READING 8
The Right to Keep and Bear Arms

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Constitutional Law for a Changing America

Rights, Liberties, and Justice

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CHAPTER NINE

THE RIGHT TO KEEP AND BEAR ARMS

PROMINENTLY DISPLAYED in the literature distributed by the National Rifle Association (NRA) and similar groups are statements invoking the Second Amendment. Advocates of gun ownership rights assert that this amendment protects the fundamental right of individuals to keep and bear arms. But supporters of gun control legislation claim that the amendment guarantees no such thing. The conflict between these two points of view has continued without interruption since the earliest government attempts to limit gun ownership rights. The controversy rests in large measure on the ambiguity of the amendment's wording.

The Second Amendment states in full, "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." The form of this amendment makes it somewhat of an oddity compared to the other provisions of the Bill of Rights because it comes with its own preamble (or prefatory clause). The structure gives rise to the question of the extent to which the preamble conditions the right itself.

As a result, two distinctly different interpretations of the amendment have been advanced. The first, often expressed by those who favor government restrictions on private gun ownership, emphasizes the first half of the amendment. According to this view, the amendment guarantees only a *collective* right of the states to arm their militias. No individual right to own firearms exists unless it is in conjunction with a state militia. This position, therefore, interprets the amendment's prefatory clause as significantly controlling the meaning of the right to keep and bear arms.

If, as gun control supporters argue, the amendment was intended as a barrier against the federal government disarming state militias, then the amendment has little relevance today. In the nation's early years, the states, with no standing armies in place, responded to emergencies by calling private persons to serve in their militias. When called into service, these individuals were often expected to bring their own weapons with them. But states no longer call on citizen militias. Whatever roles the state militias played in the nation's first century are now carried out by other institutions, such as the states' National Guard units.

The second interpretation, advocated by pro-gun interests, emphasizes the second half of the amendment. It concludes that the Constitution guarantees an *individual* right to keep and bear arms. The preamble's reference to well-regulated state militias does not in any way limit the amendment's operative clause that explicitly guarantees "the right of the people" to own and carry weapons. The freedom to keep and bear arms, among other purposes, supports the inalienable right of individuals to engage in self-defensive behavior when necessary. As such, the Second Amendment is no less relevant today than it was when it was ratified in 1791.

The wording of the Second Amendment provides significant obstacles to understanding its meaning. Further complicating matters is the fact that historical records allow different interpretations of what Congress intended by proposing the amendment and what state legislators thought it meant when they ratified it. Until 2008 the Supreme Court had not offered much assistance, rarely accepting cases that called for an interpretation of the Second Amendment.

All the while, of course, the freedom to own and carry guns has been a significant political and social issue. Gun control supporters cite the social costs associated with the irresponsible use of firearms. These include mass shootings, gun-related crimes of violence, domestic

abuse, and suicides as well as accidental injuries and deaths, often involving children. On the other side, advocates of gun ownership rights argue that the frequency of violent crime only underscores the need for responsible citizens to arm themselves for their personal protection.

In the United States, gun ownership is widespread. According to recent surveys, up to 42 percent of Americans have a gun in their home. The most cited reason for owning a firearm is personal protection, followed by hunting.[1]

Not surprisingly, the issue of gun ownership has always evoked strong reactions. Today, about 60 percent of Americans support more stringent laws on guns (see Figure 9-1); then again, only 28 percent support laws that would ban handgun possession. The nation is also sharply divided along partisan lines, with 86 percent of Democrats but only 31 percent of Republican supporting stricter gun control laws.

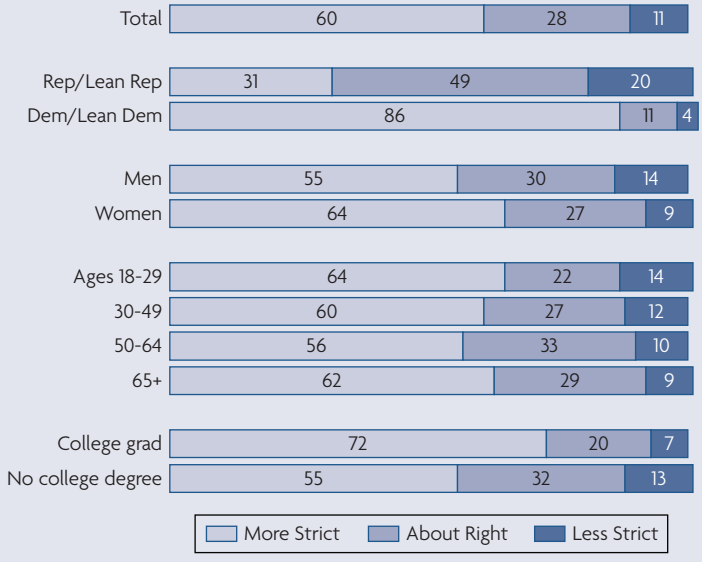
[1]Various Gallup polls taken in 2019 and 2020. Retrieved from https://news.gallup.com/poll/1645/guns.aspx.

INITIAL INTERPRETATIONS

Congress did little to regulate firearms prior to the twentieth century, and as a consequence the Supreme Court had few occasions to interpret the Second Amendment.[2] Support for federal weapons restrictions, however, began to grow in the 1920s, fueled largely by the increases in organized crime that occurred during Prohibition and into the Great Depression. Particularly significant in raising public awareness of the misuse of guns was a violent confrontation between warring criminal organizations in Chicago in the infamous 1929 St. Valentine's Day Massacre. Congress responded by first imposing a ban on the use of the postal service to transport certain weapons and then by passing the National Firearms Act of 1934 (NFA), the first significant piece of federal gun control legislation.

[2]For example, *United States v. Cruikshank* (1876), *Presser v. Illinois* (1886), and *Miller v. Texas* (1894).

Figure 9-1 Public Opinion and Gun Laws



Source: Data retrieved from Katherine Schaeffer, "Share of Americans Who Favor Stricter Gun Laws Has Increased since 2017," Pew Research Center, October 16, 2019, https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/.

Note: Respondents were asked whether gun laws should be "more strict" or "less strict" than they are today or whether the laws are "about right." Respondents who answered "don't know" are not included.

The NFA was not a direct regulation of weapons. Rather, out of a belief that federal authority over the possession of firearms may be constitutionally suspect, Congress instead used its power to levy taxes and regulate interstate commerce to justify the legislation. The law imposed an excise tax on certain particularly lethal weapons and required their registration. It further prohibited the interstate transportation of any unregistered firearm covered by the act.

Even so, the NFA was controversial, with some observers questioning its compatibility with the Constitution. Their views would get an airing in ***United States v. Miller*** (1939), in which the constitutionality of the NFA was at issue. To decide the case, the justices would need to determine if the right to keep and bear arms was a personal liberty or only a collective right tied to the need for state militias.

Miller began when Jack Miller and Frank Layton, two relatively insignificant career criminals, were indicted for transporting from Oklahoma to Arkansas a "shotgun having a barrel of less than eighteen inches in length"—that is, a sawed-off shotgun. A tax had not been paid on the weapon, and it was unregistered, both violations of the NFA.

The facts surrounding *Miller* suggest that it may have been a federally orchestrated test case.[3] The government was interested in expanding its gun control efforts, but it needed an authoritative decision by the Supreme Court to alleviate any Second Amendment concerns. Miller, the primary defendant, had a history of cooperating with the government as an informant in criminal cases. The federal district judge who heard the case, Heartsill Ragon, was a former member of Congress and a strong proponent of gun regulation. Judge Ragon refused to accept guilty pleas from Miller and Layton, thereby ensuring that the case would be tried. Although Miller and Layton put up little defense, Ragon surprisingly used the case to strike down the NFA for violating the Second Amendment. He did so by way of a memorandum opinion that provided no reasoning or argument to justify his decision. Still, the fact that he invalidated the NFA nicely set the stage for the federal government to ask the Supreme Court to reverse.

When the appeal reached the Court, only the federal government's position was presented. Among other arguments, the government claimed that the Second Amendment was not applicable because that provision was designed only to cover weapons of the kind a state militia use. The sawed-off, double-barreled shotgun in question had no relevance to any militia activity. No one represented the other side, so the position that the NFA violated the Second Amendment was not defended either by a coherent opinion from the lower court or by briefs and oral arguments on behalf of the defendants at the Supreme Court.

One could hardly imagine more favorable conditions for the federal government's position to prevail. And, in fact, the justices unanimously voted in favor of the government, holding that the NFA did not violate the Constitution. Through an opinion by Justice James C. McReynolds, the justices endorsed the government's claim that the law was a valid use of the power to tax. The Court concluded further that the Second Amendment was designed to cover only military-style weapons associated with the state militias. In rather direct language, McReynolds wrote:

> In 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. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. . . .
>
> With obvious purpose to assure the continuation and render possible the effectiveness of [state militias] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

Although the Court's decision had little impact on Jack Miller *(see Box 9-1)*, on its face the ruling offered strong support for the collective right theory of the Second Amendment—that is, the position that the right to keep and bear arms was guaranteed only as a means of supporting the state militias. Nonetheless, gun rights advocates interpreted the *Miller* decision much differently. They argued that the nation's early reliance on citizen soldiers to staff the state militias was predicated on private gun ownership.

[3]For an interesting analysis of this case, see Brian L. Frye, "The Peculiar Story of *United States v. Miller*," *NYU Journal of Law and Liberty* 3 (2008): 48–82.

BOX 9-1

Aftermath . . . Jack Miller and Frank Layton

Jack Miller was associated with the O'Malley Gang, an Oklahoma criminal organization that specialized in bank robberies. In 1934, he was indicted and jailed with other members of the gang for robbing two Oklahoma banks. Miller, a 240-pound Native American, decided to cooperate with the authorities. The evidence he provided helped convict four gang members, and in return he was released from jail. When the convicted robbers successfully escaped in a violent jailbreak in December 1935, Miller became a marked man. Fortunately for him, within a week police recaptured two of the escapees and killed the remaining two.

On April 3, 1939, just weeks before the Supreme Court would hand down its ruling in *United States v. Miller,* Jack Miller, Robert "Major" Taylor, and an accomplice, armed with shotguns, held up the Route 66 Club, a bar in Miami, Oklahoma. Their take was $80. The next day, Miller's body was found on the bank of Little Spencer Creek, just southwest of Chelsea, Oklahoma. Miller had been shot four times with a .38-caliber weapon. Found at his side was his .45-caliber automatic pistol. It had been fired three times. Miller was forty years old. Two days later, Miller's stripped and torched automobile was discovered. Police arrested Taylor for the murder, but homicide charges were dropped for lack of evidence. Taylor, however, pleaded guilty to armed robbery and was sentenced to ten years in prison.

Frank Layton, Miller's codefendant in the Supreme Court case, pleaded guilty in 1940 to the reinstated firearms charge. He was sentenced to five years' probation. Layton died in 1967. Miller and Layton are both buried in Woodlawn Cemetery in Claremore, Oklahoma.

Sources: Brian L. Frye, "The Peculiar Story of *United States v. Miller,*" *NYU Journal of Law and Liberty* 3 (2008): 48–82; "Oklahoma Gangster's Impact on U.S. Gun Laws," News at 6, KOTV, Tulsa, Oklahoma, January 29, 2008; *United States v. Miller* (1939): Gun Law News, http://www.gunlawnews.org/Miller.html.

THE SECOND AMENDMENT REVISITED

The *Miller* decision certainly did not end the controversy over the Second Amendment, though for decades the Supreme Court avoided cases that presented difficult Second Amendment issues. Not so of lawyers and historians who began, in the 1980s and 1990s, to reexamine the meaning of the Second Amendment. Earlier generations of scholars generally sided with the position that the Second Amendment guarantees only the collective right to keep and bear arms. Analyzing additional historical records, however, led some contemporary scholars to conclude that pro-gun groups, like the NRA, may have a stronger legal argument than previously thought.[4] As Justice Clarence Thomas put it in a footnote to his concurring opinion in *Printz v. United States* (1997), "Marshalling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the amendment's text suggests, a personal right."

In *District of Columbia v. Heller* (2008), the Court finally addressed the varying approaches to the Second Amendment. As you read the opinions in this case, pay close attention to the justices' reasoning, especially their attempts to use historical analyses to establish what was understood to be the meaning of the amendment at the time it was proposed and ratified.

District of Columbia v. Heller

554 U.S. 570 (2008)
http://caselaw.findlaw.com/us-supreme-court/554/570.html
Oral arguments are available at https://www.oyez.org/cases/2007/07-290.
Vote: 5 (Alito, Kennedy, Roberts, Scalia, Thomas)
4 (Breyer, Ginsburg, Souter, Stevens)

OPINION OF THE COURT: *Scalia*
DISSENTING OPINIONS: *Stevens, Breyer*

[4]See, for example, Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, MA: Harvard University Press, 1996); Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right*, 2nd ed. (Oakland, CA: Independent Institute, 1994); William Van Alstyne, "The Second Amendment and the Personal Right to Arms," *Duke Law Journal* 43 (1994): 1236–1255; Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 637–659; and Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 (1983): 204–273.

FACTS:

In 1976 the District of Columbia, concerned with the high levels of gun-related crime, passed the nation's most restrictive gun control ordinance. The law essentially banned the private possession of handguns. Individuals could own shotguns and rifles, but only if the weapons were registered, kept unloaded, and disassembled or restricted by trigger locks. The law allowed the chief of police, under certain circumstances, to issue a one-year certificate permitting an individual to carry a handgun.

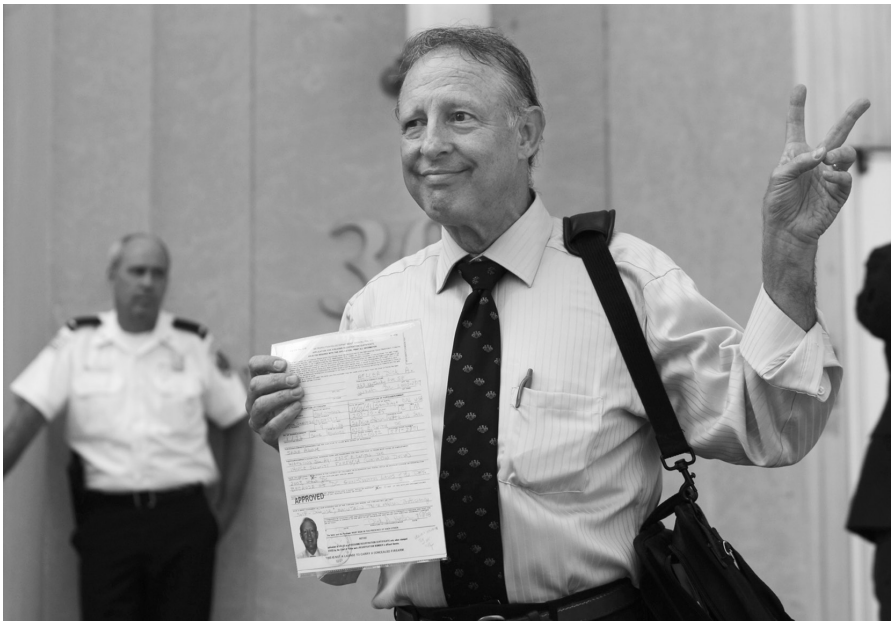
Dick Anthony Heller, a Washington, D.C., security officer, had been granted a license to carry a handgun while on duty providing security at the Federal Judicial Center. Heller applied for permission to own a handgun for self-defense, but he was refused. Claiming that the D.C. statute violated his Second Amendment right to bear arms, Heller brought a suit against the city in 2003. The district court dismissed his case, but the U.S. Court of Appeals for the District of Columbia reversed, holding that the Second Amendment protected Heller's right to possess a firearm for self-defense.

Heller's case did not occur spontaneously; instead it was planned and sponsored by attorney Robert Levy, who wanted to test the constitutionality of the District's gun control law. Levy had become a wealthy man in his first career in the financial information industry. At age forty-nine, he entered George Mason Law School and graduated first in his class. After clerking for two federal judges, he devoted his professional life to libertarian causes. Levy, who had never owned a gun, saw the District's law as a violation of personal freedom and private property rights. He recruited six possible plaintiffs to challenge the law, but only Heller met the strict standing requirements to pursue legal action. To eliminate any possible influence over the case by the NRA or any other gun rights group, Levy funded the litigation out of his own pocket.

ARGUMENTS:

For the petitioner, District of Columbia:

- Consistent with *United States v. Miller,* the Second Amendment protects the right to keep and bear arms only as it relates to service in a government-sponsored militia. The ratification debates provide little evidence that the purpose of the amendment was to protect private use of arms.
- The amendment was created in response to fears that a tyrannical federal government might attempt to disarm the state militias. Furthermore, because the District of Columbia is not a state, this rationale does not apply.
- If the Court concludes that the amendment protects private ownership, it should nevertheless allow reasonable government regulations because of the dangers posed by guns.



AP Photo/Gerald Herbert

Dick Heller leaves police headquarters in Washington, D.C., on August 18, 2008, with his newly issued gun registration. Two months earlier, in *District of Columbia v. Heller*, the Supreme Court declared the District's handgun ban unconstitutional.

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For the respondent, Dick Heller:

- The Second Amendment protects an individual right that existed before the Constitution was adopted. The Court's rationale in *Miller* presumes that individuals in the eighteenth century had the right to own the weapons they brought with them when they were called to militia service.
- The preamble to the Second Amendment provides but one justification for protecting gun ownership. It in no way limits the primary right that the amendment protects.
- The Second Amendment protects arms that civilians would reasonably possess for lawful purposes (e.g., self-defense) or that could be used in militia service.

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

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."... [O]ther legal documents of the founding era . . . commonly included a prefatory statement of purpose.

Logic demands that there be a link between the stated purpose and the command. . . . That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause. . . . 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. . . . All . . . of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body. . . .

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 term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. . . .

. . . We turn to the phrases "keep arms" and "bear arms." [Dictionaries] 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."...

At the time of the founding, as now, to "bear" meant to "carry." When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In *Muscarello v. United States* (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice Ginsburg wrote that "[s]urely a most familiar meaning is, 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.'" . . . Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

. . . 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. . . . These provisions demonstrate—again, in the most analogous linguistic context—that "bear arms" was not limited to the carrying of arms in a militia. . . .

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. . . .

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. . . .

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." 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, the militia is assumed by Article I already to be in existence. . . .

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. . . .

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. . . .

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. . . . Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people. It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down. . . .

. . . If, as the [petitioners] believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia—if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment's guarantee—it does not assure the existence of a "citizens' militia" as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force. . . . Thus, if petitioners are correct, the Second Amendment protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them. . . .

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. . . .

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

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Other States did not include rights to bear arms in their pre-1789 constitutions. . . .

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.

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. . . .

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. . . . 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.". . .

. . . [T]he 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. . . .

. . . [T]he American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It 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; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

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. . . .

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.

We affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE STEVENS, WITH WHOM JUSTICE SOUTER, JUSTICE GINSBURG, AND JUSTICE BREYER JOIN, DISSENTING.

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.

. . . 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. . . . No new evidence has surfaced . . . 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.

The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons. . . .

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. . . .

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. . . .

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.

For these reasons, I respectfully dissent.

JUSTICE BREYER, WITH WHOM JUSTICE STEVENS, JUSTICE SOUTER, AND JUSTICE GINSBURG JOIN, DISSENTING.

. . . [T]he protection the [Second] 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. . . .

. . . 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.

The majority in *Heller* rejected the collective right interpretation of the Second Amendment and held that the Constitution guarantees an individual right to keep and bear arms. Importantly, however, Justice Antonin Scalia's majority opinion clearly stated that the personal right to possess weapons is not unlimited. Scalia wrote that historical tradition would support prohibiting felons and the mentally ill from possessing firearms, banning especially dangerous or unusual weapons, forbidding weapons in sensitive locations such as schools and government buildings, and regulating the commercial sale of guns.[6] Although the majority declined to establish a test by which to evaluate gun control laws, Scalia concluded that under any standard of scrutiny, a ban on handguns, the most popular weapon for personal and family defense, would constitutionally fail.

But how far may governments go in regulating guns outside *Heller's* protected zone? Subsequent to the Heller, some states and cities have passed new ordinances curtailing gun ownership. Among these are restrictions on military-style assault weapons, gun show purchases, and magazine capacity. As these regulations have been enacted, they have often been challenged by gun rights advocates.

Thus far the Supreme Court has allowed the lower federal tribunals to develop answers to these questions.8 However, societal problems associated with guns, especially recent mass shootings in schools, churches, and entertainment venues, have heightened the call for more comprehensive regulation of firearms. As governments respond to demands for new laws, the justices will likely find it necessary to return once again to the Second Amendment issue.

The Court did return to the reach of the Second Amendment in 2022. It's decision is on the next page. Keep reading.

Reading 8—Page 9

New York State Rifle & Pistol Association v. Bruen, Superintendent of New York State Police (2022)
Opinion of the Court: Thomas
Concurring Opinions: Alito, Barrett, Kavanaugh
Dissenting Opinion: Breyer
Vote: 6 (Alito, Barrett, Gorsuch, Kavanaugh, Roberts, Thomas)
3 (Breyer, Kagan, Sotomayor)

Justice Thomas delivered the opinion of the Court.

In *District of Columbia* v. *Heller* (2008), we recognized that the Second protect[s] the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. [We] now hold, consistent with *Heller*, that the Second Amendment protects an individual's right to carry a handgun for self-defense outside the home.

[This case] asks whether New York's licensing regime respects the constitutional right to carry handguns publicly for self-defense. In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen's showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution.

New York State has regulated the public carry of handguns at least since the early 20th century…. It is a crime in New York to possess "any firearm" without a license, whether inside or outside the home, punishable by up to four years in prison or a $5,000 fine for a felony offense, and one year in prison or a $1,000 fine for a misdemeanor. Meanwhile, possessing a loaded firearm outside one's home or place of business without a license is a felony punishable by up to 15 years in prison.

A license applicant who wants to possess a firearm *at home* (or in his place of business) must convince a "licensing officer"—usually a judge or law enforcement officer—that, among other things, he is of good moral character, has no history of crime or mental illness, and that "no good cause exists for the denial of the license." If he wants to carry a firearm *outside* his home or place of business for self-defense, the applicant must obtain an unrestricted license to "have and carry" a concealed "pistol or revolver." To secure that license, the applicant must prove that "proper cause exists" to issue it. If an applicant cannot make that showing, he can receive only a "restricted" license for public carry, which allows him to carry a firearm for a limited purpose, such as hunting, target shooting, or employment.

No New York statute defines "proper cause." But New York courts have held that an applicant shows proper cause only if he can "demonstrate a special need for self- protection distinguishable from that of the general community. This "special need" standard is demanding. For example, living or working in an area " 'noted for criminal activity' " does not suffice. Rather, New York courts generally require evidence "of particular threats, attacks or other extraordinary danger to personal safety." The rule leaves applicants little recourse if their local licensing officer denies a permit.

New York is not alone in requiring a permit to carry a handgun in public. But the vast majority of States—43 by our count—are "shall issue" jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability. …

In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation [which is broadly consistent with step one]. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." …

Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement.

It is undisputed that [the] petitioners [in this case] Koch and Nash—two ordinary, law-abiding, adult citizens—are part of "the people" whom the Second Amendment protects… We therefore turn to whether the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct—carrying handguns publicly for self-defense. We have little difficulty concluding that it does. …

Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms… The Second Amendment's plain text thus presumptively guarantees petitioners Koch and Nash a right to "bear" arms in public for self-defense.

[Nonetheless, New York] claims that the Amendment "permits a State to condition handgun carrying in areas 'frequented by the general public' on a showing of a non-speculative need for armed self-defense in those areas." To support that claim, the burden falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners' proposed course of conduct.

Respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. …

But apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense. We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York's proper- cause requirement. Under *Heller*'s text-and-history standard, the proper-cause requirement is therefore unconstitutional….

Justice Breyer, with whom Justice Sotomayor and Justice Kagan join, dissenting.

In 2020, 45,222 Americans were killed by firearms. Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day.

Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States' efforts to do so. It invokes the Second Amendment to strike down a New York law regulating the public carriage of concealed handguns.

The Court wrongly limits its analysis to focus nearly exclusively on history. It refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be. The Constitution contains no such limitation,

and neither do our precedents. ...

In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms. The Second Circuit has done so and has held that New York's law does not violate the Second Amendment….

The Court's insistence that judges and lawyers rely nearly exclusively on history to interpret the Second Amendment thus raises a host of troubling questions. Consider, for example, the following. Do lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? And, most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?

I [also] fear that history will be an especially inadequate tool when it comes to modern cases presenting modern problems. Consider the Court's apparent preference for founding-era regulation. Our country confronted profoundly different problems during that time period than it does today. Society at the founding was "predominantly rural." In 1790, most of America's relatively small population of just four million people lived on farms or in small towns. Even New York City, the largest American city then, as it is now, had a population of just 33,000 people. Small founding-era towns are unlikely to have faced the same degrees and types of risks from gun violence as major metropolitan areas do today, so the types of regulations they adopted are unlikely to address modern needs.

Because I cannot agree with the Court's decision to strike New York's law down without considering the State's compelling interest in preventing gun violence and protecting the safety of its citizens, and without considering the potentially deadly consequences of its decision, I respectfully dissent.