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# **THE SECOND AMENDMENT AND THE SUPREME COURT**

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THE SECOND AMENDMENT AND THE SUPREME COURT

*Douglas G. Smith\**

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After decades of silence, the Supreme Court is finally addressing the meaning of the Second Amendment. In *District of Columbia v. Heller*, the Court will consider the narrow issue of whether the Second Amendment protects an individual right to bear arms, as opposed to a more limited right to participate in a state-run militia. The case arises in the context of a District of Columbia statute that completely bans the possession of hand guns and imposes significant restrictions on other firearms. The U.S. Court of Appeals for the District of Columbia Circuit in a split decision held that the Second Amendment guarantees an

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individual right, a determination that has been the subject of significant controversy.<sup>1</sup>

Examining the court of appeals' decisions, the arguments on both sides, and the wealth of academic literature that has been published on the topic, there is substantial support for the court of appeals' conclusion that the Second amendment guarantees an individual right to keep and bear arms. The historical record demonstrates that the right was viewed as existing prior to the formation of our nation's government and the adoption of the Constitution. The Second Amendment protects this right, which by its plain terms belongs to "the people" and "shall not be infringed."<sup>2</sup>

This conclusion is dictated by the Second Amendment's plain language, and in particular its specific reference to a right retained by "the people." The term is unambiguous and is used elsewhere in the Bill of Rights to protect rights enjoyed by citizens in their individual capacities. The Supreme Court has made clear that "the people" protected by the Bill of Rights are the entire "class of persons who are part of [the] national community"<sup>3</sup>—not, as the District posits—a subset of such persons such as an organized, state-run militia.

The District's suggestion that the Second Amendment has an "exclusively military purpose" ignores the plain text of the amendment's operative clause, as well as the Supreme Court's construction of its terms. Moreover, it is based on a construction of the amendment's prefatory clause that is demonstrably wrong.

*First*, the District assumes that the Second Amendment's prefatory clause can alter its operative meaning. However, basic rules of grammar as well as the Supreme Court's settled precedent make clear that a prefatory clause cannot compel a result contrary to the meaning of a provision's operative language. Indeed, it is common for prefatory language to state a principle or purpose narrower than the operative language used to achieve it. In such situations, the Court has held that the operative language is controlling.

*Second*, the District misconstrues the prefatory clause's plain meaning in arguing that it is intended to protect solely the States' right to form a militia. While the clause suggests that ensuring a well-regulated militia is one purpose of the right to keep and bear arms, it does not state that this is the exclusive purpose. Nor does it limit the right to "military purpose[s]" or otherwise exclude persons who are not members of an organized militia. To the contrary, the Founders understood the term "militia" to encompass "the people" at large. Indeed, that has been the consistent understanding of the term from the Founding Generation to the present day.

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<sup>1</sup> Numerous parties filed *amicus* briefs supporting both petitioners and respondent. The author of this article filed an *amicus curiae* brief in support of respondent.

<sup>2</sup> U.S. CONST. amend. II.

<sup>3</sup> See *infra* at 3-5.

Accordingly, text of the Second Amendment, its structure, and the historical record all demonstrate that the amendment guaranteed a fundamental, individual right. The court of appeals' decision so holding thus has substantial support.

I. THE OPERATIVE LANGUAGE OF THE SECOND AMENDMENT  
GUARANTEES AN INDIVIDUAL RIGHT TO KEEP AND BEAR  
ARMS.

The Second Amendment's operative language protects the "right" of "the people" to keep and bear arms.<sup>4</sup> The Framers' choice of words is telling and, indeed, dispositive of the question before the Court. The text recognizes a "right," not a "power." It guarantees that right to "the people," not "the states" or state-organized militias. The actions protected by the right—"keep[ing] and bear[ing] arms"—are broadly defined and do not exclude private action. Taken together, these words indicate that the amendment protects a fundamental, individual right.

A. *The Second Amendment's Operative Clause Guarantees  
"The People" The "Right" To Keep And Bear Arms.*

The amendment's use of the word "right" is significant. There is not a single instance in which the Constitution confers a "right" to government. "Nor does it confer any 'right' restricted to persons in governmental service, such as members of an organized military unit."<sup>5</sup> Rather, the Constitution secures rights of individuals *against* government overreaching.<sup>6</sup> "By contrast, governments, whether state or federal, have in the Constitution only 'powers' or 'authority.'"<sup>7</sup> It would be a "marked anomaly" indeed if the word "right" in the Second Amendment departed from that term's uniform usage throughout the rest of the Constitution.<sup>8</sup>

Lest there be any doubt what the Framers intended by use of the term "right," they explicitly guaranteed the right to bear arms contained in the Second Amendment to "the people." "People" is the most instructive word in the amendment. The "people" hold the right—not organized,

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<sup>4</sup> U.S. CONST. amend. II.

<sup>5</sup> *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel 11 (Aug. 24, 2004), available at [www.usdoj.gov/olc/secondamendment2.pdf](http://www.usdoj.gov/olc/secondamendment2.pdf).

<sup>6</sup> Elbridge Gerry made this point during the First Congress: "This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government." 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1107 (1971) (Aug. 17, 1789). Likewise, the Supreme Court has explained that "the first 10 amendments" were intended "to embody certain guaranties and immunities which we had inherited from our English ancestors." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). The *Robertson* Court read the Second Amendment *in pari materia* with other Bill of Rights provisions to protect pre-existing rights from government overreaching.

<sup>7</sup> *Id.* (citing U.S. CONST. art. I, § 1; art. I, § 8; art. II, § 1; art. III, § 1; amend. X).

<sup>8</sup> *See id.*

state-run military organizations, and not the states themselves. The term is also found in the First, Fourth, and Ninth Amendments, and “[i]t has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation.”<sup>9</sup> Where the Framers intended to preserve the powers of the States they knew how to do so and used quite different language. The Tenth Amendment, for example, makes clear that the Framers were “perfectly capable of distinguishing between ‘the people,’ on one hand, and ‘the states,’ on the other.”<sup>10</sup>

While the District suggests that individuals may exercise their Second Amendment rights “only as part of the state-regulated militia”—*i.e.*, an “organized and trained military force, led by state-chosen officers,”<sup>11</sup> the amendment’s text does not support this construction. The Supreme Court has made clear in decisions such as *United States v. Verdugo-Urquidez* that “the people” protected by the Second Amendment are the same people protected throughout the Bill of Rights:

“[T]he people” seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by “the People of the United States.” The Second Amendment protects “the right of the people to keep and bear Arms,” and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to “the people”.... [This] suggests 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.<sup>12</sup>

In particular, the Court has determined that “the people” has the same meaning in the First, Second, Fourth, and Ninth Amendments. It is beyond cavil that “the people” enjoy *individual rights* under those provisions.<sup>13</sup> If the phrase “the people” is interpreted consistently—as the Supreme Court instructed in *Verdugo-*

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<sup>9</sup> *Parker v. District of Columbia*, 478 F.3d 370, 381 (D.C. Cir. 2007).

<sup>10</sup> *Id.*; see AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 51 (2000) (“[W]hen the Constitution means ‘states,’ it says so.”).

<sup>11</sup> Petitioners’ Brief, *District of Columbia v. Heller*, No. 07-209, at 14, 21 (Jan. 4, 2008) (hereinafter “Petitioners’ Brief”).

<sup>12</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>13</sup> See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (“The freedom of speech ... secured by the First Amendment ... [is] among the fundamental *personal rights* and liberties which are secured to *all persons* ....”) (emphasis added); *Rakas v. Illinois*, 439 U.S. 128, 138 (1978) (“the ‘rights assured by the Fourth Amendment are personal rights’”) (citation omitted).

*Urquidez*—one can only conclude that the Second Amendment protects the personal right of *individuals* to keep and bear arms.

Thus, both the plain language of the Second Amendment and the structure of the Bill of Rights make clear that the amendment protects the rights of individuals, rather than the states or state-run organizations. Indeed, it is a basic principle of interpretation that words or provisions “are known by their companions.”<sup>14</sup> Where items in a list share an attribute, that fact “counsels in favor of interpreting the other items as possessing that attribute as well.”<sup>15</sup> “Every other provision of the Bill of Rights, excepting the Tenth, which speaks explicitly about the allocation of governmental power, protects rights enjoyed by citizens in their individual capacity.”<sup>16</sup> Accordingly, the court of appeals correctly concluded that “[t]he Second Amendment would be an inexplicable aberration if it were not read to protect individual rights as well.”<sup>17</sup>

In sum, the collectivist interpretation advanced by the District makes sense only if one ignores the plain meanings of the words “right” and “people,” as each is consistently applied throughout the Constitution and the Bill of Rights; the Supreme Court’s precedents interpreting those key terms; and the most basic canons of interpretation. Such a strained interpretation cannot stand when there is a natural reading that gives full effect to the text. The text means what it says: the “right” belongs to “the people.”

*B. The Right “To Keep And Bear Arms” Protects Private Conduct.*

The District’s contention that the Second Amendment’s use of the phrase “keep and bear arms” evidences a “distinctly military cast” fares no better.<sup>18</sup> The District’s suggestion that the phrase “bear arms” refers only to “using weapons in a military context” is belied by the plain meaning of those terms and their history.<sup>19</sup> And its attempt to interpret the word “keep” as a mere corollary of the term “bear” would read the term out of the amendment altogether.<sup>20</sup>

Once again, the District’s interpretation of the Second Amendment only works if the reader is willing to eschew the text’s most natural meaning in favor of a strained and unnatural interpretation. Neither “keep” nor “bear” has an exclusively military construction. “Keep”

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<sup>14</sup> *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (“[A] word is known by the company it keeps”).

<sup>15</sup> *Beecham v. United States*, 511 U.S. 368, 371 (1994).

<sup>16</sup> *Parker*, 478 F.3d at 383.

<sup>17</sup> *Id.*

<sup>18</sup> Petitioners’ Brief at 15.

<sup>19</sup> *Id.* at 15-16.

<sup>20</sup> *See id.* at 17 (“Securing their right to ‘keep’ those arms would ensure that they could ‘bear’ them.”).

meant much the same thing at the Founding that it means today. Samuel Johnson's dictionary defined "keep" as "to retain; not to lose," "to have in custody," to "preserve; not to let go."<sup>21</sup> Similarly, Noah Webster defined "keep" as "to hold" or "to have in custody."<sup>22</sup> Nothing about the word "keep" suggests an exclusively military use. To the contrary, the court of appeals correctly held that "the plain meaning of 'keep' strikes a mortal blow to the collective rights theory.... [It] is a straightforward term that implies ownership or possession ... by an individual for private use."<sup>23</sup>

The phrase "bear arms" is no more limited to military use. The court of appeals correctly found that leading dictionaries, including the original Webster's, demonstrate that the primary meaning of "bear" was "to carry."<sup>24</sup> Nor does the addition of the word "arms" restrict the term's meaning to exclusively military uses. To the contrary, at least ten states had contemporaneous constitutional provisions that used the phrase "bear arms" in a manner that included carrying arms for private purposes such as self-defense.<sup>25</sup> Indeed, "Pennsylvania, whose constitution of 1776 first used the phrase 'the right to bear arms,' did not even have a state militia."<sup>26</sup> It defies logic to read "bear arms" *only* in a military context, when the origins of the phrase did not have a military connotation at all.

Again, the District's position would require the Court to endorse a completely unnatural reading of the amendment's unambiguous language and interpret a phrase used without a military context in 1776 to denote *solely* a military context in 1789. It would likewise require the Court to ignore the common definitions of the terms "keep" and "bear" and ascribe to them an intent inconsistent with their usage in contemporaneous provisions. In sum, the District's construction is completely at odds with the amendment's plain meaning.

C. *The Historical Record Demonstrates That The Second Amendment Guaranteed An Individual Right To Bear Arms.*

The historical record further demonstrates the questionable nature of the District's construction. The Second Amendment was designed to guarantee pre-existing rights of individuals; not to protect the powers of

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<sup>21</sup> See JOHNSON'S AND WALKER'S ENGLISH DICTIONARIES COMBINED 540 (1830).

<sup>22</sup> WEBSTER, AMERICAN DICTIONARY (unpaginated) (1828).

<sup>23</sup> *Parker*, 478 F.3d at 386.

<sup>24</sup> *Id.* at 384.

<sup>25</sup> See *United States v. Emerson*, 270 F.3d 203, 230 n.29 (5th Cir. 2001) (collecting contemporaneous provisions); see also, e.g., PA. CONST. art. I, § 21 (1790) ("The right of the citizens to bear arms in defense of themselves and the State shall not be questioned."); KY. CONST. art. 10, ¶ 23 (1792) ("the right of the citizens to bear arms in defense of themselves and the State, shall not be questioned"); OHIO CONST. art. VIII, § 20 (1802) ("the people have a right to bear arms for the defense of themselves and the State").

<sup>26</sup> See LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 134-35 (1999).

the states. The right to keep and bear arms was viewed as a natural and inherent right that individuals possessed *before* the formation of any government, whether federal or state. As the Supreme Court has previously found: “The law is perfectly well settled that the first 10 amendments to the constitution ... were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors.”<sup>27</sup>

Here, the right “inherited from our English ancestors” was individual in nature and did not limit possession of firearms to collective purposes. England’s Declaration of Rights of 1689 guaranteed that Protestant subjects “may have Arms for their Defence suitable to their Conditions and as allowed by Law.”<sup>28</sup> This article set out a personal right not tied to military service. This understanding was shared by William Blackstone, whose works “constituted the preeminent authority on English law for the founding generation.”<sup>29</sup> Blackstone’s influential *Commentaries* refer to “the natural right of resistance and self preservation” and “having and using arms for self-preservation and defense.”<sup>30</sup> Indeed, he described the right of “self-defense” as “the primary law of nature” that cannot be “taken away by the law of society.”<sup>31</sup>

The Founding Generation well understood the right to bear arms as an individual, pre-existing right that would be protected, rather than created, through the Bill of Rights. In *Federalist No. 28*, Alexander Hamilton described the “original right” of self-defense that was “paramount to all positive forms of government.”<sup>32</sup> A 1768 town meeting led by Samuel Adams and John Hancock resolved that the English right was “founded in Nature, Reason, and sound Policy.”<sup>33</sup> Contemporaneous newspapers described that right as “a natural right which the people have reserved to themselves, confirmed by the [Declaration] of Rights, to keep arms for their own defence.”<sup>34</sup>

The Second Amendment did not purport to *create* the right to keep and bear arms—it guaranteed that the pre-existing right “shall not be infringed.” In doing so, the amendment merely declared what was

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<sup>27</sup> *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

<sup>28</sup> 1 W. & M., Sess. 2, c. 2, § 1 (1689); *see* *Nunn v. Georgia*, 1 Ga. 243, 249 (Ga. 1846) (finding that “the Constitution of the United States, in declaring that the right of the people to keep and bear arms, should not be infringed, only *reiterated a truth announced a century before*, in the act of 1689”) (emphasis added).

<sup>29</sup> *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>30</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*143-44.

<sup>31</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*4 (“Self-defense therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.”).

<sup>32</sup> THE FEDERALIST NO. 28, at 178.

<sup>33</sup> BOSTON CHRONICLE at 363 (Sept. 19, 1768), *quoted in* STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS 1-2 (1989).

<sup>34</sup> “Boston, March 17,” N.Y.J. Supp. at 1 (Apr. 13, 1769), *reprinted in* HALBROOK, *supra* note 33, at 7.



obvious to all: that each individual enjoyed a fundamental right to bear arms that was a corollary of one of the most fundamental rights—the right of self-defense.<sup>35</sup>

As a consequence, the right to bear arms cannot be viewed as a mere privilege to participate in a state-run militia or other organized fighting force. The Framers understood the right to exist *before* the creation of such entities. By necessity, it was an individual right that was a corollary to the fundamental right to defend oneself against *all* potential antagonists, not merely those at odds with the government or state-run militias.

## II. THE PREFATORY CLAUSE OF THE SECOND AMENDMENT DOES NOT LIMIT THE RIGHTS OF INDIVIDUALS WHO ARE NOT AFFILIATED WITH A STATE-REGULATED MILITIA.

Because the meaning of the terms used in the Second Amendment’s operative clause is so clear, in defending its prohibition on firearms possession, the District has largely ignored that language and instead focuses primarily on the amendment’s prefatory clause: “A well regulated Militia, being necessary to the security of a free State ....”<sup>36</sup> According to the District, the preamble limits the right to bear arms to those actively “servi[ng] in a military organization.”<sup>37</sup> This assertion fails for at least two independent reasons.

### A. *The Second Amendment’s Operative Language Protecting The Right Of “The People” Is Not Controlled Or Limited By The Amendment’s Prefatory Clause.*

As a threshold matter, the District’s argument rests on the mistaken belief that a prefatory clause or preamble can compel a result contrary to the command of the operative clause. However, basic rules of grammar make clear that the preamble is independent of this operative clause and does not control its command language.<sup>38</sup> Thus, “the Second

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<sup>35</sup> See Philip Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919-20 (1993) (“the right of self-defense, the right to bear arms, and the right to assemble were said to be natural rights” that were specifically “enumerated in bills of rights”); Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1172 (1996) (“The fact that Madison and his colleagues believed individuals had a natural right both to freedom of speech and to possess arms for self-defense is crucial evidence that they meant exactly what they said in guaranteeing ‘the right of the people to keep and bear arms.’”).

<sup>36</sup> U.S. CONST. amend. II.

<sup>37</sup> Petitioners’ Brief at 14.

<sup>38</sup> See Nelson Lund, *D.C.’s Handgun Band and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. CIV. RTS. L.J. 229, 237 (2008) (“[Prefatory clauses] are grammatically independent of the rest of the sentence, and do not qualify any word in the operative clause to which they are appended.”). Professor Lund cites several grammar and rhetoric textbooks in support of this proposition. See *id.* at 237 n.25; see e.g., JOHN WILSON, *THE ELEMENTS OF PUNCTUATION* 4 (1857) (such clauses “are grammatically independent of the other portions of the sentence in which they occur”);

(Continued...)

Amendment has exactly the same meaning that it would have if the preamble had been omitted.”<sup>39</sup>

Indeed, at the time the Second Amendment was adopted and ratified, it was “quite common for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it.”<sup>40</sup> From the Founding to the present day, such clauses have consistently been understood to impose no limitation on the operative language that follows.<sup>41</sup>

This interpretive principle is as old as the Republic itself. The Supreme Court spoke definitively on the use of preambles a mere five years after the Second Amendment’s ratification. In *Ware v. Hylton*,<sup>42</sup> Justice Chase wrote that “the intention ... expressed in the preamble” may guide the Court where an operative clause is “ambiguous or doubtful.”<sup>43</sup> However, “if the words in the enacting clause, in their nature, import, and common understanding, are not ambiguous, but plain and clear, and their operation and effect certain, *there is no room for construction.*”<sup>44</sup>

Justice Story echoed these sentiments in his *Commentaries*. Writing about the preamble of the federal Constitution, Justice Story stated the prevailing view that preambles are “properly resorted to” only where “doubts or ambiguities arise upon the words of the enacting part.”<sup>45</sup> Where the operative language was unambiguous, however, Story observed that there was “little room for interpretation.”<sup>46</sup>

More than 100 years later, this Court reaffirmed *Ware*’s interpretive rule in *Jacobson v. Commonwealth of Massachusetts*.<sup>47</sup> Citing Story’s

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VIRGINIA WADDY, *ELEMENTS OF COMPOSITION AND RHETORIC* 13 (1889) (“The absolute phrase is without grammatical dependence on any other word.”).

<sup>39</sup> *Id.*

<sup>40</sup> *Parker*, 478 F.3d at 389.

<sup>41</sup> See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814-21 (1998) (listing dozens of examples roughly contemporaneous with the Second Amendment). For example, Professor Volokh has noted that the Massachusetts, New Hampshire, and Vermont constitutions each declared that freedom of speech in the legislature was “so essential to the rights of the people” that words spoken there could not be the basis of “any” suit. See *id.*; MASS. CONST. pt. I, art. XXI (1780); N.H. CONST. pt. I, art. XXX (1784); VT. CONST. ch. I, art. XVI (1786). Under the District’s approach, speech not “essential to the rights of the people,” such as personal slanders unrelated to a pending bill, would not be protected by such provisions. Nonetheless, the consensus at the time was just the opposite: such speech was in fact clearly covered by the immunity conferred by the operative language of these provisions despite the language in the preambles. See *Volokh*, 73 N.Y.U. L. REV. at 799.

<sup>42</sup> 3 U.S. 199 (1796).

<sup>43</sup> *Id.* at 233.

<sup>44</sup> *Id.* (emphasis added).

<sup>45</sup> JOSEPH STORY, 1 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 459, at 443 (1833, reprint 1991).

<sup>46</sup> *Id.*

<sup>47</sup> 197 U.S. 11 (1905).

*Commentaries*, the Court held that the Constitution’s preamble lacks any operative legal effect.<sup>48</sup> Although the preamble states the Constitution’s “general purposes,” it is not a source of substantive rights or powers and cannot be used to confound clear operative language.<sup>49</sup>

Thus, the Supreme Court has consistently rejected the mode of interpretation suggested by the District. There is no reason to except the Second Amendment from this well-settled interpretive rule. Whatever the meaning of the Second Amendment’s prefatory clause, its operative clause states plainly that “[t]he people” have a “right” to “keep and bear arms,” and that this right “shall not be infringed.”<sup>50</sup> The language in the prefatory clause cannot change this clear command.

B. *The Second Amendment’s Prefatory Clause Refutes the “Collective Rights” View.*

Were the prefatory clause controlling, it would only further refute the District’s “collective rights” interpretation. The District suggests that the use of the term “well regulated Militia” limits the right to members of “an organized and trained military force, led by state-chosen officers.”<sup>51</sup> However, this interpretation rests on a narrow reading of “militia” that is inconsistent with the common understanding of this term from the Founding Generation to the present day.

“In 1789, when used without any qualifying adjective, ‘the militia’ referred to all citizens capable of bearing arms.”<sup>52</sup> For example, the Virginia Declaration of Rights, which was adopted in June 1776 and heavily influenced both the Declaration of Independence and the Bill of Rights, explicitly defines “well regulated militia” as “the body of the people.”<sup>53</sup> Likewise, participants in the Virginia and North Carolina ratifying conventions each spoke of “a well regulated militia composed of the body of the people.”<sup>54</sup> Indeed, the common understanding of the term was “the able bodied men ... left to pursue their usual occupations ... but not engaged in actual service except in emergencies.”<sup>55</sup>

James Madison articulated this view in *Federalist No. 46*, where he described the militia as “amounting to near half a million citizens with

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<sup>48</sup> *See id.* at 22.

<sup>49</sup> *Id.*

<sup>50</sup> U.S. CONST. amend. II.

<sup>51</sup> Petitioners’ Brief at 14

<sup>52</sup> AMAR, *supra* note 10, at 51.

<sup>53</sup> *See* Virginia Declaration of Rights art. XIII; *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 136 n.13 (1997) (citing the Virginia Declaration of Rights).

<sup>54</sup> RATIFICATIONS AND RESOLUTIONS OF SEVEN STATE CONVENTIONS (1788), *reprinted in* 2 DEBATE ON THE CONSTITUTION 561 568 (Lib. of Am. 1993).

<sup>55</sup> WEBSTER, AMERICAN DICTIONARY (unpaginated) (1828).

arms in their hands.”<sup>56</sup> In *Federalist No. 29*, Alexander Hamilton echoed this interpretation, describing the militia as “the great body of the yeomanry, and of the other classes of the citizens,” indeed “the whole nation.”<sup>57</sup> George Mason—who was the principal author of the Virginia Declaration of Rights and is often described as the “Father of the Bill of Rights”—defined the militia in the clearest possible terms. “Who are the Militia? They consist now of the whole people.”<sup>58</sup>

To the Framers, the “militia were the people and the people were the militia.”<sup>59</sup> Indeed, the initial version of the Second Amendment that passed the House of Representatives expressly defined the militia as “composed of the body of the people.”<sup>60</sup> The amendment was “stylistically shortened in the Senate” to omit this express definition.<sup>61</sup> Nonetheless, the drafting history demonstrates that the Framers understood the term “militia” to be coextensive with “the people.”

The second Militia Act, passed by the Second Congress less than one year after the Bill of Rights was ratified, confirms the Framers’ broad understanding of the term “militia.” The Act defined the militia as “each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years.”<sup>62</sup> Thus, the historical record demonstrates that the “militia” was comprised of the able-bodied population and was *not* limited to the “organized and trained military force[s]” suggested by the District.<sup>63</sup>

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<sup>56</sup> THE FEDERALIST NO. 46, at 321-22.

<sup>57</sup> THE FEDERALIST NO. 29, at 183-85.

<sup>58</sup> 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 425 (3d ed. 1937) (statement of George Mason, June 14, 1788). By contrast, there are *no* contemporaneous authorities supporting the District’s collectivist interpretation. “If anyone entertained this notion in the period during which the Constitution and the Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing [] between 1787 and 1791 states such a thesis.” STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 83 (1984).

<sup>59</sup> AKHIL AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 323 (2005).

<sup>60</sup> AMAR, *supra* note 10, at 51-52 (quoting EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 214 (1957)); *see* AMAR, *supra* note 59, at 323 (quoting *Senate Journal*, 1:63 (Aug. 25, 1789)).

<sup>61</sup> AMAR, *supra* note 10, at 51-52.

<sup>62</sup> Militia Act, 1 Stat. 271 (1792).

<sup>63</sup> The Supreme Court has made clear that “early congressional enactments” are “contemporaneous and weighty evidence of the Constitution’s meaning.” *Printz v. United States*, 521 U.S. 898, 905 (1997) (quotations and alteration omitted); *see* *Alden v. Maine*, 527 U.S. 706, 743-44 (1999) (“early congressional practice ... provides contemporaneous and weighty evidence of the Constitution’s meaning”) (quotations omitted); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). For example, in *Marsh v. Chambers*, the Supreme Court relied on contemporaneous congressional action to inform its interpretation of the First Amendment. *See* 463 U.S. at 790 (“It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for

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The Supreme Court recognized as much in *United States v. Miller*,<sup>64</sup> where it found that “the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators” all demonstrate that the “militia” referenced in the Second Amendment was comprised of “all males physically capable of acting in concert for the common defense”:

[T]he Militia [consists of] civilians primarily, soldiers on occasion. The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense.<sup>65</sup>

As the Court recognized, the entire concept of a militia was based on the spontaneous formation of an armed body comprised of ordinary citizens. “[O]rdinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”<sup>66</sup> While it is sometimes cited as support the collectivist interpretation of the Second Amendment, the Court’s analysis in *Miller* in fact affirmatively refutes the District’s contention that the Second Amendment’s protections are limited to members of “an organized and trained military force, led by state-chosen officers.”<sup>67</sup> The plain language of the prefatory clause contains no such limitation.

Indeed, this well-settled understanding of the term “militia” has persisted to the present day. Under current federal law, the “militia” consists of “all able-bodied males” between ages 17 and 45, as well as “female citizens [] who are members of the National Guard.”<sup>68</sup> The statute specifically distinguishes between the “organized militia,” which consists of the National Guard and Naval Militia, and the “unorganized militia,” which consists of members of the militia (*i.e.*, everyone who is “able-bodied” and between the ages of 17 and 45) who are *not* members of the National Guard or Naval Militia. Now, as in 1792, Congress defines the “militia” quite broadly.<sup>69</sup>

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submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.”); *see also* *Carroll v. United States*, 267 U.S. 132, 150-152 (1925) (looking to the actions of the First Congress in interpreting the Fourth Amendment).

<sup>64</sup> 307 U.S. 174 (1939).

<sup>65</sup> *Id.* at 179.

<sup>66</sup> *Id.*

<sup>67</sup> *See* Petitioners’ Brief at 14.

<sup>68</sup> 10 U.S.C. § 311.

<sup>69</sup> The statutory definition has changed little, except in ways that have extended its scope to include minorities and women. At the time the Supreme Court decided *Miller*, federal law defined “the militia” as “all able-bodied male citizens of the United States and all other able-bodied males who have declared their intention to become citizens of the

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Likewise, outside of the *Heller* litigation, the District of Columbia itself has employed a broad definition of “militia” that is nearly identical to that found in the U.S. Code. The district defines militia as “[e]very able-bodied male citizen resident within the District of Columbia, of the age of 18 years and under the age of 45 years,” with only a few narrow exceptions for mental illness or criminal background.<sup>70</sup> Thus, its own statutory definition of the term demonstrates that the militia is not limited to “organized and trained military force[s]” under state control.<sup>71</sup>

In sum, the District’s construction of the Second Amendment is at odds with its well-settled and longstanding meaning. The historical record is clear: the Second Amendment’s protections have always extended to the general populace. Interpretations of the clause at the time of its ratification, parallel state constitutional provisions such as that found in the Virginia Declaration of Rights, and statutory definitions beginning in the 1790s and continuing through the present day all demonstrate that the prefatory clause plainly contemplates that the Second Amendment guarantees an individual right.

III. WHILE THE APPROPRIATE STANDARD OF REVIEW IS NOT  
BEFORE THE SUPREME COURT, THE SECOND AMENDMENT  
GUARANTEES A FUNDAMENTAL RIGHT AND ALLEGED  
VIOLATIONS OF THE AMENDMENT ARE THEREFORE SUBJECT TO  
STRICT SCRUTINY.

Finally, while the District and certain *amici* in the *Heller* case have presented various arguments concerning the appropriate standard for reviewing potential violations of the Second Amendment, the standard of review is arguably not properly before the Court. The Supreme Court does not consider issues not “‘fairly included’ in the question presented.”<sup>72</sup> Nor does it address issues “not presented to, or ruled on by, any lower court.”<sup>73</sup> The Court granted *certiorari* to address a narrowly-circumscribed question: whether the Second Amendment applies to “individuals who are not affiliated with any state-regulated militia.” The Court did not grant review to ascertain the appropriate standard of review governing alleged violations of the Second Amendment. Nor is the standard even raised by the court of appeals’ decision.

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United States,” between the ages of 18 and 45 years of age. National Defense Act, ch. 134, § 57, 39 Stat. 166, 197 (1916). The statute specifically distinguished between the organized militia, which consisted of the National Guard and Naval Militia, and the “Unorganized Militia,” which consisted of everybody else. *Id.*

<sup>70</sup> D.C. CODE § 49-401.

<sup>71</sup> *See* Petitioners’ Brief at 14.

<sup>72</sup> *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 (1993).

<sup>73</sup> *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 280 (1993).

The government action at issue involved an absolute prohibition on the possession of certain firearms.<sup>74</sup> Such action is unconstitutional under *any* applicable standard. Thus, *Heller* raises only the threshold question of whether the amendment is even applicable: “Once it is determined ... that handguns are ‘Arms’ referred to in the Second Amendment, it is not open to the District to ban them.”<sup>75</sup> It does not raise any issue regarding the governing standard—a question the court of appeals did not reach.

Nor has the appropriate standard been treated at any length in the decisions of other appellate courts. As such, had it been raised, consideration of this question would be premature. The Court has “in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by th[e] Court.”<sup>76</sup>

Nonetheless, the framework articulated by the Supreme Court makes clear that alleged violations of the Second Amendment are subject to strict scrutiny. Strict scrutiny applies to “fundamental” rights that are “‘deeply rooted in this Nation’s history and tradition.’”<sup>77</sup> The right to bear arms has always been viewed as a “fundamental right.” For example, John Locke maintained that the right to armed self-defense was “so necessary to, and closely tied with, a man’s preservation, that he cannot part with it but by what he forfeits his preservation and life together.”<sup>78</sup> Likewise, William Blackstone recognized that the right to bear arms in the English Bill of Rights acknowledged “the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”<sup>79</sup> One of the most prominent early American commentators, St. George Tucker, described the Second Amendment as equivalent to Blackstone’s “right of self-defence [which] is the first law of nature.”<sup>80</sup> Consistent with this

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<sup>74</sup> See *Parker*, 478 F.3d at 376 (“At oral argument, counsel for the District maintained that ... D.C.’s firearm registration system amounts to a *complete prohibition on handgun ownership*.”) (emphasis added).

<sup>75</sup> *Id.* at 400.

<sup>76</sup> *Arizona v. Evans*, 514 U.S. 1, 25 n.1 (1995) (Ginsburg & Stevens, J.J., dissenting); see *McCray v. New York*, 461 U.S. 961, 963 (1983) (“it is a sound exercise of discretion” to allow other courts “to serve as laboratories in which the issue receives further study before it is addressed by this Court”).

<sup>77</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977)); see also *Burson v. Freeman*, 504 U.S. 191 (1992).

<sup>78</sup> JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* 23 (1690) (reprinted Hackett ed. 1980).

<sup>79</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*143-44.

<sup>80</sup> 1 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES* 143, 300 (1803).

view, *Federalist No. 28* recognizes an “original right of self-defense which is paramount to all positive forms of government.”<sup>81</sup>

The position of this guarantee within the Bill of Rights underscores the fundamental nature of this right. The right to keep and bear arms was enshrined in the *Second* Amendment, thus demonstrating the importance the Framers placed on this fundamental freedom. The right is therefore analogous to the rights of freedom of speech and political expression that are contained in the preceding amendment.<sup>82</sup> Relegating this fundamental right to mere “reasonableness” review would disregard both the constitutional text and history.<sup>83</sup>

The emphasis on the fundamental nature of the right to keep and bear arms continued through the Reconstruction Era and was reinforced by the Framers of the Fourteenth Amendment. They maintained that the Fourteenth Amendment was designed to protect the “rights guaranteed and secured by the first eight amendments to the Constitution, such as . . . the right to keep and bear arms” and made clear that “[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”<sup>84</sup> The right to bear arms, in particular, was critical to the newly-freed former slaves who were under constant threat of physical violence. The restrictions on gun ownership in the Southern States facilitated egregious violations of civil liberties that were of specific concern to the Framers of the Fourteenth Amendment.<sup>85</sup>

<sup>81</sup> THE FEDERALIST NO. 28, at 178.

<sup>82</sup> See *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (first amendment interests subject to strict scrutiny).

<sup>83</sup> See Petitioners’ Brief at 40-59.

<sup>84</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (Senator Howard). See also *id.* at 1182 (Senator Pomeroy) (every citizen “should have the right to bear arms for the defense of himself and family and his homestead”); AMAR, *supra* note 10, at 265-66 (arguing that the Fourteenth Amendment strengthened the individual-rights reading of the Second Amendment); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 104 (1986) (“[a]mong the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech . . . due process . . . and the right to bear arms.”); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998).

<sup>85</sup> See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 345 (1991) (the fact that “freedmen were being deprived of the right to bear arms [under Southern Black Codes] was of particular concern” to the Framers of the Fourteenth Amendment because it could lead to “virtual reenslavement of those formerly held in bondage”); AMAR, *supra* note 10, at 264, 266; HALBROOK, *supra* note 84, at 1-55.

Thus, for example, the Reconstruction Congress passed the Freedman’s Bureau Act, which specifically guaranteed “full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . . , including the constitutional right to bear arms.” 14 Stat. 173, 176 (1866). The Act’s language was “derived directly from Blackstone’s influential chapter on ‘The Absolute Rights of Individuals.’” AMAR, *supra* note 10, at 261. In that chapter, Blackstone made clear that a right to “hav[e] arms” was necessary to protecting the “primary rights” of security, liberty, and property, as well as the “ultimate individual right of ‘self-preservation.’” *Id.* at 261-62.



This understanding has continued to the present day. Public opinion polls continue to demonstrate that a broad majority views gun ownership as a fundamental, individual liberty.<sup>86</sup> Indeed, it is widely viewed as the ultimate guarantor of other fundamental constitutional rights. As such, the appropriate standard of review is plainly strict scrutiny.

#### IV. CONCLUSION

While the *Heller* case has generated significant controversy, resolution of the narrow question before the Court seems fairly straightforward. The text, structure, and history of the Second Amendment all suggest that the amendment was designed to guarantee a fundamental, individual right. The contrary reading supported by the District would require the Court to largely ignore the operative language of the amendment and the plain meaning of its terms. It would also require the Court to disregard the historical record unearthed by commentators demonstrating that the Founding Generation understood the amendment as merely guaranteeing a preexisting natural right that did not depend on government for its creation. While there may be some dispute regarding the appropriate standard of review for evaluating alleged violations of this right, there can be little dispute regarding the basic and highly individual nature of the right.

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<sup>86</sup> See Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 784 n.29 (1997) (collecting polling data showing that between 53% and 88% of the population believe that the Second Amendment guarantees a fundamental, individual right to bear arms).