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*D.C.'s Handgun Ban and the Constitutional Right to Arms:
One Hard Question?*

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Introduction

The District of Columbia's gun control statute is extraordinarily restrictive. For three decades, it has forbidden almost

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Some of the points in this paper have been explored in greater detail elsewhere. See especially Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987) ("Lund, *Political Liberty and Self-Preservation*"); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1 (1996) ("Lund, *Past and Future*"); Nelson Lund, *The Ends of Second Amendment Jurisprudence, Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. L. & Pol. 157 (1999) ("Lund, *Ends of Second Amendment Jurisprudence*"); Nelson Lund, *A Primer on the Constitutional Right to Keep and Bear Arms*, Policy Paper No. 7, Virginia Institute for Public Policy (June, 2002) [http://www.virginia institute.org/publications/primer_on_const.php] ("Lund, *Primer*"); Nelson Lund, *Federalism and the Constitutional Right to Keep and Bear Arms*, 33 *Publius: The Journal of Federalism* 63 (2003) ("Lund, *Federalism and the Right to Arms*"); Nelson Lund, *Putting the Second Amendment to Sleep*, 8 *Green Bag* 2d 101 (2004) ("Lund, *Putting the Second Amendment to Sleep*").

all civilians to possess handguns in their own homes.¹ Rifles and shotguns are permitted, but they must be kept unloaded and either disassembled or secured with a trigger lock, making them useless for self defense.² In 2003, this statute was attacked in a carefully organized Second Amendment test case. Besides offering an inviting target because its restrictions are so extreme, D.C.'s regulation was enacted pursuant to federal rather than state law, which eliminated the need for courts to grapple here with the doctrine of Fourteenth Amendment "selective incorporation."³

The case was brought on behalf of plaintiffs with respectable backgrounds and appealing reasons for wanting to possess a handgun in their homes. Furthermore, the political or policy climate appeared favorable: the case was initiated after more than a decade of increasingly widespread and dramatic relaxations of gun regulations by the states, during which rates of violent crime fell dramatically.⁴

¹ D.C. Code §§ 7-2502.02(a)(4), 7-2507.02. The few civilians who are permitted to possess a handgun at home are forbidden to carry the gun from one room to another. *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007) (discussing D.C. Code §§ 22-4504, 22-4506). Furthermore, such guns must be kept in an inoperable condition. D.C. Code § 7-2507.02.

² D.C. Code § 7-2507.02.

³ During the nineteenth century, the Second Amendment (like the rest of the Bill of Rights) was held inapplicable to the states. In the twentieth century, the Supreme Court has used substantive due process to apply most provisions of the first eight amendments to the state governments. Some provisions have been held inapplicable to the states. The Court has not yet addressed the substantive due process incorporation issue in a Second Amendment case. For further discussion of the incorporation issue, see Lund, *Past and Future*, *supra* note †, at 46-55.

⁴ Beginning with Florida in 1987, a wave of states adopted laws authorizing most law-abiding adults to obtain permits to carry concealed weapons in public. Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional*

This phenomenon casts obvious doubt on the efficacy of the prohibition regime in D.C., where violent crime has remained notoriously out of control.⁵ If any case could lead the federal courts to invalidate a gun control statute under the Second Amendment for the first time in our history, this would have to be a prime candidate.

The efforts invested in the test case were rewarded when the city's regulations were invalidated by a divided panel of the D.C. Circuit, in a narrow and carefully reasoned opinion written by Judge Laurence H. Silberman.⁶ The stage has now been set for the Supreme Court to affirm the D.C. Circuit,⁷ ending a very long silence about the

Politics of Gun Control, 71 Brooklyn L. Rev. 715, 751-54 (2005). Between 1993 and 2002, violent crime rates declined by 33.8% nationally. FBI, Crime in the United States 2002: Uniform Crime Reports, Table 1 [<http://www.fbi.gov/ucr/02cius.htm>]. Research suggesting that liberalized rules on concealed carry cause a reduction in violent crime has generated intense controversy. For one review of the literature, see *Firearms and Violence: A Critical Review*, Committee on Law and Justice, National Research Council (Charles F. Wellford et al. eds., 2004), at 120-51, 269-75. So far as I am aware, nobody has found any evidence at all that would suggest that the liberalization of these laws has led to an *increase* in violent crime.

⁵ In 2006, D.C.'s homicide rate was more than five times higher than the national average, and more than double the rate in comparably sized cities; D.C.'s overall violent crime rate was about triple the national average, and about fifty percent higher than in comparably sized cities. FBI, Crime in the United States 2006: Uniform Crime Reports (http://www.fbi.gov/ucr/cius2006/data/table_01.html (national data); http://www.fbi.gov/ucr/cius2006/data/table_08_dc.html (D.C. data); http://www.fbi.gov/ucr/cius2006/data/table_16.html (data on cities with populations between 500,000 and one million)).

⁶ *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

⁷ A petition for certiorari has been filed by the District of Columbia, and the respondent has taken the unusual step of urging the Supreme Court to grant the petition. The relevant documents can be found by searching for Docket No. 07-290

meaning of the Second Amendment.⁸ That result, if it comes, might inaugurate a new era of litigation in which courts begin cutting back in various ways on the almost limitless discretion over gun control that legislatures have long enjoyed.

If the Supreme Court reviews the case, I hope the D.C. Circuit's decision will be affirmed. I think that outcome is more likely than not, but I do not think it is inevitable. The Justices will be acutely aware that their decision is going to have enormous implications in other cases. They may well decide to issue a narrow opinion along the lines of the D.C. Circuit's, but they will first think carefully about the impact of their decision on other federal statutes, as well as on the huge number of state and local laws that may be up for grabs once the issue of Fourteenth Amendment incorporation is confronted. This group of Justices is intellectually vigorous, and those of us who support the D.C. Circuit's decision should not kid ourselves into thinking that hard questions about our position can safely be glossed over or brushed aside.

In this paper, I first discuss what I think is the strongest, though still a specious, argument *against* the position I favor—an argument that was not adequately disposed of in Judge Silberman's generally excellent opinion. I then sketch a brief response that could help the Court avoid being seduced by a false appearance of plausibility. This analysis will show that the Second Amendment's preambular language cannot be used to confine the right to arms to militia-related purposes, and that the constitutional right must extend to having guns for personal self defense against violent crime.

at <http://www.supremecourtus.gov/docket/docket.html>.

⁸ The Supreme Court's only substantial opinion interpreting the Second Amendment came in *United States v. Miller*, 307 U.S. 174 (1939).

I. Rifles, Shotguns, and the Needs of the Militia

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.

For many years, debates about the Second Amendment have focused largely on whether it protects a right of individual Americans to keep and bear arms, or a collective right of state governments to maintain their own military counterweight against the federal government. The collective or states' right theory has long been dominant among the federal courts of appeals, and Judge Karen LeCraft Henderson adopted this position in her D.C. Circuit dissent. The collective right theory, which has numerous intellectually fatal defects, has been repeatedly and thoroughly refuted in what is now a sizeable literature.⁹ In what follows, I assume that the Supreme Court will not embarrass itself by embracing this thoroughly discredited position.

Wrong though it is, the collective right theory responded to a genuine puzzle. The Second Amendment's preamble refers to the importance of a "well regulated Militia," which forces one to ask what this could have to do with the "right of the people" to keep and bear arms. One usually thinks of constitutional rights as obstacles, not spurs, to regulation. The D.C. Circuit sought to resolve the puzzle by emphasizing, as the Supreme Court had observed long ago,¹⁰ that the

⁹ For a comprehensive survey of the arguments and evidence, see U.S. Dep't of Justice, Memorandum Opinion for the Attorney General, *Whether the Second Amendment Secures an Individual Right* (2004), available at <http://www.usdoj.gov/olc/secondamendment2.pdf>. For a brief summary, see Lund, *Past and Future*, *supra* note †, at 19-39.

¹⁰ *United States v. Miller*, 307 U.S. 174, 179 (1939).

founding generation expected civilians to have private ownership of the weapons that they would need when called upon to perform their civic duty as militiamen.¹¹

Assuming that the point is historically accurate, as it appears to be, where does it take the legal analysis? One superficially plausible inference might be that the Second Amendment protects the private possession of weapons *only to the extent necessary* to preserve in civilian hands a stock of weapons suitable for use while serving in the militia. And what duties would militiamen be expected to perform? Military duties, of course, and probably also some law enforcement functions, but maybe only those of a quasi-military nature, such as suppressing insurrections and riots.¹² And perhaps the militia could be expected to respond spontaneously to certain kinds of political emergencies, say by providing armed resistance to an attempted coup or by establishing order if the government were paralyzed after a natural disaster.

In all these activities, rifles and shotguns would be the most obviously useful weapons for militiamen to bring with them from home. But the D.C. statute at issue in this case *permits* civilians to possess rifles and shotguns, along with the ammunition these weapons require. Supreme Court Justices will therefore have to ask themselves this question:

Since the D.C. statute permits civilians to keep the type of weapons (along with the requisite ammunition) that they will most likely need if called

¹¹ See *Parker*, 478 F.3d at 386-89.

¹² The Constitution specifically authorizes use of the militia by the federal government to “execute the Laws of the Union, suppress Insurrections and repel Invasions.” Art. I, § 8, cl. 15.

*upon for militia duties, why does this not satisfy the
Second Amendment?*

The D.C. Circuit believed that this question was answered in *United States v. Miller*,¹³ the Supreme Court's one significant decision interpreting the Second Amendment. *Miller*, which arose from a prosecution of two men for violating a federal statute by transporting an unregistered short-barreled shotgun across state lines,¹⁴ concluded:

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.¹⁵

The D.C. Circuit found that handguns meet this test, and that the

¹³ 307 U.S. 174 (1939).

¹⁴ For an entertaining history of the *Miller* case, see Brian L. Frye, *The Peculiar Story of United States v. Miller*, 2 NYU Journal of Law & Liberty (forthcoming 2007) [available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981831].

¹⁵ 307 U.S. at 178 (footnote citing a state case interpreting a state constitutional provision omitted).

government therefore may not ban them.¹⁶

It is certainly true that handguns are part of “ordinary military equipment,” and that their use “could contribute” to the common defense. As an effort by an inferior court to apply Supreme Court precedent, Judge Silberman’s analysis is perfectly conventional, and thus respectable. But things will not be quite so simple for the Supreme Court itself. Fully automatic rifles and carbines are equally, or even more commonly used by military personnel than pistols are. Other hand-held weapons that are commonly used by ordinary military personnel include mortars, shoulder-fired missiles, and grenades.¹⁷ Such weapons, moreover, have considerably *more* potential usefulness in standard militia activities than handguns do.

Our Justices are surely not likely to conclude that the general population is constitutionally entitled to keep machine guns and grenades in the home, let alone Stinger missiles, merely because they are “ordinary military equipment” that “could contribute” to the common defense. Whether or not they admit to repudiating the *Miller* test, the Justices will hardly be able to accept the consequences in future cases that would result from applying the test according to its terms.¹⁸

¹⁶ See *Parker*, 478 F.3d at 398 (concluding that pistols pass the *Miller* test because they are a “a lineal descendant of [a] founding-era weapon” and are “in common use today”); *id.* at 400 (“Once it is determined—as we have done—that handguns are “Arms” referred to in the Second Amendment, it is not open to the District to ban them.”).

¹⁷ For present purposes, I assume that the Second Amendment applies only to weapons that an unaided individual can “bear.”

¹⁸ This difficulty cannot be avoided by interpreting *Miller* to mean that the Second Amendment is limited to the protection of weapons that are in common use today by *civilians* (or of weapons that are in common use by both civilians and the military). *Miller* nowhere holds that being in common use by civilians is either a

Accordingly, the Supreme Court will be forced to reject the *Miller* test, either openly or otherwise. Unable to follow the D.C. Circuit's precedent-based approach, the Justices may be tempted by a new test under which permitting civilians to possess mechanically disabled rifles and shotguns is enough to fulfill the putatively "militia-centric" purpose of the Second Amendment.

That would be a serious, and quite unnecessary mistake. Once the Justices face up to the inevitability of modifying *Miller's* legal test, they will be free to think afresh about the meaning of the Second Amendment. Although space will not permit me to present the full argument in favor of striking down the District's handgun ban, I will demonstrate this more limited point: it would be fallacious for the Supreme Court to conclude that the city's statute is valid merely because it permits civilians to keep rifles and shotguns—rendered incapable of immediate use for self defense—in their homes.

II. The Language of the Second Amendment

Judge Silberman's opinion argues that the individual right to keep and bear arms is broader than its prefatory reference to a well regulated militia might suggest. His argument has two principal elements. First, he contends that the Constitution's reference to "*the*

necessary or a sufficient condition for being covered by the Second Amendment. Eighteenth century militiamen "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time," 307 U.S. at 179, because the very same weapons were at that time in "common use" for military and civilian purposes alike. Nothing in *Miller* says or implies that the "preservation or efficiency of a well regulated militia," *id.* at 178, would today be enhanced by a rule that extends Second Amendment protection to weapons with little military utility that are in common use by civilians (such as single shot or rimfire rifles and pistols) while *not* extending such protection to standard military arms such as high-velocity, fully automatic rifles.

right to keep and bear arms” implies that it protects a preexisting right.¹⁹ Second, he contends that this preexisting right entailed a right to own and use firearms for lawful private purposes such as self-defense and hunting.²⁰

Judge Silberman’s argument does not quite work. In one sense it is true that Americans had a preexisting right to firearms, for no eighteenth-century American state seems to have adopted a ban on keeping ordinary weapons in the home.²¹ But it is not clear that legislatures were legally forbidden to enact such regulations.²² The

¹⁹ *Parker*, 478 F. 3d at 382.

²⁰ *Id.* at 382-83.

²¹ A research project conducted by pro-gun-control scholars was able to identify only three kinds of eighteenth century gun regulations: 1) laws disarming limited categories of people who were deemed dangerous; 2) laws *requiring* citizens to purchase guns and ammunition; and 3) laws dealing with the safe storage of gunpowder. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 75 *Fordham L. Rev.* 487, 506-12 (2004). None of these laws is remotely analogous to a prohibition regime like the one in the District of Columbia.

²²The English Bill of Rights had provided that “the subjects which are Protestants may have arms for their defence suitable to their Conditions and as allowed by Law.” 1 W. & M., ch. 2, sess. 2 (1688) (Eng.). See generally Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994). Several American states had right-to-arms provisions in their constitutions, but the courts were apparently not confronted with a gun control statute of the modern type until the nineteenth century. See, e.g., Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 *L. & Hist. Rev.* 139, 161 (2007) (“Between 1607 and 1815, in clear contrast to English precedent, the colonial and state governments of what would become the first fourteen states neglected to exercise any police power over the ownership of guns by members of the body politic.”).

absence of such regulations could simply have resulted from an absence of any political demand for them, in much the same way that state legislatures today do not enact bans on the possession or use of fire extinguishers in the home. Because the Second Amendment was not understood to have any effect on state laws at all, those involved in its adoption had little or no reason even to ask how much unexercised discretion the various state legislatures possessed.

Absent an ascertainable eighteenth century consensus on the nature and scope of the “preexisting right” under state law, why not interpret the Second Amendment to protect only the minimum or core right suggested by its preambular language? And why wouldn’t this entail at most a private right to keep those weapons, namely rifles and shotguns, most likely to be needed for militia duty? How would the Amendment’s purpose be compromised if citizens were required to take a minute or so to unlock and load these weapons when called to duty?

These suggestions, tantalizing as they might seem to some, are based on a mistaken view of the constitutional language.

A. The Second Amendment’s Preamble

It is self-evident that the Second Amendment’s preambular phrase alludes to *a* reason for guaranteeing the right of the people to keep and bear arms, and this allusion could no doubt be used by a lazy reader to resolve every seeming ambiguity in the operative clause. There is, however, no reason to think that the Second Amendment was the product of lazy draftsmanship. The text went through several revisions in Congress, in the course of which the language became focused with increasing clarity on protecting a

private right that is not necessarily connected with militia duties.²³

A careful reading of the final text leads to the counterintuitive conclusion that the prefatory language has much less *legal* importance or usefulness than one might initially expect it to have. The historical context, moreover, indicates that the framers had *political* reasons for paying rhetorical homage to the importance of the militia, while they also had reasons to narrowly confine the legal effects of that political gesture.

1. Grammatical Structure

The most significant grammatical feature of the Second Amendment is that its preamble is an absolute phrase, often called an ablative absolute or nominative absolute.²⁴ Such constructions are grammatically independent of the rest of the sentence, and do not qualify any word in the operative clause to which they are appended.²⁵ The usual function of absolute constructions is to convey

²³ For a discussion of the drafting history, see Lund, *Ends of Second Amendment Jurisprudence*, *supra* note †, at 180-83; Lund, *Past and Future*, *supra* note †, at 34-35 & nn.77, 80.

²⁴ This type of construction is commonly used in Latin, where it takes the ablative case. In English, where it is less common, it now takes the nominative case. For an historical discussion, see C. T. Onions, *An Advanced English Syntax* 68-70 (1904).

²⁵ See, e.g., John Wilson, *The Elements of Punctuation* 4 (1857) (nominative absolutes “are grammatically independent of the other portions of the sentence in which they occur”); Virginia Waddy, *Elements of Composition and Rhetoric* 13 (1889) (“The absolute phrase is without grammatical dependence on any other word.”); Alexander M. Trotter, *A Manual of English Grammar, and Analysis of Sentences* 54 (1878) (“A noun or pronoun before a participle, having no grammatical relation to any other word in the sentence, is in the *nominative case*

some information about the subject of the main clause or the circumstances surrounding the statement in the main clause.²⁶

The other most significant grammatical feature of the Second Amendment is that the operative clause is a command. Because no word in that command is grammatically qualified by the prefatory assertion, the Second Amendment has exactly the same meaning that it would have had if the preamble had been omitted, or indeed if the preamble is demonstrably false.

Consider a simple, everyday example. Suppose that a dean announces: “The teacher being ill, class is cancelled.” Nothing about the dean’s prefatory phrase, including its truth or falsity, can qualify or modify the operative command. If the teacher called in sick to watch a ball game, the cancellation of the class remains unaffected. If the dean was secretly diverting the teacher to work on a special project, still there will be no class. If someone misunderstood a phone message, and inadvertently misled the dean into thinking the teacher would be absent, the dean’s order is not thereby modified in the least.

The Second Amendment’s grammatical structure is identical, and so are the consequences. Whatever a well regulated militia may be, or even if no such thing exists, the right of the people to keep and

absolute; as, *The dawn appearing*, we set out on our journey.”).

²⁶ See, e.g., C. T. Onions, *An Advanced English Syntax* 68 (1904) (“In English, as in other languages, the Participial Adverb Clause is in origin a simple Adverbial Adjunct, consisting of a noun or noun-equivalent in an oblique case with a participle in agreement with it, and denoting an attendant circumstance, cause, condition, etc.”); Evan Daniel, *The Grammar, History, and Derivation of the English Language* 164 (1881) (“The syntactical function of the Absolute Construction is to mark the *time, reason, cause, conditions, or some accompanying circumstances* of the action denoted by the finite verb in the principal sentence.”).

bear arms is not to be infringed.²⁷ What's more, whether or not such a militia can actually contribute to the security of a free state, the right of the people to keep and bear arms remains unaffected. Indeed, even if it could be proved beyond all doubt that *disarming* the people is necessary to the security of a free state, still the right of the people to keep and bear arms would remain completely unchanged.²⁸

In both cases, new information or changed opinions about the assertion advanced in the preamble might suggest the need to issue a new command. If the dean discovered the teacher wasn't going to be absent after all, he might make a new announcement reversing his earlier decision. Similarly, if the American people came to believe that civilian disarmament laws were necessary to promote public safety, Congress might initiate a repeal of the Second Amendment under the procedures set out in Article V. In both cases, a new command would be needed because the truth or falsity of the preambular assertion cannot alter the meaning of the original, operative command.

Lest one suppose that those who adopted the Second Amendment could have been unaware of the obvious implications of its grammatical structure, consider the Patent and Copyright Clause:

²⁷ Those who assert that the militia referred to in the Second Amendment no longer exists are wrong, but even if one thought they might be right, the grammar of the provision renders their claims irrelevant. For further discussion, see Lund, *Putting the Second Amendment to Sleep*, *supra* note †.

²⁸ Judge Silberman's opinion notes that state constitutions from the founding period frequently set forth prefatory principles of good government that were *narrower* than the operative language used to achieve those principles. 478 F.3d at 389 (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 801-07 (1998)). This is accurate as far as it goes, but it does not capture the full implications of the Second Amendment's grammatical structure. The right of the people to keep and bear arms is not to be infringed even if that right turns out to be *inconsistent* with a well regulated militia.

The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.²⁹

Unlike the Second Amendment, this provision contains an operative clause that sets out a purpose (to promote the progress of useful knowledge) and a subordinate phrase that specifies the means by which that purpose may be pursued (patents and copyrights). Because of this grammatical subordination, the authorization to grant copyrights and patents is limited by the goal set out in the operative clause, as the Supreme Court has recognized.³⁰

It is worth noting that the Supreme Court has also signaled a strong reluctance to enforce the limitation on congressional power that the language of the Patent and Copyright Clause plainly imposes,³¹ so one wonders why the Justices would infer limits on the Second Amendment right that *its* language just as plainly does *not* impose. One hopes that the Supreme Court's answer will not turn out to imply a maxim according to which congressional power is to be

²⁹ U.S. Const., art. I, § 8, cl. 8.

³⁰ *E.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (quoting *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966)).

³¹ The Court has suggested that congressional authority under this clause is limited only by the minimum rationality requirement that applies to every act of legislation. *See, e.g.*, *Eldred*, 537 U.S. at 204-05 (“[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.” (quoting *Sony Corp. of Amer. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984))); 537 U.S. at 205 n.10 (rejecting the use of heightened scrutiny).

liberally construed, contrary to the language of the Constitution if necessary, while individual rights are to be narrowly construed, contrary to the language of the Constitution if necessary. Or, worse yet, that we like patents and copyrights but we don't like guns.

In any case, the Patent and Copyright Clause provided an obvious model that the draftsmen of the Second Amendment could have used to limit the right to keep and bear arms to militia purposes.³² That model was emphatically not followed, for the Second Amendment does not say anything like, "The people shall have a right to promote the security of a free state by keeping and bearing such arms as are suitable for use in a well regulated militia."

Furthermore, the familiar words of the Preamble—which announce that the Constitution was adopted "in order" to achieve specified goals—offered another model whose grammar would at least have been compatible with putting some kind of militia limitation on the right to keep and bear arms.³³ But that model was not followed either, for the Second Amendment does not read: "In order to secure the existence of a well regulated militia, which is necessary to the security of a free state, the right of those men subject

³² This point was originally presented, and developed in somewhat more detail, in Lund, *Primer*, *supra* note †, at 6-7; Lund, *Federalism and the Right to Arms*, *supra* note †, at 69-70.

³³ We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

to militia duty to keep and bear arms shall not be infringed.”³⁴

Instead, the Second Amendment protects the right of the people to keep and bear arms, *grammatically* unqualified by any militia limitation.

2. *The Militia and the People*

Another clear textual indication that the Second Amendment’s preamble does not limit its operative language is provided by the noncongruence of the militia and the people.³⁵

The militia is and always has been a small subset of the people whose right to keep and bear arms is protected by the Second Amendment.³⁶ Most obviously, women were not part of the eighteenth century militia,³⁷ although they have always been citizens and thus part of “the people.”³⁸ For the same reason that women have

³⁴ As with the Patent and Copyright Clause, and more justifiably, the Constitution’s Preamble has never been used to limit or qualify any right or power set out in that document. It would therefore be perverse to interpret the Second Amendment’s preamble to limit or qualify its operative clause.

³⁵ Contrary to assertions by some supporters of the individual-right interpretation, one cannot reconcile the supposed tension between the two halves of the Second Amendment by positing an identity or near-identity of the people and the militia. *Cf. Parker*, 478 F.3d at 388 (rejecting the claim that the militia and the people were synonymous in the eighteenth century).

³⁶ James Madison estimated that the militia comprised about one-sixth of the population. *See* *The Federalist* No. 46, at 299 (Clinton Rossiter ed., 1961).

³⁷ Nor are women included in the militia today, except for female members of the National Guard. 10 U.S.C. § 311(a).

³⁸ *See, e.g.,* *Minor v. Happersett*, 88 U.S. 162, 165-70 (1874).

always been covered by the First Amendment's "right of the people" to assemble and petition for redress of grievances, and the Fourth Amendment's "right of the people" to be secure from reasonable searches and seizures, women have always had the same Second Amendment rights as men.

Even if one supposed, without evidence, that "the people" referred to in the First, Second, and Fourth Amendments included only those citizens with full political rights (thus excluding women),³⁹ the militia and the people would still remain substantially noncongruent. Under the second Militia Act of 1792, the militia included most free able-bodied male citizens who were at least 18 but under the age of 45.⁴⁰ This would have included a substantial number of men who were not old enough to vote or who were disenfranchised by property qualifications.⁴¹

The opposite form of noncongruence was also significant. Those who were physically unable to perform militia duties still had

³⁹ This appears to be the position taken by Akhil Amar, who has asserted that "the people" referred to in the Second Amendment included only militiamen. Akhil Reed Amar, *Second Thoughts: What the Right to Bear Arms Really Means*, *New Republic*, July 12, 1999, at 24. For a brief refutation of this position, see Lund, *Ends of Second Amendment Jurisprudence*, *supra* note †, at 173-74 nn. 41 & 43.

⁴⁰ Act of May 8, 1792, ch. XXXIII, 1 Stat. 271.

⁴¹ The standard minimum age for voting appears to have been 21 at this time. In the period between the Revolution and the adoption of the Bill of Rights, property qualifications for voting were relaxed in several states, but such qualifications were still significant in several places. *See, e.g.*, Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 24 (2000) ("By 1790, according to most estimates, roughly 60 to 70 percent of adult white men (and very few others) could vote."); Chilton Williamson, *American Suffrage from Property to Democracy 1760-1860* (1960); Kirk H. Porter, *A History of Suffrage in the United States* (1918).

all of their political rights, including the right to vote, as did those aged 45 and older. Besides the numerous men in these categories, many other citizens were given special legal exemptions from militia duties.⁴²

Furthermore, nothing in the Constitution purports to forbid Congress from exempting *everyone* from this obligation. If Congress effectively abolished the militia by enacting such a universal exemption, would the right of “the people” to keep and bear arms thereby vanish? That would obviously be absurd.

B. The Second Amendment’s Potential Contribution to a Well Regulated Militia

Thus, the text of the Constitution compels the conclusion that the right of the people to keep and bear arms is not dependent on its contributing to the goal of a well regulated militia.⁴³ This should hardly be surprising when one recalls that the Second Amendment

⁴² Examples include the officers of all three branches of the federal government, men in various occupations, and anybody exempted from militia duty under the laws of his state. Act of May 8, 1792, ch.XXXIII, § 2, 1 Stat. at 271, 272.

⁴³ Accordingly, in an important early case dealing with the constitutional allocation of regulatory authority over the militia, the Supreme Court treated the Second Amendment as an irrelevancy. See David B. Kopel, *The Supreme Court's Thirty-five Other Gun Cases: What the Supreme Court Has Said about the Second Amendment*, 18 St. Louis U. Pub. L. Rev. 99, 181-83 (1999) (discussing *Houston v. Moore*, 18 U.S. 1 (1820)); J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. Det. Mercy L. Rev. 39 (2001) (comprehensive discussion of *Houston v. Moore* and other militia preemption cases).

does not purport to require or even authorize any kind of regulation.⁴⁴ Still, it would seem that protecting the right to arms must have *something* to do with the well regulated militia, or the Second Amendment's preamble would be entirely out of place.⁴⁵ Let us focus again on the language of the Constitution.

One obvious way for a militia to be well regulated is to be well trained or well disciplined as a military organization, and the framers of the Second Amendment no doubt meant to conjure thoughts of such an organization. The Second Amendment, however, added absolutely nothing to Congress' almost plenary Article I authority to provide for military training and discipline.⁴⁶

⁴⁴ The framers of the Second Amendment in the House of Representatives considered a proposed bill of rights, apparently offered by Roger Sherman, that would have specified how the militia must be regulated instead of specifying protection for the individual right to keep and bear arms. This proposal was rejected. See Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. Dayton L. Rev. 59, 65 (1989). The framers in the Senate also specifically rejected another proposal that would have directed how the militia was to be regulated. Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 Valparaiso U. L. Rev. 131, 189 (1991).

⁴⁵ See, e.g., Alma Blount & Clark Sutherland Northup, *An Elementary English Grammar* 177 (1912) (although absolute constructions "are not formally connected with the sentence proper. . . . [o]f course there is thought-relation between this noun-participle group and the sentence proper; otherwise the absolute phrase ought not to be in the sentence").

⁴⁶ U.S. Const. art. I, § 8, cl. 16, provides Congress with the power:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Furthermore, the term “well regulated” also has a broader meaning that is actually more relevant in this context.

To see why, note that the Second Amendment simply and expressly *denies* some regulatory power to Congress, so that any possible contribution of the Second Amendment to a well regulated militia must arise from governmental *inaction*. Note also that, while it may not be immediately obvious to readers conditioned by experience with the modern Leviathan, the term “well regulated” does not imply *heavy* or *more* regulation. On the contrary, it is perfectly possible for the government to engage in *excessive* regulation or *inappropriate* regulation, and this is just what the Second Amendment forbids.

The original Constitution gave Congress virtually unlimited authority to regulate the militia. As its operative clause makes clear, the Second Amendment simply forbids one kind of inappropriate regulation (among the infinite possible regulations) that Congress might be tempted to enact under its sweeping authority to make all laws “necessary and proper” for executing the militia clauses of Article I. What is that one kind of inappropriate regulation? Disarming the citizens from among whom any genuine militia must be constituted.⁴⁷

Congress is permitted to omit many things that are required for a well regulated militia, and even to ruin the militia. Congress may organize the militia so as to create the functional equivalent of

⁴⁷ Traditionally the militia was a broad body of civilians who could be summoned to meet public emergencies, in contradistinction to armies made up of paid troops. Accordingly, the Constitution systematically distinguishes the two. See Lund, *Past and Future*, *supra* note †, at 22-24.

an army,⁴⁸ or even deprive the militia of any meaningful existence. The Second Amendment does not purport to interfere with the general discretion of Congress to regulate, or fail to regulate, or perversely regulate the militia. All it does is forbid one particularly extravagant exercise of Congress' Article I power, namely *disarming American citizens*, which might otherwise have been done under color of regulating the militia.

It is also conceivable that the Second Amendment might indirectly induce Congress to enact appropriate regulations for organizing and training the militia. If the federal government were faced with a choice between an armed but undisciplined populace and a well-trained body of citizen-soldiers, it might be more likely to choose the latter than it would be if it had the option of depriving the citizenry of both arms and military discipline.

A conceivable effect, one might object, but not a very likely or significant effect. I agree. And this simply reinforces the conclusion that the purpose of the Second Amendment was to forestall congressional overreaching in the exercise of its Article I powers, rather than to spur it into preserving the traditional militia system. That the right to arms *could conceivably* contribute to the preservation of a well regulated militia is sufficient, as a matter of textual analysis, to reconcile the Second Amendment's preamble with its operative clause.

D. The Political Purpose of the Militia Preamble

Sufficient as a matter of textual analysis, perhaps, but not very satisfying. Once again, I agree. There is, however, an intellectually

⁴⁸ Congress has done exactly that in modern times, and the Supreme Court has upheld its authority to do so. *See* *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

satisfying explanation for the Second Amendment's peculiar structure.

The Philadelphia Convention faced a conundrum. Standing armies were considered a serious threat to liberty, but experience during the Revolutionary War convinced many leading Americans that the militia—the traditional alternative to standing armies—could not provide an adequate tool for the defense of the nation against sudden threats. Faced with a difficult choice, the Convention chose to give the new federal government almost unlimited authority to maintain armies and to regulate the militia.

This massive increase in federal military authority became one of the leading complaints by Anti-Federalists who opposed the proposed new Constitution. When the First Congress took up the drafting of a bill of rights, there was absolutely no willingness to satisfy Anti-Federalist sentiment on this issue by actually subtracting from the federal government's military authority, or by trying to force the federal government to rely on the militia as an alternative to standing armies. But that did not mean that fears about the possible abuse of this new federal authority should be treated as foolish or trivial.

The words of praise for the militia in the Second Amendment are best understood as a sop to the popular fear of standing armies, and to the widespread nostalgia for the old militia system that had once provided an alternative to such armies. That explains both why the preambular language was included, and why the Amendment was so carefully drafted to ensure that the right of the people to keep and bear arms is not legally dependent in any way on its actually contributing to a well regulated militia.⁴⁹ Nor should one suppose that

⁴⁹ For a more detail, see Lund, *Ends of Second Amendment Jurisprudence*, *supra* note †, at 177-83; Lund, *Past and Future*, *supra* note †, at 30-36 and sources cited therein, especially William S. Fields & David T. Hardy, *The Militia and the*

the draftsmen could not or would not include something just to soothe the fears of citizens who worried about the power of the new federal government. The Supreme Court has concluded that the framers of the Second Amendment did exactly that when they also included the Tenth Amendment in the Bill of Rights.⁵⁰

III. The Purpose of the People's Right to Keep and Bear Arms

If the purpose of the Second Amendment is not exclusively, or even primarily, to facilitate or maintain a well regulated militia, what broader purpose does it have? The answer must be sought in the original meaning of the Constitution, which should not be confused with the subjective intentions of those involved in its creation. It would be a mistake to assume that the Second Amendment applies only to the particular problems that received the most attention in the

Constitution: A Legal History, 136 *Mil. L. Rev.* 1 (1992).

⁵⁰ *United States v. Darby*, 312 U.S. 100, 124 (1941) (emphasis added):

The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment *or that its purpose was other than to allay fears* that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e.g., II *Elliot's Debates*, 123, 131; III *id.* 450, 464, 600; IV *id.* 140, 149; I *Annals of Congress*, 432, 761, 767-768; *Story, Commentaries on the Constitution*, secs. 1907, 1908.

eighteenth century,⁵¹ just as it would be a mistake to assume that the Free Speech Clause deals with nothing more than prior restraints on publication.⁵² A proper respect for the original meaning of the Second Amendment requires that its language be applied to contemporary society, which is in important respects quite different from that of two hundred years ago.

With respect to the right to keep and bear arms, the concern that was foremost for the founding generation—fear of a tyrannical federal government—has understandably subsided during a long period of political stability. At the same time, the military power of the government has become overwhelming, which diminishes the potential of an armed citizenry to prevent such tyranny. It remains true that a large stock of arms in private hands raises the expected cost to the government of engaging in seriously oppressive actions, and thereby makes such oppression less likely to occur.⁵³ But whereas James Madison could plausibly argue that the new federal government would be incapable of raising an army capable of conquering America's armed populace,⁵⁴ it is painful even to contemplate the mayhem that today's armed forces could easily

⁵¹ *Cf.* *Dartmouth College v. Woodward*, 17 U.S. 518, 644-45 (1819) (Marshall, C.J.) (specific cases contemplated by the framers do not limit the reach of constitutional provisions).

⁵² This mistaken interpretation of the First Amendment, of course, has had its supporters, including John Marshall himself. *See* Report of the Minority on the Virginia Resolutions (1799), in 5 *The Founders' Constitution* 136-39 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁵³ This point was first made in Lund, *Political Liberty and Self-Preservation*, *supra* note †, at 115, and later developed and defended in Lund, *Past and Future*, *supra* note †, at 56-58.

⁵⁴ *The Federalist* No. 46, at 299 (Clinton Rossiter ed., 1961).

inflict on the civilian population.

Even more important, perhaps, a large gap has developed between civilian and military small arms. Whereas eighteenth century civilians commonly owned the very same weapons that they would need if called into military service, today's infantry is armed with an array of highly lethal weaponry that civilians do not need for self defense or other important and lawful purposes. The Supreme Court is not likely to blind itself to that reality, or to decide that the civilian population has a right to keep every weapon that the militia can expect to find useful if called to active duty. Nor should the Court blind itself to other contemporary realities, the most important of which is the problem of criminal violence, and the failure of the government to control it.

Rather than focus on eighteenth century responses to specific eighteenth century problems, the Court should recognize that the purpose of the Second Amendment emerges readily from the Constitution's founding principles. Sorting out the various strands of political and religious thought in the founding era is a notoriously complex and controversial historical task. Nevertheless, there can be no doubt about the dominance of the key liberal axioms summed up in the Declaration of Independence: "that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—that to secure these Rights, Governments are instituted among Men"

In liberal theory, the most fundamental of all rights is the right of self-defense. Thomas Hobbes, the founder of modern liberalism, advanced this proposition with his customary forcefulness when he acknowledged only one natural right, and described it as "the liberty each man hath to use his own power, as he will himself, for the

preservation of his own nature, that is to say, of his own life.”⁵⁵ Among political theorists most often cited by major American writers during the founding period,⁵⁶ we find unanimous agreement about the centrality of the right of self defense:

Locke: “[I]t being reasonable and just, I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a *Wolf* or a *lion*”⁵⁷

Montesquieu: “The life of states is like that of men. Men have the right to kill in the case of natural defense; states have the right to wage war for their own preservation.”⁵⁸

Blackstone: “Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither

⁵⁵ *Leviathan*, ch. 14 (1651).

⁵⁶ See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 *Am. Pol. Sci. Rev.* 189 (1984).

⁵⁷ *Second Treatise of Government* § 16 (1690).

⁵⁸ *The Spirit of the Laws*, bk. X, ch. 2, at 138 (Anne M. Cohler et al. eds. & trans., 1989) (1748).

can it be in fact, taken away by the law of society.”⁵⁹

The exchange of rights that constitutes the social contract does not diminish the central importance of the right to self defense. Rather, political or legal limitations on that right must be understood as efforts to *enhance* the citizens’ ability to protect their lives. For that reason alone, the Second Amendment should be interpreted vigorously with respect to governmental restrictions on the liberty of citizens to protect themselves from the violent criminals whom the government cannot or will not bring under control.

This corollary to the central premise of liberal political theory is quite consistent with evidence about eighteenth century attitudes. To take just one example from a legal authority who was extremely influential and popular in America, Blackstone characterized the English right to arms as a “public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”⁶⁰

Just as one would expect from the principles of liberal theory, Blackstone makes no distinction between oppression by the government and oppression that the government fails to prevent. If anything, his language seems to refer more easily to the ineradicable phenomenon of violent crime, experienced by all societies, than to the extraordinary instances of governmental oppression that call for armed resistance. In America, a similarly broad understanding of the purpose of the right to arms can be found in the first proposal for a federal bill of rights, in early state constitutions, and in public

⁵⁹ 3 *Commentaries*, at *4.

⁶⁰ 1 *Commentaries*, at *139.

statements of the time.⁶¹

The natural right of self defense is the most fundamental right known to liberal theory, and the Second Amendment is our Constitution's most direct legal expression of Blackstone's insight that "in vain would these [primary] rights [such as the right to personal security] be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment."⁶²

It would not be easy to find a more vivid illustration of Blackstone's point than the District of Columbia, where every effort has been made to ensure that law-abiding citizens are deprived of the means of defending themselves. According to "the dead letter of the laws," personal security must be very well assured in a city where almost nobody except agents of the government is authorized to possess an operable firearm. The reality is a little different, and courts need not blind themselves to that reality.

IV. Conclusion

The foregoing analysis demonstrates the unsoundness of a constitutional rule that a right to possess rifles and shotguns—kept in a condition suitable for militia purposes but not for immediate self defense—is sufficient to satisfy the Second Amendment. The

⁶¹ For details, see Lund, *Past and Future*, *supra* note †, at 59-61 and sources cited therein; Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comment. 87 (1992). For additional support, based on early post-enactment sources, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359.

⁶² 1 *Commentaries*, at *136. "Personal security" is listed as the first of the three great primary rights. *Id.* at *125. The right to arms is one of the five auxiliary rights that help to secure the great primary rights. *Id.* at *139.

grammatical structure of the provision dictates that its preamble not be read to qualify its operative language. The operative language, in turn, protects a right that belongs to many citizens other than those who are eligible for militia duties. Furthermore, there is strong evidence, in the principles on which the Constitution is based and in the public records of the founding period, that the right of our citizens to keep and bear arms is protected for the sake of self-defense generally, not merely to facilitate militia activities. In the twenty-first century, the most salient purpose of the Second Amendment is to protect the people's ability to defend themselves against violent criminals.

It should therefore be obvious how little the Second Amendment would mean if the Supreme Court were to uphold D.C.'s effort to render law abiding citizens virtually defenseless against criminal violence in their own homes. And this much, too, should be plain: the government must be required to offer justifications for gun control statutes that go far beyond fashionable slogans and unsubstantiated appeals to hypothetical salutary effects on public safety. Any other approach would trivialize the Second Amendment's principle of self defense—a principle that has no less important applications today than it had in the eighteenth century.

Other provisions of the Bill of Rights have been interpreted in light of their language and the principles on which they are based, rather than being limited in their application to the specific problems that provoked their adoption. The First Amendment's protection of the freedom of speech, for example, has become much more than a prohibition on prior restraints, and rightly so. The Second Amendment—which protects the most fundamental of all natural rights—is no less important, no more frightening, and equally deserving of robust judicial enforcement.