No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA AND
MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF THE ALASKA OUTDOOR COUNCIL, ALASKA FISH AND WILDLIFE CONSERVATION FUND, SITKA SPORTSMAN'S ASSOC., JUNEAU RIFLE AND PISTOL CLUB, JUNEAU GUN CLUB, AND ALASKA TERRITORIAL SPORTSMEN, INC. AS AMICI CURIAE SUPPORTING THE RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The Alaska Outdoor Council, Inc. is an association of small Alaska clubs and individual Alaskans, first incorporated in Alaska in 1955; it is dedicated to the preservation of outdoor pursuits in Alaska such as hunting, fishing, trapping and shooting sports. It is also dedicated to public access to and conservation of the habitats on which these activities take place.

The Alaska Fish and Wildlife Fund is a charitable organization; its mission is to use education, research, and in some cases litigation, to protect and preserve Alaska's unique heritage of hunting, fishing and trapping. It also supports the private ownership of firearms as part of America's hunting heritage.

The Sitka Sportsman's Association is an Alaskan non-profit corporation located in Sitka, Alaska; it traces its origin to the 1950's. The Sitka Sportsman's Association's mission is to promote, protect and encourage outdoor recreational facilities and shooting sports in the Sitka area. The Sitka Sportsman's Association sponsors pistol shooting leagues, skeet and trap shooting and an annual running/shooting

[1] The parties in this case have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the Amici Curiae, their members, and their counsel, contributed money or services to the preparation or submission of this brief.

biathlon. The Association also sponsors education classes on hunter safety and the safe handling of firearms.

The Juneau Rifle and Pistol Club is an Alaskan organization located in Juneau, Alaska. Its purpose is to educate the community about the safe handling and proper care of firearms, to encourage and facilitate organized rifle and pistol shooting matches in the Juneau community, and to sponsor instruction programs to improve marksmanship.

The Juneau Gun Club is an Alaskan non-profit corporation located in Juneau, Alaska whose purpose is to encourage the sport of trap shooting and educate its members about this sport. The Juneau Gun Club also sponsors a trap shooting league and operates a local trap shooting range.

The Territorial Sportsmen, Inc. is an Alaskan organization located in Juneau, Alaska. Its mission is to promote the conservation and maintenance of healthy fish and wildlife populations and their habitats. It also sponsors educational programs in the community related to fish and wildlife conservation. The Territorial Sportsmen also promotes equitable fishing and hunting rights for Alaskans and compliance with hunting and fishing regulations; the Territorial Sportsmen also encourages firearm safety.

All of these Alaskan organizations are concerned with promoting hunting and shooting sports among its members and in the community at large; they have a particular interest in the Court having an

informed understanding of a principal purpose of the Second Amendment and its relation to the right of an individual to own and possess firearms.

SUMMARY OF ARGUMENT

> *"[Tyrannies] . . . mistrust the people, and therefore deprive them of their arms."*
>
> *Aristotle*[2]

Mr. Heller resides in the District of Columbia in a high crime area; open-air drug markets are located in the vicinity of his home. J.A.76a. He wants to keep a functional handgun in his home for self-protection. J.A.77a. However, he is prohibited from doing so because of certain laws enacted by the District of Columbia.

The District justifies Mr. Heller's situation by claiming 1) there is no Second Amendment right for an individual citizen to keep a firearm for private purposes, and 2) even if there is such a right, the District's laws are a reasonable regulation of this right.

The Alaskan amici will argue that the District of Columbia's claim that the Second Amendment only guarantees the collective right of states to organize and equip their militias has no basis in a logical

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[2] Aristotle, *The Politics of Aristotle*, Book V, Chap. 10, 171 (B. Jowett, trans., Oxford, Clarendon Press 1885).

analysis of the text of the Amendment. According to the District, the word "militia" and the phrase "well regulated militia" both mean the same thing: a military force organized and equipped by the state. This is a mistake. In order to understanding the phrase "well regulated militia", one must first understand the meaning of the word "militia". And at the time the Second Amendment was drafted, "militia" referred to an unorganized and unregulated body of armed citizens – an armed citizenry. In order for a well regulated militia to exist, there must first be a body of armed citizens. So it is that the substantive clause of the Second Amendment guarantees "the right of the people to keep and bear Arms". Simply put, the existence of a well regulated militia rests on the prior existence of an armed citizenry.

A second problem with the District's collective right theory is that it undercuts a principal purpose of the Second Amendment. Political philosophers throughout history, from Aristotle to Justice Story, have remarked on the importance of an armed citizenry in resisting tyranny. Drawing on their knowledge of the history of earlier republics as well as their familiarity with classical political thought, the founding generation concluded that the long-term security of a free state necessarily depends upon an armed citizenry. An armed citizenry, they thought, will act as a check and deterrent against usurpation of legitimate government and the arbitrary power of overly ambitious rulers. They did not believe that an armed

state exercising political power over an unarmed citizenry will always act out of benevolence.

The District's claim that the Second Amendment guarantees only a collective right of the states to organize, regulate and equip militias draws no support from the political thought that influenced the founding generation. To the contrary, the collective rights theory is a twentieth century notion that is heavily influenced by German political thought that understands the state as a political institution that *must* have an exclusive monopoly on the use of legitimate force. The short answer to the District's position is this: the Constitution does not enact Max Weber's social and political theories.

Given that the logic, the text, and the historical background of the Second Amendment provide no support for the District's collective right theory, the Second Amendment must be understood to guarantee the right of an individual to "keep and bear" arms for private purposes unrelated to any affiliation with a state-regulated militia.

Lastly, the amici argue that the scope of the Second Amendment's guarantee of an individual's "right to keep and bear Arms" necessarily encompasses the fundamental right of self-defense, a right also recognized by the Ninth Amendment. The Second Amendment, therefore, guarantees the fundamental right of self-defense together with its corollary, "the right to keep and bear Arms" for self-defense. The District of Columbia's three laws under review, then,

since they amount to an outright prohibition of the guaranteed right of an individual "to keep and bear" a functional firearm for the private purpose of self-defense, constitute a *per se* violation of the Second Amendment. They eviscerate this right and render it worthless.

Alternatively, the amici argue that the District's laws must meet the standard of strict scrutiny. The argument concludes that none of the three laws meet this standard and that all three laws under review must be found to violate the Second Amendment's guarantee of Mr. Heller's right to "keep and bear Arms".

ARGUMENT

I. THE DISTRICT'S CLAIM THAT THE SECOND AMENDMENT DOES NOT PROTECT AN INDIVIDUAL RIGHT TO "KEEP AND BEAR ARMS" IS NOT SUPPORTED BY A LOGICAL ANALYSIS OF THE TEXT OF THE AMENDMENT.

The Second Amendment reads as follows: *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

The District's position that the Second Amendment protects only the collective right of the states to maintain an effective militia is often termed the states' rights view.

To prove the truth of this claim, the District must show that the ordinary meaning ascribed to the language of the Second Amendment demonstrates that it does not protect an individual right to "keep and bear" arms.

In other words, the District must show that the first and second propositions below are logically equivalent to the third proposition:

> 1) A well regulated Militia, being necessary to the security of a free State, the right of the States to organize, arm and equip its Militias shall not be infringed.
>
> 2) Congress shall have no power to prohibit state-organized and directed Militias.
>
> 3) 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.

But the problem for the District is that third proposition has an entirely different meaning from the first two. There is no logical equivalence here.

A. The District's Argument overlooks the Fact that the Word "Militia" has an Entirely Different Meaning from the Phrase "a Well Regulated Militia".

Despite the lack of logical equivalence, the District proceeds to construct an argument based on the

assumption that it is reasonable to believe that the following premises are true:

> a) the word "militia" *and* the phrase "well regulated militia", as it appears in the prefatory clause of the Second Amendment, mean the same thing: "an organized and trained military force led by state-chosen officers";[3]
>
> b) the phrase "keep and bear" in the Second Amendment's guarantee of " . . . the right of the people to keep and bear Arms" guarantees the right of members of a well-organized state militia to "keep" arms so that they can " bear" them for military purposes,[4] and
>
> c) the meaning of the prefatory clause of the Amendment shapes and completely defines the meaning of the substantive clause, i.e., "the right of the people to keep and bear Arms shall not be infringed."[5]

Using the above premises in its argument, the District concludes the term "people" in the substantive clause of the Amendment refers to individuals who are members of an organized military force established and actively maintained by the state. There is only one problem. The District has failed to show that it is reasonable to believe that the three premises of its argument are true.

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[3] Petitioners' Brief at 12-14.

[4] *Id.* at 16-17.

[5] *Id*. at 17-18.

The District's attempt to derive a collective right of the states from the language of the Second Amendment works only if one views the phrase "well regulated militia" as a single word that is logically equivalent to the term "militia". In other words, the District conflates the meaning of "militia" with that of a "well regulated militia".

But it is difficult to see how this can be done in a rational way. The adjective/verb "well regulated" modifies and tells us something about the noun "militia". For the entire phrase to be intelligible, one must first understand the meaning of the word "militia". For example, consider the sentence "Alaska has a well regulated militia". This sentence makes two assertions: 1) Alaska has a militia and 2) Alaska's militia is well regulated. In order to understand the meaning of the full sentence, one must understand the meaning of "well regulated" and the meaning of "militia".

If, then, the term "militia" means something other than "an organized and trained military force led by state-chosen officers", if, for example, it refers to an unorganized body of armed citizens, then a clear distinction must be drawn between a "militia" and a "well regulated militia". And if the word "militia" refers to an armed body of citizens, then any question about the meaning of the Second Amendment is easily resolved: the Amendment, by protecting the individual right of citizens to keep arms, makes the existence of a well organized militia possible. In other

words, the former is a necessary condition for the existence of the latter.

In fact, this is exactly how the word "militia" was understood at the time the Second Amendment was drafted. As evidenced by its common usage at this time, the ordinary meaning of "militia" was understood by the founding generation to refer to "the whole body of the people".[6] Richard Henry Lee, proposing that a Bill of Rights be part of the Constitution before ratification, argued that "to preserve liberty, it is essential that the whole body of the people always possess arms."[7] George Mason, at the ratification convention in Virginia, asked and answered his own question: "Who are the militia, they consist now of the whole people, except a few public officers."[8]

The Second Militia Act of 1792 also makes it clear that a militia at this time was understood to be an unorganized body of armed males that make up the raw material out of which a regulated and organized military force can be formed.[9] Sec. 1 of the Act called for all male citizens of the states between 18 and 45

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[6] Donald B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L.R. 204, 216 n.51 (1982).

[7] Richard H. Lee, *An Additional Number of Letters From the Federal Farmer* 170 (1788).

[8] 3 *Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 425-26 (Jonathan Elliot ed., 2d ed. 1891).

[9] Act of May 8, 1792, ch. XXXIII, 1 Stat. 271.

years of age be enrolled or listed as members of the militia and required each of these citizens to arm himself.[10] Section 3 of the Act required that this unorganized body of citizens then be regulated and organized "into divisions, brigades, regiments, battalions and companies. . . ."[11] And Section 4 of the Act further defined how each battalion should be organized:

> *And be it further enacted*, That out of the Militia enrolled as is herein directed, there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen;. . . . [12]

At the time the Second Amendment was drafted and adopted, it is clear that the word "militia" simply referred to a body of armed citizens, unorganized and unregulated. The purpose of the Second Militia Act was to turn this unorganized and unregulated body into a regulated and disciplined fighting force.

This meaning of "militia" continued up through the passage of the Dick Act in 1903 that created today's National Guard.[13] The Act "divided the class of able-bodied male citizens" of a certain age into an "organized militia" and "unorganized militia":

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[10] *Id*., Section 1.

[11] *Id*., Section 3.

[12] *Id*., Section 4.

[13] The Act of January 21, 1903, 32 Stat. 775.

> The Dick Act divided the class of able-bodied male citizens between 18 and 45 years of age into "organized militia" to be known as the National Guard of the several States, and the remainder of which was then described as the "reserve militia", which later statutes have termed the "unorganized militia."

Perpich v. Department of Defense, 496 U.S. 334, 342 (1990).

Moreover, the District's understanding of "militia" to be "a military force established and maintained by the government" makes the phrase "well maintained" superfluous, adding nothing to the word "militia". (As an aside, what makes the District's position in this regard even more puzzling is that it is fully aware of the semantic distinction between a "militia" and "well organized militia". It concedes this point in its brief: "The unorganized militia has no duties and receives no training or supervision by state-appointed officers." Petitioners' Brief at 14, note 2.

Given the term "militia", as it was understood at the time the Second Amendment was drafted and adopted, referred to the class of armed citizens, the language of the Amendment makes perfect sense; it draws a clear distinction between the body of ordinary citizens possessing arms ("the people") and a "well regulated militia". Aware that the former is necessary before the latter can even come it into existence, the Framers sought to protect the right of ordinary citizens to "keep and bear Arms". And they

intended to protect the right of ordinary citizens to "keep and bear Arms" because citizens, as a body of armed people, may at some future time find it necessary to defend "the security of a free State". And even if the body of armed citizens is organized into a "well regulated Militia" for this defense, the point remains that the right "to keep and bear Arms" is guaranteed for individual citizens, and not the state.

It is only by disregarding the definition of "militia" as an unorganized body of armed citizens, that the District is able to draw the conclusion that the word "people" in the substantive clause of the Second Amendment refers to members of state-organized militias.

B. The District's Assertion that the Words "Keep and Bear" in the Second Amendment simply mean "Keeping" Arms for the purpose of "Bearing Arms" in a Military Context is without Foundation.

The District attempts to make the case that at the time of the drafting of the Amendment, the word "bear" in the phrase "bear Arms", meant using arms in connection with military service. But Judge Silberman, writing for the Court of Appeals for the District of Columbia in the decision below, convincingly refuted this assertion by noting that "it is equally evident from a survey of late eighteenth- and early nineteenth-century state constitutional provisions that the public understanding of 'bear Arms'

also encompasses the carrying of arms for private purposes such as self-defense."[14] *See Parker v. District of Columbia*, 478 F.3d 370, 384 (D.C. Cir. 2007) (citations omitted) (emphasis added); cert. granted, *District of Columbia v. Heller* (same case), 76 USLW 3266 (U.S. November 20, 2007) (No. 07-290).

The District also argues that the Second Amendment's guarantee of "the right of the people to keep . . . Arms" refers to the right of militia members to "keep" arms so that they can bear them in a military sense. Rather than focus on the meaning of the word "keep", the District instead comes up with a circular and idiosyncratic definition of the word "keep" to mean "keeping arms for the purpose of bearing them in a military context". Judge Silberman concisely and persuasively dismisses this argument: "We think 'keep' is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use." *See Parker v. District of Columbia,* 478 F.3d at 385-86 (citations omitted).

The logic and plain text of the Second Amendment, then, clearly supports the view that it guarantees an individual right to "keep and bear Arms".

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[14] The "survey" that Judge Silberman is referring to here is to is found in *United States v. Emerson*, 270 F.3d 203, 230, n.29 (5th Cir. 2001).

C. The District's Notion that the Nature of a Right Specifically Guaranteed by the Constitution should be Understood by an Intended Purpose of the Guarantee is Mistaken.

The understanding that the Second Amendment guarantees an individual right is consistent with the rule of reason that a right guaranteed by the Constitution should be measured by the language of the substantive clause creating the guarantee, rather than by resorting to contrived definitions for words that are used in a description of an intended effect, or intended purpose, of the guarantee. But the District dismisses this common sense rule. It ignores the specific meaning of the word "militia" as it appears in the prefatory clause of the Second Amendment and instead assumes the word "militia" means "a well regulated militia". It then uses the meaning of a "well regulated militia" to define "people" in the substantive clause of the Amendment. This circular approach allows the District to effectively eliminate the individual right that is specifically guaranteed by the substantive clause.

The notion that one can discern the nature of a right that is specifically guaranteed by the Constitution by relying on something other than the plain meaning of the language that is used to guarantee the right, such as a word or phrase used to describe an intended effect of the guarantee, opens the door to eliminating the right. *See Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) ("This

reasoning abstracts from the right to its purpose, and then eliminates the right.") Hence the First Amendment's guarantee of "the right of the people peaceably to assemble" so they might "petition the Government for a redress of grievances"[15] has never been construed to mean that the people can only assemble for that purpose alone or, if the government is made aware of their grievances by some other means, the people have no right to assemble. Similarly, if there were a constitutional provision that read "A well schooled electorate being necessary to the security of a free State, the right of the people to keep and read books shall not be infringed", no one would think that this right belonged collectively to only those enrolled in state-sanctioned schools and not to each individual person.

II. THE DISTRICT'S CLAIM THAT THE SECOND AMENDMENT DOES NOT PROTECT AN INDIVIDUAL RIGHT "TO KEEP AND BEAR ARMS" IS UNSUPPORTED BY THE PRINCIPAL PURPOSE OF THE AMENDMENT.

The Framers certainly could have drafted the Second Amendment so that it read like either one of the following propositions:

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

[15] U.S. Const. amend. I.

of the States to organize, arm and equip its Militias shall not be infringed.

b) Congress shall have no power to prohibit state-organized and directed Militias.

Had they done so, there would be no question that the intent of the Amendment was to protect the collective right for state-organized militias to "keep and bear Arms". But they did not. And they did not because the Framers had no intention to protect only a collective right for the states.

The Framers, then, must have had a purpose that is quite different from the one that is asserted by the District. And this brings us to the second reason why the District's reading of the Second Amendment is wrong.

Just what the Framers had in mind when they linked "the right of the people to keep and bear Arms" with "the security of a free State" has much to do with how they viewed the relationship between arms and the citizens of a republic. And how they viewed this relationship was most certainly informed by the political thought of early writers on republicanism.[16]

[16] The petitioners dismiss what these early thinkers wrote on this subject as " . . . wildly scattered expressions by individuals not directly involved in drafting the language [of the Second Amendment]." *See* Petitioners' Brief at 22. It is difficult to see how a willful disregard of the observations of some of the most insightful political philosophies that Western Civilization has produced is helpful in resolving a matter of this significance.

Thomas Jefferson wrote that the principles set out in the Declaration of Independence rested in part on "the elementary books of public right, as Aristotle, Cicero, Locke & Sidney. . . ."[17] It is a fair inference to suppose that the thinking of these same writers, in no small way, influenced the meaning and intent of the Bill of Rights and, in particular, the meaning of the Second Amendment.

Aristotle observed that it is the nature of tyranny to "mistrust the people, and therefore deprive them of their arms."[18] John Locke speaks of the right of self-preservation as a natural right growing out of the "natural Inclination . . . to preserve his Being".[19] Locke also argued that individuals have a natural right to defend their life, liberty, and property from criminals and oppressive governments.[20] Sidney proposed that "in a popular or mixed government . . . the body of the people is the publik defense, and every man is armed and disciplined. . . ."[21] Other

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[17] Thomas Jefferson, *Living Thoughts*, 42 (J. Dewey ed. 1940).

[18] Aristotle, *The Politics of Aristotle*, Book V, Chap. 10, 171 (B. Jowett, trans., Oxford, Clarendon Press 1885).

[19] John Locke, *Locke's Two Treatises of Government*, First Treatise of Government, Book I, Chap. IX, section 86 at 223-24 (Peter Lanslett ed. Cambridge Univ. Press 1967) (1698).

[20] *Id.*, Second Treatise of Government, Chap. III, sections 16-19 at 296-300 and Chap. XIX, sections 222-23 at 430-32.

[21] Algernon Sidney, *Discourses Concerning Government*, Chap. 2, section 21 at 199 (Thomas G. West ed. Liberty Classics 1990) (1698).

early writers on republicanism reached the same conclusion. Machiavelli believed "the citizen-warrior" to be "the staunchest bulwark of a republic."[22] The English political writers John Trenchard and Thomas Gordon, in their *Cato's Letters*, stressed that "The Exercise of despotick Power is the unrelenting war of an armed Tyrant upon his unarmed Subjects"; and James Burgh, a political theorist well known by the founding generation, wrote "there is no end to observations in the difference between measures likely to be pursued by a minister backed by a strong army and those of a court awed by the fear of an armed people." According to Burgh, "No Kingdom can be secure otherwise than by arming the people."[23]

It was this principle, the principle that an armed citizenry was absolutely necessary to the continuing political health of a free republican state, that formed a significant part of the philosophical understanding of republics that existed at the time the Second Amendment was drafted and adopted. Indeed, Madison himself, the very person who drafted the Second Amendment, relied on this proposition in his answer to the concern raised by the anti-federalists that the federal government, using its standing army, might turn against the states (and the people) themselves. Madison answered this objection in Federalist No. 46:

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[22] Robert E. Shalope, *The Ideological Origins of the Second Amendment*, 69 The Journal of American History 599, 601 (1982).

[23] *Quoted in* Robert E. Shalope, *supra* note 22, 603-04.

> To these [the standing army] would be opposed a militia amounting to near half a million citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. . . . *Besides the advantage of being armed, which Americans possess over the people of almost every other nation,* the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. *Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.*

The Federalist No. 46, 299 (Madison) (Clinton Rossiter ed., 1961) (emphasis added).

The founding generation knew that they were engaged in a momentous project – the creation of a new Republic in a new land. Drawing on their knowledge of earlier republics and their defects, they thought long and hard about what they believed was necessary to safeguard the long-term viability of the republic they were founding. History, they thought, demonstrated that the long-term security of a free republic necessarily depends upon an armed citizenry. And so it is clear that a principal purpose of the

Second Amendment is to constitutionalize a "third component of republican government" – that of an armed citizenry that "stands ready to defend republican liberty against the depredations of the other two. . . ."[24] This understanding reflects the founding generation's rejection of the ahistorical belief that an armed state exercising political power over an unarmed citizenry will always act benevolently.

During the eighteenth and nineteenth centuries, not a single American political theorist or legal commentator on the Constitution ever suggested a collective rights interpretation of the Second Amendment. Joel Barlow, for example, writing in 1792, argued that in a democracy "the people will be universally armed: they will assume these weapons for security, which the art of war has invented for destruction".[25] Only tyrants, he wrote, "disarmed their people"; "[a] republican society", he argued, "needed armed citizens".[26] Similarly, Justice Joseph Story, in his *Commentaries on the Constitution*, stressed the connection between armed citizens and a check against the "arbitrary power of rulers":

> The right of citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a

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[24] Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 651 (1989).

[25] *Quoted in* Robert E. Shalope, *supra* note 22, 607-08.

[26] *Id*.

> strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[27]

Judge Thomas M. Cooley took the same view of the Second Amendment:

> The amendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1698, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.
>
> The Right is General – It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia but this would be an interpretation not warranted by the intent. . . . But the law may make provision for

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[27] 3 Joseph Story, *Commentaries on the Constitution of the United States with Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution,* §1890, 746-47 (Boston, 1833).

> the enrollment of all who are fit to perform military duty, or a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is that the people from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.[28]

There can be little doubt that the meaning of the Second Amendment, from its inception until well into the twentieth century, was understood to guarantee the protection of an individual "right of the people to keep and bear Arms".

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[28] Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America*, Chap. XIV, §4, 297-98 (3d ed. 1898).

III. THE "COLLECTIVE RIGHT" INTERPRETATION OF THE SECOND AMENDMENT RESTS ON AN IMPORTED IDEOLOGY TAKEN FROM GERMAN SOCIAL AND POLITICAL THEORY AND STANDS WHOLLY OUTSIDE AMERICAN POLITICAL THOUGHT AND TRADITIONS.

During the latter part of the twentieth century the Second Amendment came to be understood in some circles as guaranteeing a collective right of the states to maintain an effective militia. What made this view plausible to some contemporary American academics and legal commentators was due to the influence of the social and political theories of the German social scientist Max Weber.[29] Weber understood the nature of the modern political state to be "the repository of a monopoly of the legitimate means of violence":[30]

> . . . to-day, the use of force as legitimate only in so far as it is either permitted by the state or prescribed by it. . . . The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization.[31]

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[29] Sanford Levinson, *supra* note 24, 650.

[30] *Id.*

[31] Max Weber, *The Theory of Social and Economic Organization*, 156, (T. Parsons ed. 1947) *quoted in* Sanford Levinson, *supra* note 24, 650, n.68. *Also see* Allan Bloom, *The Closing of the American Mind*, 212, 219 (Simon & Schuster, 1987) ("Weber,

(Continued on following page)

The District itself reflects Weber's political views when it opines that " . . . choosing among [which] arms [to allow] is the *government's duty*."[32]

If one accepts Weber's definition, it does not take much effort to reformulate the Second Amendment, recast its meaning so that it comports with a particular view about the use of firearms that is popular in certain intellectual circles today, and then read it as guaranteeing only a collective right of the states. After all, the state, as Weber tells us, has, and should have, a monopoly on the legitimate use of violence.[33]

But this notion of a state monopoly on the use of force has no American pedigree; it is an imported ideology taken from the "German tradition of the (strong) state".[34] It has nothing to do with, and flatly contradicts, the "American political tradition that is fundamentally mistrustful of state power, and vigilant about maintaining ultimate power, including the power of arms, in the populace."[35] The notion that the Second Amendment protects only a collective right of the state to organize and regulate a militia is, essentially and profoundly, a foreign idea that stands wholly outside

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of course, meant that all societies or communities of human beings require such violent domination – as the only way order emerges from chaos. . . .").

[32] Petitioners' Brief at 47.

[33] Sanford Levinson, *supra* note 24, 650.

[34] *Id*.

[35] *Id.*

of American traditions and American political thought.

To paraphrase Justice Holmes remark in *Lochner v. New York* about Herbert Spencer's social statistics,[36] the short answer to the District's argument that the Second Amendment guarantees only a collective right is this: The Second Amendment does not enact Mr. Max Weber's political theories.

IV. IF THE SECOND AMENDMENT IS UNDERSTOOD TO PROTECT THE RIGHT OF INDIVIDUALS, WHO ARE NOT AFFILIATED WITH ANY STATE-REGULATED MILITIA, TO "KEEP AND BEAR" FIREARMS, THEN EACH OF THE DISTRICT'S THREE LAWS UNDER REVIEW VIOLATE MR. HELLER'S SECOND AMENDMENT RIGHTS.

If it is true that the Second Amendment protects an individual's right to "keep and bear" firearms for private use (unrelated to any affiliation with a state-regulated militia), then the question becomes whether this right includes the right to keep functional firearms for the purpose of self-defense and personal protection. And if it does, are the District's laws under review a *per se* infringement of this right?

Alternatively, if there is no *per se* violation here, then the next question becomes whether the right to

[36] 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

keep functional firearms for the purpose of self-defense and protection is a fundamental right. And if it is a fundamental right, what is the correct standard of review of a law that is said to infringe upon this right? And lastly, using the appropriate standard of review, do any, or all, of the District's three laws under review violate Mr. Heller's Second Amendment right to possess a functional firearm for the purpose of self-defense and protection.

A. The Second Amendment Recognizes a Pre-Existing Right of the People to Keep and Bear Arms.

The operative clause of the Second Amendment reads as follows: "the right of the people to keep and bear Arms, shall not be infringed." Unless the Second Amendment *creates* this right, the Amendment must refer to a pre-existing right.

Some have made the argument that the source of all human rights is the state. However, the notion that the origin of important individual rights is the state, in the sense that such rights owe their very creation and existence to the state, is not an idea that is supported by either American history or tradition. When the Declaration of Independence speaks of men being "endowed by their Creator with certain unalienable rights", it is not talking about rights that are created by the state. Similarly, when the Ninth

Amendment refers to unenumerated rights "retained by the people"[37], it is not referring to rights created by the state. The plain meaning of the operative clause of the Second Amendment, then, is that it recognizes a pre-existing individual right "to keep and bear Arms", a right that pre-dates the Bill of Rights and is a member of that class of *pre-existing* human rights that the Ninth Amendment references, and then classifies, into rights that are enumerated by the Constitution and those that are not enumerated, but are "retained by the people."

B. The "Right of the People to Keep and Bear Arms" Encompasses the Common Law Right of Self-Defense and its Corollary, the "Right to Keep and Bear Arms" for Self-Defense.

The scope of the pre-existing individual right "to keep and bear Arms" guaranteed by the Second Amendment is not exhausted by the Amendment's prefatory clause. To be sure, the right of an individual to resist a tyrannical regime together with the reasonable means to do so is surely a fundamental right. *See* The Declaration of Independence para. 2 (U.S. 1776). But it would be a mistake to assume that the only individual right guaranteed by the Second Amendment is the right of individuals "to keep and bear Arms" to resist tyranny. The phrase "the right of

[37] U.S. Const. amend. IX.

the people to keep and bear Arms" directly implies another right, the right of self-defense.

This Court, in *Ex Parte Grossman*, 267 U.S. 87 (1924), has recognized that questions of constitutional interpretation that involve common law terms should be resolved "by reference to the common law" as it was "when the instrument was framed and adopted":

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention . . . were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

Ex Parte Grossman, 267 U.S. 108-09.

Cicero recognized the right of self defense as part of Roman law: " . . . the wisdom of the law itself . . . permits self-defense . . . a man who has used arms in self-defense is not regarded as having carried them

with a homicidal aim."[38] The right of self-defense has long been a part of English common law. Blackstone, writing in Chapter 1 of Book I of his *Commentaries on the Law of England*, a chapter titled "Of the Absolute Rights of Individuals", points out that the "rights" or "liberties of Englishmen . . . consist primarily in the free enjoyment of personal security, personal liberty, and private property."[39] He further remarks that "to vindicate these rights, when actually violated or attacked the Subjects of England are entitled . . . *to the right of having and using arms for self-preservation and defense*" (emphasis added).[40] The right of "Self-defense", he says, " . . . is justly called the primary law of nature so it is not, neither can it be, in fact, taken away by the laws of society."[41]

The common law recognition of the right "of having and using arms for self-preservation" was not simply asserted without any justification. Rather, its justification rests on the philosophical explanation provided by John Locke. Locke understood the right to preserve oneself against danger to be a fundamental natural right growing out of the natural inclination

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[38] Cicero, *Selected Political Speeches*, 222 (M. Grant trans., 1969). Q*uoted in* Stephen P. Holbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason L.R. 1, 5-6 (1981).

[39] William Blackstone, Blackstone's Commentaries, Bk. I, Chap. 1, 143-44 (2 St. George Tucker ed. 1803) (1765-1769).

[40] *Id.*, at 144 (emphasis added).

[41] *Id.*, Book III, Chap. 1, 3 (4 Tucker ed. 1803).

that a person has to preserve his own existence, i.e., his "Life and Being".[42] "A Man", said Locke, " . . . cannot subject himself to the Arbitrary Power of another"[43]. A " . . . Rational Creature", he wrote, "cannot be supposed when free, to put himself into Subjection to another, for his own harm".[44]

Given that the right of self-defense was considered to be a natural right by the common law, and by Cicero and Locke as well, the "right to keep and bear Arms", as it is recognized by the Second Amendment, should be understood to encompass the common law right to keep and bear arms for self defense.

C. The Right to Keep and Bear Arms for Self-Defense is a Fundamental Right.

If the right to keep and bear arms for self-defense is encompassed by the Second Amendment, then the question becomes whether this right, a right thought to be primary and fundamental by John Locke and recognized as such in English common law, should be recognized in American constitutional law as a fundamental right.

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[42] John Locke, *supra* note 19.

[43] John Locke, *supra* note 19, Second Treatise of Government, Chap. XI, section 135 at 375.

[44] John Locke, *supra* note 19, Second Treatise of Government, Chap. XIV, section 164 at 395.

This Court has said that the Constitution recognizes and protects a non-textual right if it is a right " . . . so rooted in the traditions and conscience of our people as to be ranked as fundamental",[45] if it is "a strong tradition" that is reflected by "[t]he history and culture of Western Civilization" and "is now established beyond debate as an enduring American tradition",[46] and if it is "deeply rooted in this Nation's history and tradition."[47]

The right to use arms for self-defense surely meets these criteria. Locke noted that the right to self-defense stems from a human being's natural inclination to preserve his very existence and he thought that it is related to freedom in this sense: a citizen cannot be free if he is put into "Subjection to another, for his own harm."[48] Prosser traces the right of self-defense in English law back to 1400.[49] Blackstone, in his Commentaries published in the 1760's, describes this right as "the primary law of nature".[50] And without exception, our nation has recognized the right to use arms in self-defense ever since the very

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[45] *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

[46] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

[47] *Moore v. Cleveland,* 431 U.S. 494, 503-04 (1977).

[48] John Locke, *supra* note 19, Second Treatise of Government, Chap. XIX, section 164 at 395.

[49] Prosser, W., *The Law of Torts*, 4th ed., Chap. 4, section 19 at 108 (West, 1971).

[50] Blackstone, *supra* note 39, Book III, Chap. 1, 3 (4 Tucker ed. 1803).

beginning of our legal institutions and traditions. The right of self-defense and its corollary, the right to use arms in exercising this right, are certainly "deeply rooted in this Nation's history and traditions." The right of self-defense can hardly be anything less than fundamental.

Contrary to the assertions of some, the right at issue here is not a mere property right. Rather the right to use arms in self-defense is a fundamental right; it is guaranteed by the Second Amendment, the liberty/due process clause of the Fifth Amendment, and by the Ninth Amendment's recognition of rights "retained by the people."[51] The Second Amendment's guarantee of the right of an individual who is not affiliated with any state-regulated militia to "keep and bear Arms" must therefore be understood to guarantee an individual's fundamental right to "keep and bear Arms" for the purpose of self-defense.

D. The District's Three Laws under Review are *Per Se* Violations of Mr. Heller's Second Amendment Rights.

A complete ban on a firearm, such as a handgun (D.C. Code §7-2502.02(a)(4)), that can be easily and readily used for self-defense, is clearly a *per se* unconstitutional violation of the individual right to "keep and bear Arms" guaranteed by the Second Amendment.

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[51] U.S. Const. amend. V; U.S. Const. amend. IX.

Similarly, a prohibition on carrying a handgun from room to room in one's own residence as well as a requirement that all firearms in lawful possession in one's own residence must be kept unloaded and locked or disassembled are *per se* violations of the Second Amendment. *See* D.C. Code §22-4504(a) and §7-2507.02. Such prohibitions make a handgun, as well as any firearm, dysfunctional and absolutely useless in a self-defense situation.

The District's three laws eviscerate a citizen's guaranteed constitutional right "to keep and bear" a functional firearm for the purpose of self-defense and render it worthless.

E. Alternatively, if there is no *Per Se* Second Amendment Violation here, then the Correct Standard of Review of the District's Laws is Strict Scrutiny.

If the inquiry moves from whether an outright ban on handgun ownership, or a ban on a functional firearm, is a *per se* violation of the Second Amendment to whether the District's ban on handguns and functional firearms is a lawful regulation under its police powers, then the question becomes what is the correct standard of review of this ban.

More than half a century ago, this Court announced that legislation that appears "to be within a specific prohibition of the Constitution, such as those of the first ten Amendments," a more searching review is required than merely "some rational basis". *United*

States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938). Moreover, the regulation of "certain 'fundamental rights' . . . may be justified only by a 'compelling state interest'." *Roe v. Wade,* 410 U.S. 113, 155 (1973). Lastly, the government "must demonstrate that its" regulation "is narrowly tailored to achieve" its compelling interest. *Miller v. Johnson,* 515 U.S. 900, 920 (1995). In other words, the government has the burden of proof in showing both that it has a compelling government purpose and that the law is reasonably necessary to achieve this purpose. *See Miller,* 515 U.S. at 920-21.

Since the right to use arms in self-defense is a fundamental right guaranteed by the Second Amendment, the District must first prove that it has a compelling interest in regulating Mr. Heller's Second Amendment rights. Second, the District must show each of its three laws under review is "narrowly tailored to achieve" the compelling objective that the District intends to accomplish. *See Miller,* 515 U.S. at 920.

F. The District has Failed to Carry its Burden of Proof as Required by the Standard of Strict Scrutiny.

The District claims that the objective of its three gun laws under review is to reduce gun violence. But the District has been unable to reasonably quantify, either the deterrent effect of allowing the private possession of a handgun in one's residence, or the

number of times that an armed intruder, a home invasion assault or a robbery has been thwarted because a resident had access to a functional handgun. Nor has the District quantified the deterrent value of a criminal knowing that a citizen has a protected right to have quick and lawful access to a functional handgun in his home or, conversely, whether a law prohibiting individuals from possessing a handgun in their homes likely increases the probability of a home invasion for unlawful purposes. And lastly, the District has not shown how its gun laws would have any real effect on keeping guns out of the hands of criminals. Unless this kind of information is reliably quantified, all the focus is on the costs, and none on the benefits. A statistical analysis that lacks this kind of data is not persuasive.

In sum, the District has failed to prove that any of its three laws under review will actually achieve its objective, much less that they are necessary to achieve its objective.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia should be affirmed.

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