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who say constitutional law should be about improving the processes of government, those who emphasize contemporary values, and other variants too. Often, the Supreme Court has looked to tradition in deciding whether a right is protected by the Constitution.⁸

The debate over how the Constitution should be interpreted—and the extent to which the method of interpretation should limit the judiciary—arises in all areas of constitutional law.

HOW SHOULD THE CONSTITUTION BE INTERPRETED? THE SECOND AMENDMENT AS AN EXAMPLE

In thinking about the debate over the appropriate method of interpretation, consider, as an example, the meaning of the Second Amendment, which states: “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.” There is a heated debate among scholars, as well as in society, about the proper interpretation of the Second Amendment. On the one hand, some believe that the Second Amendment safeguards a right of individuals to keep and own firearms. From this perspective, federal laws that infringe this right are at least presumptively unconstitutional.⁹ On the other hand, some believe that the Second Amendment means only that there is a right to have guns for militia service.

The underlying issue, of course, is how should the Supreme Court—or a lower court or a member of Congress or you—decide the proper meaning of the Second Amendment. In June 2008, for the first time in American history, the Supreme Court invalidated a law as violating the Second Amendment and held that the Second Amendment protects a right to have guns apart from militia service.

In reading *District of Columbia v. Heller*, focus on the interpretive methodology used by the majority and the dissents. What sources do they look to? What should they consider?

DISTRICT OF COLUMBIA v. HELLER

128 S. Ct. 2783 (2008)

Justice SCALIA delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

8. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to find constitutional protection for a right to engage in private consensual homosexual activity, in part, because of the lack of a tradition of providing such protection), with *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (finding constitutional protection for the right of an extended family to live together because of the tradition of protecting such families). Both cases are presented in Chapter 8.

9. The issue of whether the Second Amendment applies to state and local governments is a distinct issue discussed in Chapter 5. As of now, the Supreme Court never has held that the Second Amendment applies to state and local governments. The issue of the application of the Bill of Rights to the states is discussed in Chapter 5.

I

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. See D.C.Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. See §§ 22-4504(a), 22-4506. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, “unloaded and disassembled or bound by a trigger lock or similar device” unless they are located in a place of business or are being used for lawful recreational activities. See § 7-2507.02.¹⁰

Respondent Dick Heller is a D.C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal 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 prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of “functional firearms within the home.”

II

We turn first to the meaning of the Second Amendment.

A

The Second Amendment provides: “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.” In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today’s dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, “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.” Although this structure of the Second Amendment is unique in our Constitution, other legal

10. There are minor exceptions to all of these prohibitions, none of which is relevant here. [Footnote by the Court.]

documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose.

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, "A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed." But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.

1. *Operative Clause*

a. "Right of the People." The first salient feature of the operative clause is that it codifies a "right of the people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology. All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.

What is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset. This contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people" — those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

b. "Keep and bear Arms." We move now from the holder of the right — "the people" — to the substance of the right: "to keep and bear Arms."

Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of defence." 1 Dictionary of the English Language 107 (4th ed.) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary (1771). The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, 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.

We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody."

Webster defined it as “[t]o hold; to retain in one’s power or possession.” No party has apprised us of an idiomatic meaning of “keep Arms.” Thus, the most natural reading of “keep Arms” in the Second Amendment is to “have weapons.”

The phrase “keep arms” was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to “keep Arms” as an individual right unconnected with militia service.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that “bear arms” had in the 18th century. In numerous instances, “bear arms” was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to “bear arms in defense of themselves and the state” or “bear arms in defense of himself and the state.” It is clear from those formulations that “bear arms” did not refer only to carrying a weapon in an organized military unit.

Justice Stevens places great weight on James Madison’s inclusion of a conscientious-objector clause in his original draft of the Second Amendment: “but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” He argues that this clause establishes that the drafters of the Second Amendment intended “bear Arms” to refer only to military service. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process. In any case, what Justice Stevens would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families, even though “[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes have been almost overwhelming.” Thus, the most natural interpretation of Madison’s deleted text is that those opposed to carrying weapons for potential violent confrontation would not be “compelled to render military service,” in which such carrying would be required.

Finally, Justice Stevens suggests that “keep and bear Arms” was some sort of term of art, presumably akin to “hue and cry” or “cease and desist.” This suggestion usefully evades the problem that there is no evidence whatsoever to support a military reading of “keep arms.” And even if “keep and bear Arms” were a unitary phrase, we find no evidence that it bore a military meaning. Although the phrase was not at all common (which would be unusual for a term of art), we have found instances of its use with a clearly nonmilitary connotation.

c. Meaning of the Operative Clause. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it “shall not be infringed.”

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. *Prefatory Clause*

The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State. . . ."

a. "Well-Regulated Militia." In *United States v. Miller* (1939), we explained that "the Militia comprised all males physically capable of acting in concert for the common defense." That definition comports with founding-era sources.

Petitioners take a seemingly narrower view of the militia, stating that "[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, § 8, cls. 15-16)." Although we agree with petitioners' interpretive assumption that "militia" means the same thing in Article I and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create ("to raise . . . Armies"; "to provide . . . a Navy," Art. I, § 8, cls. 12-13), the militia is assumed by Article I already to be in existence. Congress is given the power to "provide for calling forth the militia," § 8, cl. 15; and the power not to create, but to "organiz[e]" it—and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence, *ibid.*, cl. 16. This is fully consistent with the ordinary definition of the militia as all able-bodied men.

Finally, the adjective "well-regulated" implies nothing more than the imposition of proper discipline and training.

b. "Security of a Free State." The phrase "security of a free state" meant "security of a free polity," not security of each of the several States as the dissent below argued. There are many reasons why the militia was thought to be "necessary to the security of a free state." First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

3. *Relationship between Prefatory Clause and Operative Clause*

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right — unlike some other English rights — was codified in a written Constitution. Justice Breyer's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms is profoundly mistaken. He bases that assertion solely upon the prologue — but that can only show that self-defense had little to do with the right's codification; it was the central component of the right itself.

B

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two of them — Pennsylvania and Vermont — clearly adopted individual rights unconnected to militia service.

North Carolina also codified a right to bear arms in 1776. Many colonial statutes required individual arms-bearing for public-safety reasons — such as the 1770 Georgia law that "for the security and defence of this province from internal dangers and insurrections" required those men who qualified for militia duty individually "to carry fire arms" "to places of public worship."

The 1780 Massachusetts Constitution presented another variation on the theme: "The people have a right to keep and to bear arms for the common defence. . . ." Once again, if one gives narrow meaning to the phrase "common defence" this can be thought to limit the right to the bearing of arms in a state-organized military force. But once again the State's highest court thought otherwise. Writing for the court in an 1825 libel case, Chief Justice Parker wrote: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."

We therefore believe that the most likely reading of all four of these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes.

Between 1789 and 1820, nine States adopted Second Amendment analogues. The historical narrative that petitioners must endorse would thus treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an overreading of the prefatory clause.

C

Justice Stevens relies on the drafting history of the Second Amendment — the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one. But even assuming that this legislative history is relevant, Justice Stevens flatly misreads the historical record.

It is true, as Justice Stevens says, that there was concern that the Federal Government would abolish the institution of the state militia. That concern found expression, however, not in the various Second Amendment precursors proposed in the State conventions, but in separate structural provisions that would have given the States concurrent and seemingly nonpre-emptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so.

D

We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. Three important founding-era legal scholars interpreted the Second Amendment in published writings. All three understood it to protect an individual right unconnected with militia service. We have found only one early 19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia — and he recognized that the prevailing view was to the contrary.

The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service. Many early 19th-century state cases indicated that the Second Amendment right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions.

In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive.

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense. Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service.

E

We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment. Justice Stevens places overwhelming reliance upon this Court's decision in *United States v. Miller* (1939). *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a Second Amendment challenge two men's federal convictions for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was not that the defendants were "bear[ing] arms" not "for . . . military purposes" but for "nonmilitary use." Rather, it was that the type of weapon

at issue was not eligible for Second Amendment protection. Beyond that, the opinion provided no explanation of the content of the right.

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons:

It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment. The respondent made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government.

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.

III

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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.

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

It may be objected that if weapons that are most useful in military service — M-16 rifles and the like — may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But 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.

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would fail constitutional muster.

We must also address the District’s requirement (as applied to respondent’s handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. The District argues that we should interpret this element of the statute to contain an exception for self-defense. But we think that is precluded by the unequivocal text, and by the presence of certain other enumerated exceptions: “Except for law enforcement personnel . . . , each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.” D.C. Code § 7-2507.02. The nonexistence of a self-defense exception is also suggested by the D.C. Court of Appeals’ statement that the statute forbids residents to use firearms to stop intruders.

Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering “interest-balancing inquiry” that “asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. 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. We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no

different. Like the First, it is the very product of an interest-balancing by the people — which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.

* * *

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller* (1939), provide a clear answer to that question.

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed

an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major federal firearms law. Upholding a conviction under that Act, this Court held that, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *United States v. Miller*. The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.

Since our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there; we ourselves affirmed it in 1980. See *Lewis v. United States* (1980). No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons. Indeed, a review of the drafting history of the Amendment demonstrates that its Framers rejected proposals that would have broadened its coverage to include such uses.

Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, would prevent most jurists from endorsing such a dramatic upheaval in the law.

In this dissent I shall first explain why our decision in *Miller* was faithful to the text of the Second Amendment and the purposes revealed in its drafting history. I shall then comment on the postratification history of the Amendment, which makes abundantly clear that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes.

I

The text of the Second Amendment is brief. It provides: "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."

Three portions of that text merit special focus: the introductory language defining the Amendment's purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects.

"A well regulated Militia, being necessary to the security of a free State"

The preamble to the Second Amendment makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it

recognizes that the militia must be “well regulated.” In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence. Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies.

The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison* (1803).

The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment’s operative provision and returning to the preamble merely “to ensure that our reading of the operative clause is consistent with the announced purpose.” That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted.

“The right of the people”

The centerpiece of the Court’s textual argument is its insistence that the words “the people” as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments. According to the Court, in all three provisions—as well as the Constitution’s preamble, “the term unambiguously refers to all members of the political community, not an unspecified subset.” But the Court itself reads the Second Amendment to protect a “subset” significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to “law-abiding, responsible citizens.” But the class of persons protected by the First and Fourth Amendments is not so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting pronouncements.

“To keep and bear Arms”

Although the Court’s discussion of these words treats them as two “phrases”—as if they read “to keep” and “to bear”—they describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities.

As a threshold matter, it is worth pausing to note an oddity in the Court’s interpretation of “to keep and bear arms.” Unlike the Court of Appeals, the Court does not read that phrase to create a right to possess arms for “lawful, private purposes.” Instead, the Court limits the Amendment’s protection to the right “to possess and carry weapons in case of confrontation.” No party or amicus urged this interpretation; the Court appears to have fashioned it out of whole cloth. But although this novel limitation lacks support in the text of the Amendment, the Amendment’s text does justify a different limitation: the “right to keep and bear arms” protects only a right to possess and use firearms in connection with service in a state-organized militia.

The term “bear arms” is a familiar idiom; when used unadorned by any additional words, its meaning is “to serve as a soldier, do military service, fight.” 1 Oxford English Dictionary 634 (2d ed. 1989). It is derived from the Latin *arma ferre*, which, translated literally, means “to bear [ferre] war equipment [arma].”

The Amendment’s use of the term “keep” in no way contradicts the military meaning conveyed by the phrase “bear arms” and the Amendment’s preamble. To the contrary, a number of state militia laws in effect at the time of the Second Amendment’s drafting used the term “keep” to describe the requirement that militia members store their arms at their homes, ready to be used for service when necessary. The Virginia military law, for example, ordered that “every one of the said officers, non-commissioned officers, and privates, shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer.” “[K]eep and bear arms” thus perfectly describes the responsibilities of a framing-era militia member.

* * *

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms. Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence. The textual analysis offered by respondent and embraced by the Court falls far short of sustaining that heavy burden.

Indeed, not a word in the constitutional text even arguably supports the Court’s overwrought and novel description of the Second Amendment as “elevat[ing] above all other interests” “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”

II

The proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached, reflected in Article I’s Militia Clauses and the Second Amendment, represent quintessential examples of the Framers’ “splitting the atom of sovereignty.”

It is strikingly significant that Madison’s first draft omitted any mention of nonmilitary use or possession of weapons. Rather, his original draft repeated the essence of the two proposed amendments sent by Virginia, combining the substance of the two provisions succinctly into one, which read: “The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.”

Madison’s decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When Madison prepared his first draft, and when that draft was debated and modified, it is reasonable to assume that all participants in

the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.

Madison's initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. It confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military character of both. The objections voiced to the conscientious-objector clause only confirm the central meaning of the text.

The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger. But state militias could not effectively check the prospect of a federal standing army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed. As we explained in *Miller*: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." The evidence plainly refutes the claim that the Amendment was motivated by the Framers' fears that Congress might act to regulate any civilian uses of weapons. And even if the historical record were genuinely ambiguous, the burden would remain on the parties advocating a change in the law to introduce facts or arguments "newly ascertained[]"; the Court is unable to identify any such facts or arguments.

[IV]

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights "enshrine[d]" in the Constitution. But the right the Court announces was not "enshrined" in the Second Amendment by the Framers; it is the product of today's law-changing decision. The majority's exegesis has utterly failed to establish that as a matter of text or history, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" is "elevate[d] above all other interests" by the Second Amendment.

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a "law-abiding, responsible citize[n]" the right to keep and use weapons in the home for self-defense is "off the table." Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

I do not know whether today's decision will increase the labor of federal judges to the "breaking point" envisioned by Justice Cardozo, but it will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries.

The Court properly disclaims any interest in evaluating the wisdom of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice—the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join; dissenting.

We must decide whether a District of Columbia law that prohibits the possession of handguns in the home violates the Second Amendment. The majority, relying upon its view that the Second Amendment seeks to protect a right of personal self-defense, holds that this law violates that Amendment. In my view, it does not.

I

The majority's conclusion is wrong for two independent reasons. The first reason is that set forth by Justice Stevens—namely, that the Second Amendment protects militia-related, not self-defense-related, interests. These two interests are sometimes intertwined. To assure 18th-century citizens that they could keep arms for militia purposes would necessarily have allowed them to keep arms that they could have used for self-defense as well. But self-defense alone, detached from any militia-related objective, is not the Amendment's concern.

The second independent reason is that the protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are—whether they do or do not include an independent interest in self-defense—the majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.

In respect to the first independent reason, I agree with Justice Stevens, and I join his opinion. In this opinion I shall focus upon the second reason. I shall show that the District's law is consistent with the Second Amendment even if that Amendment is interpreted as protecting a wholly separate interest in individual self-defense. That is so because the District's regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem.

Thus I here assume that one objective (but, as the majority concedes, not the primary objective) of those who wrote the Second Amendment was to help assure citizens that they would have arms available for purposes of self-defense. Even so, a legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and

injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted. In these circumstances, the District's law falls within the zone that the Second Amendment leaves open to regulation by legislatures.

[II]

I therefore begin by asking a process-based question: How is a court to determine whether a particular firearm regulation (here, the District's restriction on handguns) is consistent with the Second Amendment? What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect?

The question matters. The majority is wrong when it says that the District's law is unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." How could that be? It certainly would not be unconstitutional under, for example, a "rational basis" standard, which requires a court to uphold regulation so long as it bears a "rational relationship" to a "legitimate governmental purpose." The law at issue here, which in part seeks to prevent gun-related accidents, at least bears a "rational relationship" to that "legitimate" life-saving objective.

Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws — prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales — whose constitutionality under a strict scrutiny standard would be far from clear.

Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. That is because almost every gun-control regulation will seek to advance (as the one here does) a "primary concern of every government — a concern for the safety and indeed the lives of its citizens." The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties. Thus, any attempt in theory to apply strict scrutiny to gun regulations will in practice turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or

to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. Contrary to the majority's unsupported suggestion that this sort of "proportionality" approach is unprecedented, the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases.

In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. Nonetheless, a court, not a legislature, must make the ultimate constitutional conclusion, exercising its "independent judicial judgment" in light of the whole record to determine whether a law exceeds constitutional boundaries.

[III]

A

No one doubts the constitutional importance of the statute's basic objective, saving lives. But there is considerable debate about whether the District's statute helps to achieve that objective.

First, consider the facts as the legislature saw them when it adopted the District statute. As stated by the local council committee that recommended its adoption, the major substantive goal of the District's handgun restriction is "to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia." The committee concluded, on the basis of "extensive public hearings" and "lengthy research," that "[t]he easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 years." It reported to the Council "startling statistics," regarding gun-related crime, accidents, and deaths, focusing particularly on the relation between handguns and crime and the proliferation of handguns within the District.

The committee informed the Council that guns were "responsible for 69 deaths in this country each day," for a total of "[a]pproximately 25,000 gun-deaths . . . each year," along with an additional 200,000 gun-related injuries. Three thousand of these deaths, the report stated, were accidental. A quarter of the victims in those accidental deaths were children under the age of 14. And according to the committee, "[f]or every intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home."

In respect to local crime, the committee observed that there were 285 murders in the District during 1974—a record number. The committee report furthermore presented statistics strongly correlating handguns with crime. Of the 285 murders in the District in 1974, 155 were committed with handguns. *Ibid.* This did not appear to be an aberration, as the report revealed that "handguns [had been] used in roughly 54% of all murders" (and 87% of murders of law enforcement officers) nationwide over the preceding several years. Nor were handguns only linked to murders, as statistics showed that they were used in roughly 60% of robberies and 26% of assaults. "A crime committed with a pistol," the committee reported, "is 7 times more likely to be lethal than a crime committed with any other weapon." The committee furthermore presented statistics regarding

the availability of handguns in the United States, and noted that they had "become easy for juveniles to obtain," even despite then-current District laws prohibiting juveniles from possessing them.

Next, consider the facts as a court must consider them looking at the matter as of today. Petitioners, and their amici, have presented us with more recent statistics that tell much the same story that the committee report told 30 years ago. At the least, they present nothing that would permit us to second-guess the Council in respect to the numbers of gun crimes, injuries, and deaths, or the role of handguns.

From 1993 to 1997, there were 180,533 firearm-related deaths in the United States, an average of over 36,000 per year. Over that same period there were an additional 411,800 nonfatal firearm-related injuries treated in U.S. hospitals, an average of over 82,000 per year. Of these, 62% resulted from assaults, 17% were unintentional, 6% were suicide attempts, 1% were legal interventions, and 13% were of unknown causes.

The statistics are particularly striking in respect to children and adolescents. In over one in every eight firearm-related deaths in 1997, the victim was someone under the age of 20. Firearm-related deaths account for 22.5% of all injury deaths between the ages of 1 and 19. More male teenagers die from firearms than from all natural causes combined. Persons under 25 accounted for 47% of hospital-treated firearm injuries between June 1, 1992, and May 31, 1993.

Handguns are involved in a majority of firearm deaths and injuries in the United States. From 1993 to 1997, 81% of firearm-homicide victims were killed by handgun. In the same period, for the 41% of firearm injuries for which the weapon type is known, 82% of them were from handguns. Firearm Injury and Death From Crime 4. And among children under the age of 20, handguns account for approximately 70% of all unintentional firearm-related injuries and deaths. In particular, 70% of all firearm-related teenage suicides in 1996 involved a handgun.

Handguns also appear to be a very popular weapon among criminals. In a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun. Statistics further suggest that urban areas, such as the District, have different experiences with gun-related death, injury, and crime, than do less densely populated rural areas. A disproportionate amount of violent and property crimes occur in urban areas, and urban criminals are more likely than other offenders to use a firearm during the commission of a violent crime.

Finally, the linkage of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas. "[S]tudies to date generally support the hypothesis that the greater number of rural gun deaths are from rifles or shotguns, whereas the greater number of urban gun deaths are from handguns."

Finally, consider the claim of respondent's amici that handgun bans cannot work; there are simply too many illegal guns already in existence for a ban on legal guns to make a difference. In a word, they claim that, given the urban sea of pre-existing legal guns, criminals can readily find arms regardless. Nonetheless, a legislature might respond, we want to make an effort to try to dry up that urban sea, drop by drop. And none of the studies can show that effort is not worthwhile.

In a word, the studies to which respondent's amici point raise policy-related questions. They succeed in proving that the District's predictive judgments are controversial. But they do not by themselves show that those judgments

are incorrect; nor do they demonstrate a consensus, academic or otherwise, supporting that conclusion.

Thus, it is not surprising that the District and its amici support the District's handgun restriction with studies of their own. One in particular suggests that, statistically speaking, the District's law has indeed had positive life-saving effects. See Loftin, McDowall, Weirsema, & Cottey, *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 *New England J. Med.* 1615 (1991). Others suggest that firearm restrictions as a general matter reduce homicides, suicides, and accidents in the home. Still others suggest that the defensive uses of handguns are not as great in number as respondent's amici claim.

Respondent and his amici reply to these responses; and in doing so, they seek to discredit as methodologically flawed the studies and evidence relied upon by the District. The upshot is a set of studies and counterstudies that, at most, could leave a judge uncertain about the proper policy conclusion. But from respondent's perspective any such uncertainty is not good enough. That is because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact. And, given that constitutional allocation of decision-making responsibility, the empirical evidence presented here is sufficient to allow a judge to reach a firm legal conclusion.

In particular this Court, in First Amendment cases applying intermediate scrutiny, has said that our "sole obligation" in reviewing a legislature's "predictive judgments" is "to assure that, in formulating its judgments," the legislature "has drawn reasonable inferences based on substantial evidence." And judges, looking at the evidence before us, should agree that the District legislature's predictive judgments satisfy that legal standard. That is to say, the District's judgment, while open to question, is nevertheless supported by "substantial evidence."

There is no cause here to depart from [that] standard for the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions.

For these reasons, I conclude that the District's statute properly seeks to further the sort of life-preserving and public-safety interests that the Court has called "compelling."

B

I next assess the extent to which the District's law burdens the interests that the Second Amendment seeks to protect. Respondent and his amici, as well as the majority, suggest that those interests include: (1) the preservation of a "well regulated Militia"; (2) safeguarding the use of firearms for sporting purposes, e.g., hunting and marksmanship; and (3) assuring the use of firearms for self-defense. For argument's sake, I shall consider all three of those interests here.

I

The District's statute burdens the Amendment's first and primary objective hardly at all. As previously noted, there is general agreement among the Members of the Court that the principal (if not the only) purpose of the Second Amendment is found in the Amendment's text: the preservation of a "well

regulated Militia.” What scant Court precedent there is on the Second Amendment teaches that the Amendment was adopted “[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces” and “must be interpreted and applied with that end in view.”

2

The majority briefly suggests that the “right to keep and bear Arms” might encompass an interest in hunting. But in enacting the present provisions, the District sought “to take nothing away from sportsmen.” And any inability of District residents to hunt near where they live has much to do with the jurisdiction’s exclusively urban character and little to do with the District’s firearm laws. For reasons similar to those I discussed in the preceding subsection — that the District’s law does not prohibit possession of rifles or shotguns, and the presence of opportunities for sporting activities in nearby States — I reach a similar conclusion, namely, that the District’s law burdens any sports-related or hunting-related objectives that the Amendment may protect little, or not at all.

3

The District’s law does prevent a resident from keeping a loaded handgun in his home. And it consequently makes it more difficult for the householder to use the handgun for self-defense in the home against intruders, such as burglars. As the Court of Appeals noted, statistics suggest that handguns are the most popular weapon for self defense. To that extent the law burdens to some degree an interest in self-defense that for present purposes I have assumed the Amendment seeks to further.

C

In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive alternatives. Are there other potential measures that might similarly promote the same goals while imposing lesser restrictions? Here I see none.

The reason there is no clearly superior, less restrictive alternative to the District’s handgun ban is that the ban’s very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that any handgun he sees is an illegal handgun. And there is no plausible way to achieve that objective other than to ban the guns.

D

The upshot is that the District’s objectives are compelling; its predictive judgments as to its law’s tendency to achieve those objectives are adequately supported; the law does impose a burden upon any self-defense interest that the Amendment seeks to secure; and there is no clear less restrictive alternative. I turn now to the final portion of the “permissible regulation” question: Does the District’s law disproportionately burden Amendment-protected interests? Several considerations, taken together, convince me that it does not.

First, the District law is tailored to the life-threatening problems it attempts to address. The law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition. The area that falls within its scope is totally urban. That urban area suffers from a serious handgun-fatality problem. The District’s law directly aims at that compelling problem.

And there is no less restrictive way to achieve the problem-related benefits that it seeks.

Second, the self-defense interest in maintaining loaded handguns in the home to shoot intruders is not the primary interest, but at most a subsidiary interest, that the Second Amendment seeks to serve. The Second Amendment's language, while speaking of a "Militia," says nothing of "self-defense."

Further, any self-defense interest at the time of the Framing could not have focused exclusively upon urban-crime related dangers. Two hundred years ago, most Americans, many living on the frontier, would likely have thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways. Insofar as the Framers focused at all on the tiny fraction of the population living in large cities, they would have been aware that these city dwellers were subject to firearm restrictions that their rural counterparts were not. They are unlikely then to have thought of a right to keep loaded handguns in homes to confront intruders in urban settings as central. And the subsequent development of modern urban police departments, by diminishing the need to keep loaded guns nearby in case of intruders, would have moved any such right even further away from the heart of the amendment's more basic protective ends.

Nor, for that matter, am I aware of any evidence that handguns in particular were central to the Framers' conception of the Second Amendment. The lists of militia-related weapons in the late 18th-century state statutes appear primarily to refer to other sorts of weapons, muskets in particular.

Third, irrespective of what the Framers could have thought, we know what they did think. Samuel Adams, who lived in Boston, advocated a constitutional amendment that would have precluded the Constitution from ever being "construed" to "prevent the people of the United States, who are peaceable citizens, from keeping their own arms." And he doubtless knew that Massachusetts law prohibited Bostonians from keeping loaded guns in the house. So how could Samuel Adams have advocated such protection unless he thought that the protection was consistent with local regulation that seriously impeded urban residents from using their arms against intruders? It seems unlikely that he meant to deprive the Federal Government of power (to enact Boston-type weapons regulation) that he kn[e]w Boston had and (as far as we know) he would have thought constitutional under the Massachusetts Constitution.

Fourth, a contrary view, as embodied in today's decision, will have unfortunate consequences. The decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time. As important, the majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems. But I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order.

For these reasons, I conclude that the District's measure is a proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it.

2. Congressional Limits

Article III of the Constitution provides that the "Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." May Congress use this authority to restrict Supreme Court jurisdiction to hear particular types of cases so as to effectively overrule Supreme Court decisions? There is no definitive answer to this question, although many proposals have been introduced into Congress in an attempt to restrict jurisdiction to change the substantive law.

For example, during the 1950s, the Supreme Court invalidated some loyalty oaths for government workers and attorneys.¹¹ In response, the Jennings-Butler Bill was introduced in the United States Senate to prevent review of State Board of Bar Examiners' decisions concerning who could practice law in a state.¹² Altogether, since the 1940s, over 100 proposals were introduced in Congress to restrict federal court jurisdiction over particular topics.¹³ During the 1980s, there were proposals in Congress to prevent federal courts from hearing cases involving challenges to state laws permitting school prayers or state laws restricting access to abortions.¹⁴ Most recently, in June 2004, the House of Representatives passed a bill to prevent the Supreme Court or lower federal courts from interpreting or hearing challenges to the Defense of Marriage Act.¹⁵ And in September 2004, the House passed a bill to preclude judicial review of the constitutionality of the Pledge of Allegiance.¹⁶

In large part, the debate centers on two major constitutional issues: What does the language of Article III mean when it says that Supreme Court jurisdiction exists subject to such "exceptions and regulations" as Congress shall make? Does separation of powers limit the ability of Congress to restrict Supreme Court jurisdiction?

THE EXCEPTIONS AND REGULATIONS CLAUSE

Even after more than 200 years of American history, there is no consensus as to what the Constitution means when it provides that the Supreme Court possesses appellate jurisdiction "both as to Law and Fact, with such Exceptions, and

11. See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

12. S. 3386, 85th Cong., 2d Sess. (1958).

13. Paul Bator, Daniel Meltzer, Paul Mishkin, & David Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 377 (3d ed. 1988).

14. See, e.g., S. 158, 97th Cong., 1st Sess. (1981); H.R. 3225, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction in abortion cases); S. 481, 97th Cong., 1st Sess. (1981); H.R. 4756, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction over cases that involve voluntary school prayers).

15. H.R. 3313, 108th Cong., 2d Sess. (2004).

16. H.R. 2023, 108th Cong., 2d Sess. (2004).