

**Kitrosser, Constitutional Law, fall '09**  
**Supp. reading #1**

Your first assignment is the recent U.S. Supreme Court case of *D.C. v. Heller*, involving the 2<sup>nd</sup> Amendment right to bear arms. The case begins on the next page of this supplement. The case is different from most of the materials that you will read this semester in that it involves a provision of the Bill of Rights. For most of the semester, we will focus not on “rights” provisions of the Constitution, but on government structure and powers as outlined in the “original” Constitution (that is, the articles of the Constitution that precede the Bill of Rights (the Bill of Rights was added two years after the original Constitution was ratified)). Your syllabus discusses the distinction between the Constitution’s rights provisions and its structural provisions in a bit more detail.

While the 2<sup>nd</sup> Amendment is important in its own right, my main purpose in assigning it for your first day is to introduce you to constitutional interpretation more generally. Questions that you should ask yourself as you read *D.C. v. Heller* include:

- (1) What type or types of interpretive methodology/ies is each Justice using? For example, how does each use history? To determine and apply the founders’ original expected applications of the 2<sup>nd</sup> Amendment? To determine and apply the original principles underlying the 2<sup>nd</sup> Amendment to modern circumstances? What other method/s are the Justices using to interpret the 2<sup>nd</sup> Amendment’s text? How do the Justices differ from one another in their methodologies and/or applications thereof?
- (2) Do you agree with any of the interpretive methodologies that you see reflected in the *Heller* opinions? With the way that any of the Justices apply those methodologies? Do you disagree with any of these approaches?
- (3) How does Justice Scalia translate the conclusion that the 2<sup>nd</sup> Amendment protects an individual right into a practical assessment of actual laws? How does Justice Breyer differ from him in this respect? Who has the better approach?

*[Note from Prof. K: This case has been edited]*

**H**District of Columbia v. Heller  
U.S.,2008.

Supreme Court of the United States  
DISTRICT OF COLUMBIA et al., Petitioners,  
v.  
Dick Anthony HELLER.  
**No. 07-290.**

Argued March 18, 2008.  
Decided June 26, 2008.

[SCALIA](#), J., delivered the opinion of the Court, in which [ROBERTS](#), C.J., and [KENNEDY](#), [THOMAS](#), and [ALITO](#), JJ., joined. [STEVENS](#), J., filed a dissenting opinion, in which [SOUTER](#), [GINSBURG](#), and [BREYER](#), JJ., joined. [BREYER](#), J., filed a dissenting opinion, in which [STEVENS](#), [SOUTER](#), and [GINSBURG](#), JJ., joined.

Justice [SCALIA](#) delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of \*2788 usable handguns in the home violates the Second Amendment to the Constitution.

## 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](#).

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## II

We turn first to the meaning of the Second Amendment.

### A

[1] 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.” [United States v. Sprague](#), 282 U.S. 716, 731, 51 S.Ct. 220, 75 L.Ed. 640 (1931); see also [Gibbons v. Ogden](#), 9 Wheat. 1, 188, 6 L.Ed. 23 (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

\*2789 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. See Brief for Petitioners 11-12; *post*, at 2822 (STEVENS, J., dissenting). 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. See Brief for Respondent 2-4.

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." See J. Tiffany, *A Treatise on Government and Constitutional Law* § 585, p. 394 (1867); Brief for Professors of Linguistics and English as *Amici Curiae* 3 (hereinafter Linguists' Brief). Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose. See generally Volokh, [The Commonplace Second Amendment](#), 73 *N.Y.U.L.Rev.* 793, 814-821 (1998).

[2][3] 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." That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause ("The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence." The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Darris, *A General Treatise on Statutes* 268-269 (P. Potter ed. 1871) (hereinafter Darris); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 42-45 (2d ed. 1874).<sup>FN3</sup> "It is nothing unusual in acts ... for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law." J. Bishop, *Commentaries on Written Laws and Their Interpretation* § 51, p. 49 (1882) (quoting *Rex v. Marks*, 3 East, 157, 165 (K.B.1802)). Therefore, while we will begin\*2790 our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.<sup>FN4</sup>

## 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 ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). 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.<sup>FN5</sup>

Three provisions of the Constitution refer to "the people" in a context other than "rights"-the famous preamble ("We the people"), § 2 of Article I (providing that "the people" will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively-but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.<sup>FN6</sup>

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 \*2791 an unspecified subset. As we said in [United States v. Verdugo-Urquidez](#), 494 U.S. 259, 265, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990):

“ [T]he people’ seems to have been a term of art employed in select parts of the Constitution .... [Its uses] sugges[t] that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”

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); see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

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. \*\*\*\*

[4] 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, e.g., [Reno v. American Civil Liberties Union](#), 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms of search, e.g., [Kyllo v. United States](#), 533 U.S. 27, 35-36, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the Second Amendment extends, \*2792 prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

[5] 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.” Johnson 1095. 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.

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“Keep arms” was simply a common way of referring to possessing arms, for militiamen *and everyone*

else.<sup>FN7</sup>

\*2793 [6] At the time of the founding, as now, to “bear” meant to “carry.” See Johnson 161; Webster; T. Sheridan, *A Complete Dictionary of the English Language* (1796); 2 *Oxford English Dictionary* 20 (2d ed.1989) (hereinafter Oxford). When used with “arms,” however, the term has a meaning that refers to carrying for a particular purpose-confrontation. \*\*\*\* 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.

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.”<sup>FN8</sup> It is clear from those formulations that “bear arms” did not refer only to carrying a weapon in an organized military unit. Justice James Wilson interpreted the Pennsylvania Constitution’s arms-bearing right, for example, as a recognition of the natural right of defense “of one’s person or house”—what he called the law of “self preservation.” 2 *Collected Works of James Wilson* 1142, and n. x (K. Hall & M. Hall eds.2007) (citing Pa. Const., Art. IX, § 21 (1790)); see also T. Walker, *Introduction to American Law* 198 (1837) \*2794 (“Thus the right of self-defence [is] guaranteed by the [Ohio] constitution”); see also *id.*, at 157 (equating Second Amendment with that provision of the Ohio Constitution). That was also the interpretation of those state constitutional provisions adopted by pre-Civil War state courts.<sup>FN9</sup> These provisions demonstrate—again, in the most analogous linguistic context—that “bear arms” was not limited to the carrying of arms in a militia.

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[8][9] **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.” As we said in *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L.Ed. 588 (1876), “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The \*2798 Second amendment declares that it shall not be infringed ....”<sup>FN16</sup>

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By the time of the founding, the right to have arms had become fundamental for English subjects. \*\*\*\*

the right secured in 1689 as a result of the Stuarts’ abuses was by the time of the founding understood to be an individual \*2799 right protecting against both public and private violence.

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[10][11] 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, see, e.g., *United States v. Williams*, 553 U.S. ----, 128 S.Ct. 1830, --- L.Ed.2d ---- (2008). 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, 307 U.S. 174, 179, 59 S.Ct. 816, 83 L.Ed. 1206 \(1939\)](#), 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).” Brief for Petitioners 12. Although we agree with petitioners' interpretive assumption that “militia” means the same thing in Article I\*2800 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. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. \*\*\*\*

[12] Finally, the adjective “well-regulated” implies nothing more than the imposition of proper discipline and training. See Johnson 1619 (“Regulate”: “To adjust by rule or method”); Rawle 121-122; cf. Va. Declaration of Rights § 13 (1776), in 7 Thorpe 3812, 3814 (referring to “a well-regulated militia, composed of the body of the people, trained to arms”).

[13] 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, see [478 F.3d, at 405, and n. 10](#). \*\*\*\*

It is true that the term “State” elsewhere in the Constitution refers to individual States, but the phrase “security of a free state” and close variations seem to have been terms of art in 18th-century political discourse, meaning a “‘free country’ ” or free polity.  
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## 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.

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We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment.

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Justice STEVENS places overwhelming reliance upon this Court's decision in [United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 \(1939\)](#). “[H]undreds of judges,” we are told, “have relied on the view of the amendment we endorsed there,”*post*, at 2823, and “[e]ven if the textual and historical arguments on both side 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 \*2814 jurists from endorsing such a dramatic upheaval in the law,”*post*, at 2824. And what is, according to Justice STEVENS, the holding of [Miller](#) that demands such obeisance? That the Second Amendment “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.” *Post*, at 2823.

Nothing so clearly demonstrates the weakness of Justice STEVENS' case. [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, 48 Stat. 1236. 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,” *post*, at 2823. Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection: “In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*.” [307 U.S., at 178, 59 S.Ct. 816](#) (emphasis added). “Certainly,” the Court continued, “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.” *Ibid.* 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. Justice STEVENS can say again and again that [Miller](#) did “not turn on the difference between muskets and sawed-off shotguns, it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns,”*post*, at 2845, but the words of the opinion prove otherwise. The most Justice STEVENS can plausibly claim for [Miller](#) is that it declined to decide the nature of the Second Amendment right, despite the Solicitor General's argument (made in the alternative) that the right was collective, see Brief for United States, O.T.1938, No. 696, pp. 4-5. [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.

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We may as well consider at this point (for we will have to consider eventually) *what* types of weapons [Miller](#) permits. Read in isolation, [Miller's](#) phrase “part of ordinary military equipment” could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in [Miller](#)) might be unconstitutional, machineguns being useful in warfare in 1939. We think that [Miller's](#) “ordinary military equipment” language must be read in tandem with what comes after: “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” [307 U.S., at 179, 59 S.Ct. 816](#). The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. “In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.” [State v. Kessler, 289 Ore. 359, 368, 614 P.2d 94, 98 \(1980\)](#) (citing G. Neumann, *Swords and Blades of the American Revolution* 6-15, 252-254 (1973)). Indeed, that is precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its

preface. We therefore read *Miller* to say only that the Second Amendment\*2816 does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right, see Part III, *infra*.<sup>FN25</sup>

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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. This Court first held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), and it was not until after World War II that we held a law invalid under the Establishment Clause, see *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948). Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). It is demonstrably not true that, as Justice STEVENS claims, *post*, at 2844 - 2845, “for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial.” For most of our history the question did not present itself.

### III

[16] 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. See, e.g., *Sheldon*, in 5 Blume 346; Rawle 123; Pomeroy 152-153; Abbott 333. 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. See, e.g., *State v. Chandler*, 5 La. Ann., at 489-490; *Nunn v. State*, 1 Ga., at 251; see generally 2 Kent \*340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884). 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\*2817 of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>FN26</sup>

<sup>FN26</sup>. We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

[17] 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.” 307 U.S., at 179, 59 S.Ct. 816. 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,<sup>FN27</sup> banning from the home \*2818 “the most preferred firearm in the nation to ‘keep’ and use for protection of one's home and family,”<sup>478 F.3d, at 400</sup>, would fail constitutional muster.

<sup>FN27</sup>. Justice BREYER correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. *Post*, at 2850 - 2851. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. See, e.g., [Engquist v. Oregon Dept. of Agriculture](#), 553 U.S. ----, ----, 128 S.Ct. 2146, 2153 - 2154, 2008 WL 2329768, \*6-7, --- L.Ed.2d ---- (2008). In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See [United States v. Carolene Products Co.](#), 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) (“There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments ...”). If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

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It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the 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.

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[19][20] In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as \*2822 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.

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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.

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## 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 \*2825 with the Declaration of Independence.<sup>FN5</sup> 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.<sup>FN6</sup> While the need for state militias has not been a matter of significant public interest for almost two centuries, that fact should not obscure the contemporary concerns that animated the Framers.

The parallels between the Second Amendment and these state declarations, and the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. \*\*\*\* The contrast between those two declarations and the Second Amendment reinforces the clear statement of purpose announced in the Amendment's preamble. It confirms that the Framers' single-minded focus in crafting the constitutional guarantee “to keep and bear arms” was on military uses of firearms, which they viewed in the context of service in state militias.

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](#), 1 Cranch 137, 174, 2 L.Ed. 60 (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.” *Ante*, at 2790. 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. While the Court makes the novel suggestion that it need only find some “logical connection” between the preamble and the operative provision, it does acknowledge that a prefatory clause may resolve an ambiguity in the text. *Ante*, at 2789.<sup>FN7</sup> Without identifying any language in the text that

even mentions civilian uses of firearms, the Court proceeds to “find” its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court’s approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.

*“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 \*2827 the Constitution’s preamble, [section 2 of Article I](#), and the Tenth Amendment—“the term unambiguously refers to all members of the political community, not an unspecified subset.” *Ante*, at 2790 - 2791. 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,” *ante*, at 2821. 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.

\*\*\*\*

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*].” Brief for Professors of Linguistics and English as *Amici Curiae* 19. \*\*\*\* Had the Framers wished to expand the meaning of the phrase “bear arms” to encompass civilian possession and use, they could have done so by the addition of phrases such as “for the defense of themselves,” as was done in the Pennsylvania and Vermont Declarations of Rights. \*\*\*\* The absence of any reference \*2829 to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble.<sup>FN10</sup> But when discussing these words, the Court simply ignores the preamble.

\*\*\*\*

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. \*\*\*\*

This reading is confirmed by the fact that the clause protects only one right, rather than two. It does not describe a right “to keep arms” and a separate right “to bear arms.” Rather, the single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary.<sup>FN13</sup> Different language surely would have been used to protect nonmilitary use and possession of weapons from regulation if such an intent had played any role in the drafting of the Amendment.

\*\*\*\*

Thus, for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial.<sup>FN38</sup> Indeed, the Second Amendment was not even mentioned\*2845 in either full House of Congress during the legislative proceedings that led to the passage of the 1934 Act. Yet enforcement of that law produced the judicial decision that confirmed the status of the Amendment as limited in reach to military usage. After reviewing many of the same sources that are discussed at greater length by the Court today, the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have “some reasonable relationship to the preservation or efficiency of a well regulated militia.” 307 U.S., at 178, 59 S.Ct. 816.

The key to that decision did not, as the Court belatedly suggests, *ante*, at 2813 - 2815, turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the Second Amendment were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?

\*\*\*\*

For these reasons, I respectfully dissent.

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

\*\*\*\*

#### 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.

\*\*\*\*

Although I adopt for present purposes the majority's position that the Second Amendment embodies a general concern about self-defense, I shall not assume that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars. The majority, which presents evidence in favor of the former proposition, does not, because it cannot, convincingly show that the Second Amendment seeks to maintain the latter in pristine, unregulated form.

To the contrary, colonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the "right to keep and bear arms," whether embodied in Federal or State Constitutions, or the background common law. And those examples include substantial regulation of firearms in urban areas, including regulations that imposed obstacles to the use of firearms for the protection of the home.

\*\*\*\*

This historical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry. That the District law impacts self-defense merely raises *questions* about the law's constitutionality. But to answer the questions that are raised (that is, to see whether the statute is unconstitutional) requires us to focus on practicalities, the statute's rationale, the problems that called it into being, its relation to those objectives—in a word, the details. There are no purely logical or conceptual answers to such questions. All of which to say that to raise a self-defense question is not to answer it.

### III

I therefore begin by asking a process-based question: How is a court to determine\*2851 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." *Ante*, at 2817. 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." [Heller v. Doe](#), 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). 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." [Abrams v. Johnson](#), 521 U.S. 74, 82, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); see Brief for Respondent 54-62. 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. See *ante*, at 2816.

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." [United States v. Salerno](#), 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," see *id.*, at 750, 754, 107 S.Ct. 2095, and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, see e.g., [Brandenburg v. Ohio](#), 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*) (First \*2852 Amendment free speech rights); [Sherbert v. Verner](#), 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (First Amendment religious rights); [Brigham City v. Stuart](#), 547 U.S. 398, 403-404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)

(Fourth Amendment protection of the home); [New York v. Quarles](#), 467 U.S. 649, 655, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (Fifth Amendment rights under [Miranda v. Arizona](#), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)); [Salerno, supra](#), at 755 (Eighth Amendment bail rights). 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. See [Nixon v. Shrink Missouri Government PAC](#), 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring). 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. See [ibid.](#)

\*\*\*\*

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. See [Turner Broadcasting System, Inc. v. FCC](#), 520 U.S. 180, 195-196, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997); see also [Nixon, supra](#), at 403, 120 S.Ct. 897 (BREYER, J., concurring). 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. [Randall v. Sorrell](#), 548 U.S. 230, 249, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (opinion of BREYER, J.) (citing [Bose Corp. v. Consumers Union of United States, Inc.](#), 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)).

The above-described approach seems preferable to a more rigid approach here for a further reason. Experience as much as logic has led the Court to decide that in one area of constitutional law or another \*2853 the interests are likely to prove stronger on one side of a typical constitutional case than on the other. See, e.g., [United States v. Virginia](#), 518 U.S. 515, 531-534, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (applying heightened scrutiny to gender-based classifications, based upon experience with prior cases); [Williamson v. Lee Optical of Okla., Inc.](#), 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (applying rational-basis scrutiny to economic legislation, based upon experience with prior cases). Here, we have little prior experience. Courts that *do* have experience in these matters have uniformly taken an approach that treats empirically-based legislative judgment with a degree of deference. See Winkler, [Scrutinizing the Second Amendment](#), 105 Mich. L.Rev. 683, 687, 716-718 (2007) (describing hundreds of gun-law decisions issued in the last half-century by Supreme Courts in 42 States, which courts with “surprisingly little variation,” have adopted a standard more deferential than strict scrutiny). While these state cases obviously are not controlling, they are instructive. Cf., e.g., [Bartkus v. Illinois](#), 359 U.S. 121, 134, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) (looking to the “experience of state courts” as informative of a constitutional question). And they thus provide some comfort regarding the practical wisdom of following the approach that I believe our constitutional precedent would in any event suggest.

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A

No one doubts the constitutional importance of the statute's basic objective, saving lives. See, e.g., [Salerno](#), 481 U.S., at 755, 107 S.Ct. 2095. But there is considerable debate about whether the District's statute helps to achieve that objective. I begin by reviewing the statute's tendency to secure that objective from the perspective of (1) the legislature (namely, the Council of the District of Columbia) that enacted the statute

in 1976, and (2) a court that seeks to evaluate the Council's decision today.

1

First, consider the facts as the legislature saw them when it adopted the District statute. \*\*\*\* 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.” *Id.*, at 24, 25. It reported to the Council “startling statistics,” *id.*, at 26, regarding gun-related crime, accidents, and deaths, focusing particularly on the relation between handguns and crime and the proliferation of handguns within the District. See *id.*, at 25-26.

\*\*\*\*

The District's special focus on handguns thus reflects the fact that the committee report found them to have a particularly strong link to undesirable activities in the District's exclusively urban environment. See *id.*, at 25-26. The District did not seek to prohibit possession of other sorts of weapons deemed more suitable for an “urban area.” See *id.*, at 25. Indeed, an original draft of the bill, and the original committee recommendations, had sought to prohibit registration of shotguns as well as handguns, but the Council as a whole decided to narrow the prohibition. Compare *id.*, at 30 (describing early version of the bill), with [D.C.Code § 7-2502.02](#)).

2

Next, consider the facts as a court must consider them looking at the matter as of today. See, e.g., [Turner, 520 U.S., at 195, 117 S.Ct. 1174](#) (discussing role of court as \*2856 factfinder in a constitutional case). 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.

\*\*\*\*

Respondent and his many *amici* for the most part do not disagree about the *figures* set forth in the preceding subsection, but they do disagree strongly with the District's *predictive judgment* that a ban on handguns will help solve the crime and accident problems that those figures disclose. In particular, they disagree with the District Council's assessment that “freezing the pistol ... population within the District,” DC Rep., at 26, will reduce crime, accidents, and deaths related to guns. And they provide facts and figures designed to show that it has not done so in the past, and hence will not do so in the future.

\*\*\*\*

These empirically based arguments may have proved strong enough to convince many legislatures, as a matter of legislative policy, not to adopt total handgun bans. But the question here is whether they are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them. And that they are not. \*\*\*\*

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 \*2860 handgun restriction with studies of their own. \*\*\*\*

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 decisionmaking responsibility, the empirical evidence presented here is sufficient to allow a judge to reach a firm *legal* conclusion.

\*\*\*\* the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. See [Nixon, 528 U.S., at 402, 120 S.Ct. 897](#) (BREYER, J., concurring). 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.” [Salerno, 481 U.S., at 750, 754, 107 S.Ct. 2095](#).

## 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.

## 1

The District's statute burdens the Amendment's first and primary objective hardly at all. \*\*\*\*

The majority briefly suggests that the “right to keep and bear Arms” might encompass an interest in hunting. See, *e.g.*, *ante*, at 2801. But in enacting the present provisions, the District sought “to take nothing away from sportsmen.” DC Rep., at 33. 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.

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. \*\*\*\* To that extent the law burdens to some \*2864 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.

It does not help respondent's case to describe the District's objective more generally as an “effort to diminish the dangers associated with guns.” That is because the very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous. That they are easy to hold and control means that they are easier for children to use. See Brief for American Academy of Pediatrics et al. as *Amici Curiae* 19 (“[C]hildren as young as three are able to pull the trigger of most handguns”). That they are maneuverable and permit a free hand likely contributes to the fact that they are by far the firearm of choice for crimes such as rape and robbery. See *Weapon Use and Violent Crime 2* (Table 2). That they are small and light makes them easy to steal, see *supra*, at 2797 - 2798, and concealable, cf. *ante*, at 2816 (opinion of the Court) (suggesting that concealed-weapon bans are constitutional).

This symmetry suggests that any measure less restrictive in respect to the use of handguns for self-defense will, to that same extent, prove less effective in preventing the use of handguns for illicit purposes.

\*\*\*\*

The absence of equally effective alternatives to a complete prohibition finds support in the empirical fact that other States \*2865 and urban centers prohibit particular types of weapons. \*\*\*\*

#### 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. \*\*\*\*

Further, any self-defense interest at the time of the Framing could not have focused exclusively upon urban-crime related dangers. \*\*\*\* 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. \*\*\*\*

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. \*\*\*\*

\*\*\*\*

I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny. These consist of (1) "prohibitions on carrying concealed weapons"; (2) "prohibitions on the possession of firearms by felons"; (3) "prohibitions on the possession of firearms by ... the mentally ill"; (4) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (5) government "conditions and qualifications" attached "to the commercial sale of arms." *Ante*, at 2816. Why these? Is it \*2870 that similar restrictions existed in the late 18th century? The majority fails to cite any colonial analogues. And even were it possible to find analogous colonial laws in respect to all these restrictions, why should these colonial laws count, while the Boston loaded-gun restriction (along with the other laws I have identified) apparently does not count? See *supra*, at 2849 - 2850, 2867 - 2868.

At the same time the majority ignores a more important question: Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pick up a loaded gun on their parents' bedside table? That they (who certainly showed concern for the risk of fire, see *supra*, at 2849 - 2850) would have lacked concern for the risk of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring? Unless we believe that they intended future generations to ignore such matters, answering questions such as the questions in this case requires judgment-judicial judgment exercised within a framework for constitutional analysis that guides that judgment and which makes its exercise transparent. One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit*.

\*\*\*\*

## VI

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. And, for these reasons as well as the independently sufficient reasons set forth by Justice STEVENS, I would find the District's measure consistent with the Second Amendment's demands.

With respect, I dissent.

U.S., 2008.

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