend towards a private right to bear arms. In 2003 the United States Court of Appeals for the Ninth Circuit reaffirmed its adherence to the collective rights view in *Silveira v. Lockyer*.<sup>62</sup> Accordingly, the Ninth Circuit held that the appellants lacked the requisite standing to assert a Second Amendment claim because “[t]he amendment protects the people’s right to maintain an effective state militia,” not “an individual right to own or possess firearms for personal or other use.”<sup>63</sup> Thus, the circuit courts remained divided.

#### IV. COURT’S RATIONALE

##### A. *The Majority Opinion*

Writing for the 5-4 majority, Justice Scalia divided the Second Amendment analysis in *Heller v. District of Columbia*<sup>64</sup> into three stages.<sup>65</sup> First, to determine the nature of the Second Amendment right to keep and bear arms, the Court undertook an extensive dissection of the language, structure, and history of the amendment.<sup>66</sup> Second, the Court warned that the Second Amendment does not guard an unfettered right to bear arms.<sup>67</sup> Finally, the Court struck down the District of Columbia’s bans on handguns and operable firearms in the home as impermissible violations of the Second Amendment under any constitutional standard.<sup>68</sup>

**1. Review of the Second Amendment’s Structure, Text, and History.** In the first stage of its analysis, the Court established the meaning of the Second Amendment by examining its structure, text, and historical background.<sup>69</sup> The Court explained that the amendment is composed of two clauses: the prefatory clause (“A well regulated militia, being necessary to the security of a free State”) and the operative clause

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60. Bradbury, *supra* note 44, at 105.

61. *Silveira*, 312 F.3d at 1066.

62. 312 F.3d 1052 (9th Cir. 2003).

63. *Id.* at 1066-67.

64. 128 S. Ct. 2783 (2008).

65. *See id.* at 2788-2822. Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* at 2787.

66. *Id.* at 2788-2816.

67. *Id.* at 2816-17.

68. *Id.* at 2817-22.

69. *Id.* at 2788-2816.

(“the right of the people to keep and bear arms shall not be infringed”).<sup>70</sup> According to the Court, the prefatory clause, which announces a purpose behind the operative clause’s command, may clarify ambiguity in the operative clause but may not limit or alter the scope of the operative clause.<sup>71</sup>

In analyzing the operative clause, the Court first examined the phrase “right of the people” and determined that the right belongs to individual Americans.<sup>72</sup> The majority asserted that “[n]owhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”<sup>73</sup> Moreover, the six other Constitutional provisions mentioning “the people” use the term to include “all members of the political community, not an unspecified subset.”<sup>74</sup> Based on this understanding, the Court adopted “a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”<sup>75</sup>

To define the substance of the right, the majority turned to the phrase “to keep and bear Arms.”<sup>76</sup> The majority determined that the eigh-

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70. *Id.* at 2789. Illustrating this structure, the Court explained that the amendment could be rephrased as follows: “Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.” *Id.* (quoting J. TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW § 585, at 394 (1867)). Acknowledging that this structure is not found elsewhere in the U.S. Constitution, the Court noted that the use of prefatory statements is common in other founding era legal documents including individual-rights provisions of state constitutions. *Id.*

71. *Id.* at 2789-90. Thus, the Court first tackled the operative clause before returning to the prefatory clause only to ensure consistency between the Court’s interpretation and the stated purpose. *Id.*

72. *Id.* at 2790-91.

73. *Id.* at 2790. Further, the Court noted that the phrase “right of the people” or similar terminology clearly referring to individual rights can be found in other constitutional provisions. *Id.* Specifically, the Court pointed to the First Amendment’s Assembly and Petition Clause, U.S. CONST. amend I, the Fourth Amendment’s Search and Seizure Clause, U.S. CONST. amend. IV, and the Ninth Amendment, U.S. CONST. amend. IV. *Heller*, 128 S. Ct. at 2790.

74. *Heller*, 128 S. Ct. at 2790-91. Although not in the context of rights, three additional constitutional provisions mention “the people”: the preamble (“We the people”), U.S. CONST. pmbl; § 2 of Article I (providing that “the people” will choose members of the House), U.S. CONST. art. I, § 2; and the Tenth Amendment (providing that those powers not given to the Federal government will remain with the States or the people), U.S. CONST. amend. X. *Heller*, 128 S. Ct. at 2790-91.

75. *Heller*, 128 S. Ct. at 2791. Therefore, the Court concluded that an interpretation restricting the Second Amendment right to “keep and bear arms” to militia members, a subset of the people, is incompatible with the operative clause’s award of the right to “the people.” *Id.*

76. *Id.*

teenth century definition of “Arms” would include any weapons used for offense or defense including those “not specifically designed for military use [or] . . . employed in a military capacity” and that the most natural meaning of the phrase was simply to possess or have weapons.<sup>77</sup> However, the majority declined to adopt a straightforward definition of “bear” meaning to “carry,” explaining that “bear,” when used with the term “Arms,” refers to carrying for general purposes of confrontation.<sup>78</sup> Given these textual elements, the Court held that the amendment’s operative clause “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”<sup>79</sup>

Next, the majority examined the prefatory clause: “A well regulated Militia, being necessary to the security of a free State.”<sup>80</sup> Rejecting the petitioner’s narrow definition of “militia” as the organized “state-and congressionally-regulated military forces described in the Militia Clauses,” the majority defined “militia” as all able-bodied men.<sup>81</sup> The majority explained that the militia is assumed to already exist in Article I<sup>82</sup> as Congress is given the power to call forth and organize, but not create, this body.<sup>83</sup> Further, the majority held that “well-regulated”

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77. *Id.* at 2791-92. The Court swiftly dismissed as frivolous the argument that the Second Amendment only protects arms that were in existence in the eighteenth century. *Id.* In the same way that the First and Fourth Amendments protect modern forms of communication and methods of search, the majority explained, “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.*

78. *Id.* at 2793. The Court adopted a description from Justice Ginsburg’s dissenting opinion in *Muscarello v. United States*, 524 U.S. 125 (1998), a case involving the meaning of “carries a firearm” in a federal criminal statute, as the most natural meaning of “bear arms.” *Heller*, 128 S. Ct. at 2793. In *Muscarello* Justice Ginsburg wrote, “as the Constitution’s Second Amendment . . . indicate[s]: ‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’” *Muscarello*, 524 U.S. at 143 (Ginsburg, J., dissenting) (quoting BLACK’S LAW DICTIONARY 214 (6th ed. 1990)). However, the Court was quick to point out that this definition does not necessitate participation in a formal military group. *Heller*, 128 S. Ct. at 2793.

79. *Heller*, 128 S. Ct. at 2797. Additionally, the Court identified the English Bill of Rights’ assurance that Protestant subjects would “have arms for their defence” as the predecessor of the Second Amendment and noted that this was “clearly an individual right, having nothing whatever to do with service in a militia.” *Id.* at 2798. By the time of the founding, the Court explained, this right to have arms had evolved into a fundamental individual right of self-defense against public and private intrusions. *Id.* at 2798-99.

80. *Id.* at 2799-2801.

81. *Id.* at 2799-2800.

82. U.S. CONST. art. I, § 8, cl. 16.

83. *Heller*, 128 S. Ct. at 2800. The Court opines that nothing in the clause suggests that Congress must use the entire militia. *Id.* Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them. *Id.*

merely implies “the imposition of proper discipline and training”<sup>84</sup> and that the phrase “security of a free state” did not mean security of individual states but rather “security of a free polity.”<sup>85</sup>

After establishing the meaning of the prefatory clause, the majority concluded that it fit “perfectly” with the operative clause creating an individual right to keep and bear arms.<sup>86</sup> Historically, the majority recounted, tyrants enabled a select militia or standing army to suppress political adversaries by stripping the people’s arms which, in turn, eviscerated the militia.<sup>87</sup> Thus, it was widely understood that the right to keep and bear arms protected the “ideal of a citizen militia” as a bulwark against tyranny.<sup>88</sup> According to the majority, the prefatory clause announced the reason behind the “ancient” right’s codification but did not preclude other motivations, such as self-defense and hunting.<sup>89</sup> In fact, the majority asserted that self-defense was a “*central component* of the right itself,” even if it contributed little to its codification.<sup>90</sup>

To further support its conclusion that the Second Amendment protects a personal right to keep and bear arms for private purposes, the majority reviewed the amendment’s history before and shortly after its adoption.<sup>91</sup> First, the Court cited analogous arms-bearing rights in state constitutions, which secure an individual right for purposes of defense, purposes unconnected to military service, and purposes of public safety.<sup>92</sup> The majority also turned to the drafting history of the

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84. *Id.*

85. *Id.* at 2800-01. Although the term “State” refers to individual states in other parts of the Constitution, the Court explained that, in those cases, “state” is modified by words such as “each,” “any,” “several,” “particular,” “one,” or “no” which clarify that the reference is to the several states. *Id.* at 2800. Moreover, the majority added that the use of the term “foreign state” in Articles I and III demonstrates that the word “state” did not have an exclusive meaning in the Constitution. *Id.* Additionally, the majority noted that eighteenth century political discourse appeared to treat the phrase “security of a free state” and similar variations as terms of art meaning a free country or polity. *Id.* In conclusion, the majority reasoned that the militia was necessary to the security of a free polity (1) to repel invasions and suppress insurrections, (2) to eliminate the need for large standing armies, and (3) to resist tyranny. *Id.* at 2800-01.

86. *Id.* at 2801.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* Moreover, according to the majority, the argument that the Second Amendment right belongs to members of the organized militia does not further the ideal of a citizens’ militia because Congress controls membership in the militia and thus, would dictate the holder of the right under such an interpretation. *Id.* at 2802. In effect, this would guarantee a select militia as used by the Stuart kings but not a people’s militia. *Id.*

91. *Id.* at 2802-12.

92. *Id.* at 2802-04.

amendment for support, stressing that the Bill of Rights was intended to codify “venerable, widely understood liberties.”<sup>93</sup> Finally, the majority examined post ratification interpretations of the amendment, including post-ratification commentary, pre-civil war caselaw, and post-civil war legislation and commentary as evidence of the public understanding of the right.<sup>94</sup>

Moreover, the majority concluded that “nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.”<sup>95</sup> Noting that the victims in *United States v. Cruikshank*<sup>96</sup> made no claim of being denied the right to carry arms in a militia, the majority argued that the Court’s description in *Cruikshank* of bearing of arms for a “lawful purpose” and instruction to look to the states’ police power for protection from violations by other citizens was inconsistent with the theory that the amendment only protects a state right or an individual right to bear arms in a state militia.<sup>97</sup> Additionally, the majority asserted that the decision in *Presser v. Illinois*<sup>98</sup> posed no obstacle to the individual rights view because the Court did not address the substance of the Second Amendment beyond holding that it did not invalidate a state prohibition on membership in an unauthorized military organization.<sup>99</sup>

Turning to the Court’s opinion in *United States v. Miller*,<sup>100</sup> the majority explained that the decision hinged on whether the type of weapon at issue was protected by the amendment.<sup>101</sup> The majority contended that the *Miller* decision “positively suggest[ed]” an individual right to keep and bear those types of arms having “some reasonable relationship to the preservation or efficiency of a well regulated militia” and that the Court would have examined whether the defendants belonged to a militia if the right only belonged to militiamen.<sup>102</sup> Cautioning against an overreading of *Miller*, the majority declared,

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93. *Id.* at 2804. However, as Justice Breyer points out, “the right to keep and bear arms for service in a state militia was also a pre-existing right.” *Id.* at 2831 (Breyer, J., dissenting).

94. *Id.* at 2804-12 (majority opinion).

95. *Id.* at 2816.

96. 92 U.S. 542 (1875).

97. *Heller*, 128 S. Ct. at 2813.

98. 116 U.S. 252 (1886).

99. *Heller*, 128 S. Ct. at 2813. The majority noted that in *Presser* the plaintiff’s nonmembership in a militia was only relevant to the Court’s discussion of the Fourteenth Amendment. *Id.*

100. 307 U.S. 174 (1939).

101. *Heller*, 128 S. Ct. at 2814.

102. *Id.*

“*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.”<sup>103</sup>

Finally, to explain the lack of judicial review of the Second Amendment, the majority offered two reasons: (1) the long-held belief that the Bill of Rights was inapplicable to the States and (2) the lack of significant federal legislation regulating the possession of firearms by law-abiding citizens.<sup>104</sup> Rather than being “well settled and uncontroversial,” the majority argued that the validity of firearms regulations under the Second Amendment was simply unexamined.<sup>105</sup>

**2. Limitations on the Second Amendment Right to Keep and Bear Arms.** In the second stage of its analysis, the majority stressed that the Second Amendment right to keep and bear arms is not absolute.<sup>106</sup> From the founding, the majority continued, courts and commentators have explained that the right can be limited in terms of the types of arms, the manner of keeping and carrying arms, and the purposes for keeping and carrying arms.<sup>107</sup> Announcing a non-exhaustive list of “presumptively lawful regulatory measures,” the Court stated,

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>108</sup>

Additionally, the majority recognized that only certain types of arms fall under the Second Amendment umbrella, as demonstrated in *Miller*.<sup>109</sup> The majority explained that colonial militiamen brought the same weapons to service that they used to protect their homes.<sup>110</sup> Thus, by

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103. *Id.* The majority explained that the Court in *Miller* did not thoroughly examine the nature or history of the Second Amendment right but pointed out that this weakness was not entirely the Court’s fault because the respondent did not appear in the case and the government’s brief offered only two pages discussing English legal sources. *Id.* at 2814-15.

104. *Id.* at 2816.

105. *Id.* Similarly, the First Amendment eluded judicial scrutiny until 1931. *Id.*

106. *Id.* at 2816-17.

107. *Id.*

108. *Id.* Conceding that no small arms could be useful against modern-day bombers and tanks, the majority reasoned, “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.” *Id.* at 2817.

109. *Id.* at 2817.

110. *Id.* at 2815-16. In its reasoning, the majority used the *Miller* language describing protected weapons as those “in common use at the time” but added the addendum from

equating weapons used for militia service with those used for personal self-defense, the majority read *Miller* to hold that “weapons not typically possessed by law-abiding citizens for lawful purposes” were ineligible for Second Amendment protection.<sup>111</sup>

**3. Analyzing the Constitutionality of the District of Columbia’s Regulations.** In the final stage of its analysis, the majority examined the constitutional validity of the District of Columbia’s total ban on handgun possession and the requirement that lawfully owned firearms in the home be rendered inoperable by disassembly or trigger lock.<sup>112</sup>

First, the Court determined that the complete ban on handguns would fail constitutional muster under any standard of judicial scrutiny.<sup>113</sup> Given the centrality of “the inherent right of self-defense” to the Second Amendment, the majority held that the ban, which outlaws an entire class of “arms” constituting Americans’ first choice for self-defense and “extends . . . to the home, where the need for defense of self, family, and property is most acute,” causes an impermissible infringement upon the citizenry’s right to keep and bear arms.<sup>114</sup>

Second, the Court also struck down the District’s requirement that lawfully owned firearms be kept inoperable in the home.<sup>115</sup> Despite

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*Presser* “for lawful purposes” to further support a nonmilitary meaning of the right. *See id.*

111. *Id.* at 2816. The majority argued that this characterization was consistent with traditional prohibitions against “dangerous and unusual weapons.” *Id.* at 2817.

112. *Id.* at 2817-22.

113. *Id.* at 2817-18. The majority admitted that the law would pass rational basis scrutiny but argued that such a test is only used “when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws.” *Id.* at 2818 n.27. Because the rational basis is the substance of the right itself, the majority continued, the same level of scrutiny is inappropriate to assess the propriety of a legislature’s regulation of a specific, enumerated right. *Id.* Given the general prohibitions against irrational laws, the Second Amendment guarantee would be redundant if rational basis review was applied. *Id.* Further, the majority refused to adopt the “interest-balancing” approach suggested in Justice Breyer’s dissenting opinion, claiming that the Second Amendment itself is the product of an interest balancing inquiry conducted by the people. *Id.* at 2821. The majority argued that the scope of a constitutional right is frozen at the time of its adoption and the role of future judges or legislatures is not to challenge that scope or declare the amendment “extinct.” *Id.* at 2821-22.

114. *Id.* at 2817-18. The majority recognized that “[a handgun] is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; [and] it can be pointed at a burglar with one hand while the other hand dials the police.” *Id.* at 2818. However, in acknowledgment of the problems associated with handguns, the Court noted that the District was free to use other less restrictive means to target handgun-related issues. *Id.* at 2822.

115. *Id.* at 2818.

the District's suggestion, the majority declined to read an implicit self-defense exception into the statute because the "unequivocal" text and explicit statutory exceptions precluded such a reading.<sup>116</sup> Thus, the Court ordered the District to allow Heller to register his handgun and to issue him a license to carry it in his home.<sup>117</sup>

### B. Justice Stevens's Dissent

In dissent, Justice Stevens approved of the majority's conclusion that the Second Amendment protects a right belonging to individuals<sup>118</sup> but sharply disagreed with the majority's holding that the right's scope includes nonmilitary purposes, such as hunting and personal self-defense.<sup>119</sup> Justice Stevens explained that the amendment was designed to prevent Congress from pursuing disarmament of state militias and, thus, ensure a well-regulated militia amidst fears that a national standing army "posed an intolerable threat to [state] sovereignty," and that the drafters' goal was not to curb legislative regulation of civilian firearm possession and use.<sup>120</sup>

To begin, Justice Stevens analyzed the amendment's text to confirm a military connection to the right.<sup>121</sup> According to Justice Stevens, the preamble set forth the "single-minded" and exclusive purpose of the amendment—preservation of the militia—as supported by the lack of provisions expressly providing for non military purposes.<sup>122</sup> Adopting the idiomatic meaning of "bear arms," which is "to serve as a soldier, do military service, fight" Justice Stevens opined that the word "keep" only reinforced the military connotation because militiamen often maintained their own arms as a requirement of service.<sup>123</sup> Ultimately, Justice

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116. *Id.* In addition, the majority relied on a previous D.C. Court of Appeals statement that the statute prohibited residents from using firearms to stop intruders as further evidence of the nonexistence of a self-defense exception. *Id.* at 2818-19 (citing *McIntosh v. Washington*, 395 F.2d 744, 755-56 (D.C. Cir. 1978)).

117. *Id.* at 2822.

118. *Id.* (Stevens, J., dissenting) (stating that "[s]urely [the Second Amendment] protects a right that can be enforced by individuals").

119. *Id.* Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer. *Id.*

120. *Id.* Thus, according to Justice Stevens, the Second Amendment served as a counterweight to the Article I Militia Clause. *Id.* at 2831.

121. *Id.* at 2824-31.

122. *Id.* Justice Stevens found the absence of a Second Amendment provision allowing for private purposes particularly telling in light of contemporary analogous state declarations of the right and drafting proposals expressly providing for nonmilitary purposes. *Id.* at 2825-26.

123. *Id.* at 2828-30 (quoting 1 OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989)). Justice Stevens explained that the phrase "to keep and bear arms" describes a singular, unitary right to have and use arms when necessary for military service. *Id.* at 2830.

Stevens concluded that the majority's "overwrought" and "novel" interpretation of the amendment to protect a right of personal self-defense was not supported by a single word in the text.<sup>124</sup>

Second, Justice Stevens attacked the majority's reliance on the English Bill of Rights, Blackstone's Commentaries, post-enactment commentary, and post-civil war legislative history.<sup>125</sup> Explaining that the English Bill of Rights cannot be treated coextensively with the Second Amendment because it was adopted under different political and historical circumstances and lacked a preamble identifying a "narrow militia-related purpose," Justice Stevens concluded that Blackstone's Commentary addressing the English Bill of Rights and post-enactment commentary tending to collapse the two rights into one another are of little value in interpreting the Second Amendment.<sup>126</sup> Also, Justice Stevens argued that post-civil war legislative history was too far temporally removed to reveal the framers' intent.<sup>127</sup>

Third, Justice Stevens argued that Second Amendment jurisprudence conditioning the right on militia service has been "well-settled and uncontroversial."<sup>128</sup> Illustrating this point, Justice Stevens observed that the first two federal laws restricting private firearm possession did not raise serious Second Amendment questions because the laws were unrelated to the military.<sup>129</sup> Examining *Cruikshank*, Justice Stevens proposed that the charge of violating the Second Amendment could have stemmed from the prosecutor's belief that the victims, citizens chosen by the Sheriff to protect the courthouse from a mob attack, were elevated by the circumstances to the status of state militia members.<sup>130</sup> Further, Justice Stevens argued that in *Presser* the Court's holding that

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124. *Id.* at 2831. Moreover, Justice Stevens argued that the preamble's military limitation should not be treated as mere surplusage, and he accused the majority of reading its own interpretation into an ambiguous text and then ignoring the clarifying function of the preamble. *Id.* at 2826.

125. *Id.* at 2836-42.

126. *Id.* at 2837-39. Further, Justice Stevens cautioned that the post-enactment commentary cited by the majority demonstrated unfamiliarity with the drafting history of the Second Amendment. *Id.* at 2839.

127. *Id.* at 2841-42. Justice Stevens also pointed out that post-civil war legislative history was more ambiguous concerning the nature of the Second Amendment right than the majority would admit and that all of the majority's examples were unlikely to have been objective interpretations as they were taken from intense political debates. *Id.*

128. *Id.* at 2844.

129. *Id.*; Act of February 8, 1927, ch. 75, 44 Stat. 1059 (prohibiting the mail delivery of firearms which could be concealed on the person); National Firearms Act, Pub. L. No. 90-618, ch. 757, 48 Stat. 1236 (1934) (codified in scattered sections of 28 U.S.C.) (banning the possession of machine guns, sawed-off shotguns, and other weapons).

130. *Heller*, 128 S. Ct. at 2843 (Stevens, J., dissenting).

bans on unauthorized militia activities are constitutional suggests, in turn, that the amendment does not protect the use of arms outside of participation in a lawfully organized militia.<sup>131</sup>

Finally, Justice Stevens propounded that there has been “substantial reliance” on *Miller’s* unanimous decision limiting Second Amendment protection to arms having “some reasonable relationship to the preservation or efficiency of a well-regulated militia” for over seventy years.<sup>132</sup> According to Justice Stevens, *Miller* did not “turn on the difference between muskets and sawed-off shotguns . . . [but] on the basic difference between the military and nonmilitary use and possession of guns.”<sup>133</sup> Justice Stevens posited that the Court in *Miller* would have had no reason to distinguish between the types of weapons if the amendment were not limited to military uses of weapons and that the Court should have focused on the weapon’s suitability for self-defense if that was the amendment’s purpose.<sup>134</sup> Out of respect for the stability of well-established law, Justice Stevens argued that the party seeking a deviation assumes the burden of presenting new reasons to support a change in position and concluded that, here, the burden had not been met.<sup>135</sup>

In conclusion, Justice Stevens warned that the majority’s decision denied the legislature of the ability to define acceptable gun control policy and left courts to define, case-by-case, the scope of this newly manufactured and uncharted right.<sup>136</sup>

### C. Justice Breyer’s Dissent

Assuming *arguendo* that the Second Amendment protects a right of personal self-defense, in a second dissent,<sup>137</sup> Justice Breyer argued that

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131. *Id.*

132. *Id.* at 2823, 2845-46 (quoting *Miller*, 307 U.S. at 178). Justice Stevens noted that *Miller* was affirmed by the Supreme Court as late as 1980. *Id.* at 2823.

133. *Id.* at 2845. Justice Stevens argued that if self-defense had been the relevant inquiry, the weapon should have been scrutinized for its defensive qualities not military relationship. *Id.*

134. *Id.* at 2823, 2845.

135. *Id.* at 2823-24. Justice Stevens explained that the Court in *Miller* had access to the same information presented to the Court in this case and reached a different conclusion. *Id.* at 2845. Also, Justice Stevens argued that the fact that the respondent did not appear should have no impact on the precedential value of a unanimous court decision seeing as how only one side appeared in the foundational case of *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1803). *Heller*, 128 S. Ct. at 2845 (Stevens, J., dissenting).

136. *Heller*, 128 S. Ct. at 2846-47 (Stevens, J., dissenting).

137. Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 2847 (Breyer, J., dissenting). While acknowledging that self-defense interests were furthered by allowing militiamen to keep their arms at home, Justice Breyer plainly stated that the

the District's bans on handguns and operable firearms in the home passed constitutional muster under an interest-balancing approach.<sup>138</sup>

According to Justice Breyer, general tests presuming constitutionality or unconstitutionality are particularity ill-suited for evaluation of gun control statutes because important interests are at stake on each side of the equation.<sup>139</sup> In practice, Justice Breyer explained, application of a strict scrutiny test would amount to an interest-based analysis weighing the government's compelling interests of crime prevention and protection of its citizens' lives against the individual's Second Amendment interests.<sup>140</sup> Accordingly, Justice Breyer proposed explicit adoption of an interest-balancing inquiry as used in election, speech, and due process cases.<sup>141</sup> Under such a test, the main question would be "whether the statute burdens [the Second Amendment] interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other governmental interests" and "the existence of any clearly superior less restrictive alternative" would be considered.<sup>142</sup> Following the example of lower courts, Justice Breyer suggested that judicial deference should be given to the legislature's policy decisions.<sup>143</sup>

Quickly disposing of the constitutional challenge to the District's requirement that lawfully owned firearms be kept inoperable in the home by reading an implicit self-defense exception into the statute, Justice Breyer dedicated the bulk of his dissent to the District's complete prohibition on handguns.<sup>144</sup> At the outset, Justice Breyer accepted the handgun statute's goal to reduce the likelihood of gun-related crimes and

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Second Amendment is not concerned with self-defense detached from any militia related objective. *Id.*

138. *Id.* at 2847-48. Before delving into his analysis, Justice Breyer laid out four propositions accepted by the entire Court: (1) the right is separately possessed, and may be enforced, by individuals; (2) the amendment was adopted "[w]ith [the] obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces"; (3) the amendment "must be interpreted and applied with that end in view"; and (4) the right is subject to government regulation. *Id.* at 2848 (quoting *Miller*, 307 U.S. at 178).

139. *Id.* at 2852.

140. *Id.* at 2851-52.

141. *Id.* at 2852.

142. *Id.*

143. *Id.* at 2852-53.

144. *Id.* at 2853-54. At the time of the founding, Justice Breyer explained, several cities including Boston, Philadelphia, and New York restricted the use of firearms and the storage of gun powder within city limits. *Id.* at 2848-50. While none of these regulations contained explicit self-defense exceptions, Justice Breyer found it puzzling that the majority effortlessly read implicit self-defense exceptions into these colonial laws but refused to do so in interpreting the District's regulations. *Id.* at 2850, 2853-54.

deaths within the District as compelling.<sup>145</sup> After examining the facts presented to the legislature upon adoption of the statute,<sup>146</sup> as well as present day statistics concerning handgun-related accidents and crime,<sup>147</sup> Justice Breyer concluded that the legislature “ha[d] drawn reasonable inferences based on substantial evidence.”<sup>148</sup> In response to the petitioner’s opposing statistics, Justice Breyer noted that, while this data presented a challenge to the wisdom of the District’s predictive judgments, it was insufficient to demonstrate that the District’s conclusions were wrong or irrational.<sup>149</sup> Explaining that the legislature’s aptitude and responsibility was to draw inferences from conflicting evidence and make appropriate policy decisions, Justice Breyer determined that the statute properly furthered compelling government interests.<sup>150</sup>

After establishing that the handgun ban resulted from a rational legislative decision based upon substantial evidence, Justice Breyer weighed the government’s interest in reducing the District’s handgun-related problems against each of the Second Amendment interests adopted by the majority: “(1) the preservation of a ‘well regulated Militia’; (2) safeguarding the use of firearms for sporting purposes . . . ; and (3) assuring the use of firearms for self-defense.”<sup>151</sup> First, Justice Breyer concluded that the statute hardly burdens the amendment’s “first and primary objective,” preservation of the militia, because the respondent was “not affiliated with any state-regulated militia.”<sup>152</sup> Second, Justice Breyer argued that any interference with firearm-related sporting activities likely resulted from the District’s urban character, not

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145. *Id.* at 2854-61.

146. *Id.* at 2854-55. The data available to the legislature at the time of the statute’s enactment included a number of statistics regarding handguns, crime, and the proliferation of handguns as well as statistics “strongly correlating handguns with crime.” *Id.*

147. *Id.* at 2855-57. The present-day data included reports showing the involvement of handguns in a majority of firearm deaths and injuries, the popularity of handguns among criminals, the unique impact of gun-related problems in urban areas, and the strong link between handguns and deaths in urban areas. *Id.*

148. *Id.* at 2860 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)).

149. *Id.* at 2859. Petitioners noted first that the ban has not been effective because violent crime in the District had increased since the institution of the handgun ban. *Id.* at 2857-58. Second, petitioners asserted that gun laws do not reduce violent crime as murder rates are higher in European nations with stricter gun laws. *Id.* at 2858. Third, petitioners argued that evidence showed that firearm ownership aids self-defense. *Id.* Fourth, petitioners argued that gun laws only keep guns from law-abiding citizens, not criminals. *Id.* at 2858-59.

150. *Id.* at 2860-61.

151. *Id.* at 2861.

152. *Id.* at 2861-62.

the ban.<sup>153</sup> Moreover, Justice Breyer asserted that these first two interests are minimally burdened, if at all, because the regulation allows citizens to possess and use other firearms in lawful recreational activities and to keep and use handguns in neighboring jurisdictions at minimal cost.<sup>154</sup> Finally, Justice Breyer conceded that the handgun ban burdens the amendment's interest in self-defense by preventing citizens from using a choice weapon for self-defense to repel intruders in the home.<sup>155</sup>

Continuing his analysis, Justice Breyer searched for any "clearly superior, less restrictive alternative[s]" to the complete ban on handguns and found none.<sup>156</sup> Although there were less restrictive alternatives, none were equally effective as an outright prohibition.<sup>157</sup> Justice Breyer explained that the statute's essential goal was to reduce the total number of handguns, which the legislature had determined would reduce the number of handgun-related deaths and accidents.<sup>158</sup>

In the final step of his interest-balancing test, Justice Breyer determined that the handgun ban did not disproportionately burden Second Amendment interests for four reasons. First, the ban's scope was narrowly tailored to weapon type (handguns) and location (the urban area encompassing the District).<sup>159</sup> Second, the only constitutional interest burdened, the self-defense interest, was merely a subsidiary interest entitled to less weight than the primary interest of preserving the militia.<sup>160</sup> Third, the framers did not consider colonial urban firearm regulations to be inconsistent with Second Amendment interests.<sup>161</sup> Finally, Justice Breyer considered the "unfortunate consequences" of holding that the handgun ban disproportionately burdens Second Amendment interests, such as leaving courts and legislatures without a clear standard to assess Second Amendment

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153. *Id.* at 2863.

154. *Id.* at 2862-63.

155. *Id.* at 2863-64.

156. *Id.* at 2864.

157. *Id.* Justice Breyer recognized that available, less restrictive alternatives would include trigger lock and licensing requirements. *Id.*

158. *Id.*

159. *Id.* at 2865-66.

160. *Id.* at 2866. Moreover, Justice Breyer explained, any self-defense interest in the founding era could not have focused on dangers specific to urban areas because of the primarily rural composition of the population and no evidence shows that the Framers considered handguns to be of any particular importance in relation to the Second Amendment. *Id.* at 2866-67.

161. *Id.* at 2867. In any case, Justice Breyer noted that a lack of regulation does not necessarily mean that the legislature did not have the authority to enact the same. *Id.* at 2868.

violations and encouraging an onslaught of litigation.<sup>162</sup> For these reasons, Justice Breyer determined that the District's handgun ban was constitutional.<sup>163</sup>

#### V. IMPLICATIONS

Ultimately, the United States Supreme Court's narrow 5-4 decision in *Heller v. District of Columbia*<sup>164</sup> leaves open an array of questions. First, now that a majority of the Court has held that the Second Amendment secures an individual right, the Court must decide whether to incorporate that right to the states.<sup>165</sup> Second, the majority failed to adopt a standard to evaluate Second Amendment challenges while leaving the scope of the right largely undefined. As a result of these uncertainties combined with the secured standing of individuals to assert Second Amendment claims, an increase in litigation can naturally be anticipated in *Heller's* wake. Ultimately, however, the decision is unlikely to have a profound practical impact on existing gun control legislation.

One reason the Second Amendment has yet to be incorporated against the states is that many courts did not consider it to protect an individual right until recently.<sup>166</sup> After *Heller*, incorporation of the Second Amendment is likely, if not inevitable.<sup>167</sup> Since *Presser v. Illinois*<sup>168</sup> and *United States v. Cruikshank*,<sup>169</sup> most of the Bill of Rights has been incorporated via the Due Process Clause of the Fourteenth Amendment.<sup>170</sup> The current test for incorporation is whether the right is

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162. *Id.* at 2868. Moreover, Justice Breyer chastised the majority for stifling the legislature's ability to address critical gun-related problems without listing a single sufficient alternative. *Id.*

163. *Id.* at 2870.

164. 128 S. Ct. 2783 (2008).

165. The question of incorporation against state and local governments through the Fourteenth Amendment was not at issue in *Heller* because of the direct application of the Bill of Rights to the District of Columbia. Klukowski, *supra* note 53, at 189.

166. Desmond, *supra* note 6, at 1050.

167. Lund, *supra* note 19, at 50.

168. 116 U.S. 252 (1886).

169. 92 U.S. 542 (1875).

170. Koren W. Wong-Ervin, Note, *The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence*, 50 HASTINGS L.J. 177, 196-99 (1998). See also *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (incorporating the Sixth Amendment guarantee of trial by jury); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (incorporating the Fifth Amendment provision against self-incrimination); *Robinson v. California*, 370 U.S. 660, 667 (1962) (incorporating the Eighth Amendment); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 14-15 (1947) (incorporating the First Amendment Free Exercise Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the First Amendment Free Exercise

“fundamental to the American scheme of justice” or “necessary to an Anglo-American regime of ordered liberty.”<sup>171</sup> The amendment’s preamble itself suggests that the right to keep and bear arms is “necessary to the security of a free State,” and the right also has deep historical roots in Anglo-American society as a bulwark against tyranny.<sup>172</sup> Even today, forty-three states have included a right to arms in their constitutions.<sup>173</sup> In *Heller* the majority references several descriptions of the right as a natural right of self-preservation and clearly states, “[b]y the time of the founding, the right to have arms had become *fundamental* for English subjects.”<sup>174</sup> Thus, it would be a great surprise if the Second Amendment were not incorporated.<sup>175</sup>

In reasoning that the District’s bans failed under any standard of constitutional scrutiny, the majority deferred articulation of a workable standard for addressing Second Amendment challenges beyond holding that outright bans on the most popular weapon of self-defense or operable firearms generally, which extend to the home, are per se invalid.<sup>176</sup> The majority expressly rejected the interest-balancing approach proposed by Justice Breyer as well as a rational basis standard.<sup>177</sup> Despite Justice Breyer’s suggestion, however, the majority did not implicitly reject a strict standard analysis by “broadly approving a set of laws,” which would be vulnerable to a strict scrutiny analysis.<sup>178</sup> Rather, the majority provided a non-exclusive list of enshrined exceptions to the right that were present at the time of the amendment’s adoption.<sup>179</sup> Yet the majority did not undertake the challenge of identifying which exceptions are so enshrined or how to evaluate potential exceptions.<sup>180</sup> Surely, it would be unduly cumber-

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Clause); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment Freedom of Speech).

171. *Duncan*, 391 U.S. at 149; Lund, *supra* note 19, at 53.

172. Lund, *supra* note 19, at 53-54 (quoting U.S. CONST. amend. II).

173. *Id.* at 54-55.

174. *Heller*, 128 S. Ct. at 2798 (majority opinion) (emphasis added). For example, the majority refers to Blackstone’s commentaries and court language from *Nunn v. State*, 1 Ga. 243 (1846), describing a “*natural* right of self-defense.” *Heller*, 128 S. Ct. at 2798, 2809.

175. *See* Lund, *supra* note 19, at 55.

176. *See Heller*, 128 S. Ct. at 2817-18.

177. *Id.* at 2817 n.27.

178. *See id.* at 2851 (Breyer, J., dissenting).

179. *Id.* at 2816-17 (majority opinion). The majority explained, “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” *Id.* at 2821.

180. *Id.* at 2816-17, 2822. The majority explained, “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to

some and unsound to require lower courts to trace the origins of every firearm control measure to the founding era without consideration of modern circumstances.<sup>181</sup> In the absence of a constitutional framework, courts are left without knowing where or how to draw the line when regulatory firearm restrictions are only separated by a matter of degree or when Second Amendment interests run contrary to other constitutional rights.

The lack of a clear standard to address Second Amendment infringements is sure to invite additional challenges to gun control legislation. Additional filings are all the more likely considering the Court's undivided rejection of the collective rights interpretation of the Second Amendment which had dominated most of its jurisprudence.<sup>182</sup> Without controversy, both the majority and dissent affirmed that the right belongs to and is enforceable by individuals.<sup>183</sup> Consequently, individuals are assured the requisite standing to assert Second Amendment claims in federal courts.<sup>184</sup> Simply as a result of removing this procedural bar, the courts can expect a greater number of Second Amendment challenges.

Despite a probable increase in litigation, however, the decision in *Heller* is unlikely to have a substantial impact on existing gun laws.<sup>185</sup> As written, the majority's opinion in *Heller* is both sufficiently ambiguous and narrowly tailored for lower courts to sidestep a massive upset of federal gun control laws. Some scholars have pointed to the lower federal courts' resistance to the Court's decision in *United States v. Lopez*<sup>186</sup> as evidence that lower courts, with their bureaucratic tendencies and commitment to entrenched views, may shirk upheaval in the Second Amendment context.<sup>187</sup> To courts interpreting *United States*

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clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145 (187[8]), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty." *Id.* at 2822.

181. *See id.* at 2799 (majority opinion), 2870 (Breyer, J., dissenting).

182. Under the collective rights theory, only state governments whose state militia had been impaired by federal regulations could invoke the amendment. *See* Glenn H. Reynolds and Brannon P. Denning, Colloquy, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 406, 407 (July 17, 2008).

183. *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).

184. Assuming, of course, that all other relevant standing requirements are met.

185. *See* Reynolds, *supra* note 182, at 408-11.

186. 514 U.S. 549 (1995).

187. In the wake of *United States v. Lopez*, a decision invalidating the Gun Free Schools Act as exceeding Congress's delegated authority under the Commerce Clause, the courts were bombarded with claims, mostly from convicted defendants challenging federal criminal statutes, asserting that other federal laws were similarly not within Congress's commerce power. 514 U.S. 549, 551 (1995); Reynolds, *supra* note 182, at 409. From this

*v. Miller*<sup>188</sup> as a rejection of the traditional individual rights view, the decision in *Heller* uprooted a unanimous decision of the Court supported by nearly seventy years of judicial acquiescence. The narrowness of the 5-4 majority decision and the clear split along partisan lines do nothing to encourage the faith of apprehensive courts in the decision's soundness.<sup>189</sup> Further, the majority's lack of a defined standard of review opens the door for courts to confine *Heller* to its facts and could foster the conclusion that any measure that is less restrictive than an absolute ban would pass constitutional muster.<sup>190</sup> In contrast, a definite standard would expose the lower courts' reasoning in addressing Second Amendment challenges, making an evasion of the decision in *Heller* easier to detect.<sup>191</sup> Thus, given the courts' reluctance to "rock the boat," it appears doubtful that they will do so.<sup>192</sup>

Moreover, in *Heller*'s immediate future, only a handful of laws will be vulnerable to legitimate Second Amendment challenges. Despite some dicta suggesting that the right is protected by the Due Process Clause,<sup>193</sup> the Court has yet to directly incorporate the Second Amendment right to the states. Thus, state and local gun laws may be shielded for the time being, leaving only federal firearms restrictions subject to judicial scrutiny under the Second Amendment. Further, even if the amendment is incorporated, the majority clearly explained that the right

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onslaught, only one law was struck down by a federal appellate court. Reynolds, *supra* note 182, at 409.

188. 307 U.S. 174 (1939).

189. Desmond, *supra* note 6, at 1048 (noting the partisan nature of the split).

190. Reynolds, *supra* note 182, at 410. Importantly, the District's firearm restrictions were some of the strictest in the nation. Therefore, most existing firearm regulations would fall short of the constitutional infringements asserted in *Heller*.

191. *Id.*

192. *Id.* See Minotti v. Whitehead, 584 F. Supp. 2d 750, 760 n.2 (D. Md. Oct. 31, 2008) (distinguishing *Heller* on the basis that the defendant's weapon was found in his car whereas in *Heller* the decision focused on "the inherent right of self-defense central to the Second Amendment in the context of defense of one's home"); United States v. Bonner, No. CR 08-00389SBA, 2008 WL 4369316 (N.D. Cal. Sept. 23, 2008) (declining to extend the *Heller* holding to a felon seeking to wear body armor for purely defensive purposes in violation of a statute explaining that, as a felon, the defendant had forfeited his constitutional right); United States v. Knight, 574 F. Supp. 2d 224 (D. Md. 2008) (concluding that *Heller* does not invalidate regulation inquiring whether a firearm purchaser is subject to a court order for domestic violence as a narrowly tailored temporary restriction on firearm possession); People v. Ferguson, No. 2008QN036911, 2008 WL 4694552 (N.Y. City Crim. Ct. Oct. 24, 2008) (holding that *Heller* does not invalidate a requirement that handguns be licensed in the state of New York).

193. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992); Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977).

protected was subject to exceptions and expressly exempted large categories of longstanding firearms restrictions from *Heller's* reach.<sup>194</sup>

In light of these mitigating factors, perhaps *Heller's* primary significance will be the symbolic enshrinement of a personal right to bear arms as the Court judicially established the nature of the right, but not its scope.

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194. See Reynolds, *supra* note 182, at 410. These presumptively valid regulations included laws restricting firearm possession by certain persons, such as felons and the mentally ill, or in certain sensitive locations, as well as laws regulating the commercial sale of arms. *Heller*, 128 S. Ct. at 2816-17 (majority opinion).