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The Second Amendment Comes Before the Supreme Court: The Issues and the Arguments

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The United States Supreme Court has decided only one significant case involving the Second Amendment, and that was almost 70 years ago. Next week, the Court will return to the issue when it hears arguments in *District of Columbia v. Heller.* This is a test case brought by a D.C. special police officer who carries a gun while on duty. Under D.C.'s extremely restrictive gun control laws, he is forbidden to keep a handgun, or an operable rifle or shotgun, in his home.

The U.S. Court of Appeals for the D.C. Circuit held that these laws violate the Second Amendment. The court concluded that handguns are lineal descendants of founding-era weapons and are still in common use today, so they may not be banned; the court also held that D.C.'s requirement that guns be stored in a mechanically disabled condition is unconstitutional because it prevents them from being used for self-defense.[1] The Supreme Court is now reviewing that decision.

The parties presenting arguments next week offer three different interpretations of the meaning of the Second Amendment. D.C.'s argument—that the Second Amendment protects a right to arms only in service of a government-organized militia—does not stand up to historical analysis or textual scrutiny. Heller's position—that the Amendment establishes an individual right to keep ordinary weapons for self protection—is sound but not persuasively argued. And the Bush Administration's position—recognizing an individual right but leaving the government with some large and undefined power to curtail the right—is dangerously vague and legally weak.

Careful textual analysis, along with the relevant historical context, yields a remarkably clear, sensible, and workable answer to the question presented in this case. The Amendment protects an individual right to keep operable firearms for self-defense, which cannot be taken away by federal law. D.C.'s effort to disarm the residents of that city is unconstitutional.

From *Miller* to *Heller.* The Second Amendment says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *United States v. Miller* (1939), its only significant case interpreting the meaning of the Second Amendment, the Supreme Court reviewed a federal statute prohibiting the interstate transportation of unregistered short-barreled shotguns. The Court's opinion, however, is ambiguous about the Amendment's meaning and scope. The crucial passage says:

> In the absence of any evidence tending to show that possession or use of a [short-barreled] shotgun at this time has some reasonable relationship to the preservation or efficiency of a

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> well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

D.C.'s gun control statutes forbid almost all civilians to possess handguns and require other firearms to be stored unloaded and mechanically disabled. The question before the Court is whether these laws violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia but wish to keep handguns and other firearms for private use in their homes.

D.C.'s Argument in Favor of Upholding the Statutes. D.C.'s principal contention is that the Second Amendment protects a right to arms only in service of a government-organized militia. Its only effect, then, is to stop Congress from preempting state militia laws that give individuals a right to keep and bear arms while serving in an organized state militia.[2]

D.C. argues that this conclusion is dictated by the language of the Second Amendment, which is filled with military terminology and refers expressly to the militia without any hint about private uses of firearms. D.C. reinforces its textual argument with historical materials showing (1) that the Amendment was adopted in response to fears that the new federal government might pursue tyrannical aims by disarming the state militias and (2) that there was no discussion of the use of arms for private purposes anywhere in the Amendment's legislative history.

This argument is untenable.

First, it implies that the Second Amendment substantially amended a provision of the Constitution (Article I, section 8, cl. 16) that gives Congress almost unfettered authority to regulate the militia. There is no historical evidence at all to support this conclusion.

Second, a right of the states to organize and arm their own militias as they see fit conflicts with another constitutional provision (Article I, section 10, cl. 3) that prohibits the states from keeping troops without the consent of Congress. Once again, there is no evidence that the Second Amendment was meant to repeal this clause of the Constitution.

Third, the Supreme Court has consistently concluded that the federal government has extremely broad powers to preempt state militia laws and has never suggested that the Second Amendment has any relevance at all to the constitutionality of federal laws preempting state militia regulations.

D.C. also argues that *Miller* is consistent with its claim that the right to keep arms applies only to those serving in an organized militia. But *Miller* said no such thing and never even suggested that it might be relevant whether the defendants in that case were members of any militia.

In addition to its main argument, D.C. defends its statutes on two alternative and independent grounds. First, the city argues that the Second Amendment's purpose is to protect the states from the federal government so that it has no application in a federal enclave like the District of Columbia. This argument assumes that the term "the people" in the Second Amendment really means "the state governments," which is both implausible and bereft of historical support.

Second, D.C. argues that if the Court concludes that the Constitution protects a private right to arms, its handgun ban should be upheld as a reasonable effort to protect the public against several unique dangers posed by these weapons. In a related argument, D.C. defends as a reasonable safety regulation its requirement that other guns be stored unloaded and mechanically disabled (either disassembled or secured with a trigger lock). According to the city, its laws contain an implicit exception permitting civilians to unlock their guns if an intruder suddenly appears in their homes.

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1. Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *available at* http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/04-7041a.pdf.
2. Petitioner's brief in District of Columbia v. Heller, No. 07-290 (U.S. Supreme Court), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_Petitioner.pdf.

This argument was concocted for the occasion. D.C. never before suggested the existence of a "sudden intruder" exception, which in any event would have little practical significance if the victim has to wait until a criminal appears in her bedroom at night before she can start unlocking her gun and loading it with ammunition.

Heller's Argument for Declaring D.C.'s Laws Unconstitutional. Heller argues that the Second Amendment's text plainly refers to a pre-existing individual right and contends that this right is necessary for free people to guarantee their security by acting as a militia.[3] He emphasizes that the text does not say that fostering a well-regulated militia is the sole purpose of the right to arms. Heller also presents historical evidence that American colonists fought the British using militias that were well regulated without being regulated by the government. According to Heller, "should our Nation suffer tyranny again, preservation of the right to keep and bear arms would enhance the people's ability to act as militia in the manner practiced by the Framers."

If this argument is correct, it could mean that Americans have a constitutional right to keep arms that would be useful against an army controlled by a tyrannical government. That would seem to include standard infantry rifles like the M-16 and other military arms.

Heller does not draw this conclusion in his brief. Relying on *Miller,* Heller maintains that the Second Amendment only protects those weapons (1) that civilians can be expected to use for ordinary lawful purposes and (2) that would be useful in militia service. Handguns meet both prongs of this test, and he concludes that the government therefore may not ban them outright, although he adds that "[t]here is no justification to limit the Second Amendment's protection to arms that have military utility."

Miller is ambiguous in several respects, but the Second Amendment test it articulated is whether the weapon is "part of the ordinary *military* equipment or [one whose] use could contribute to the *common defense*." *Miller* did mention that eighteenth-century militiamen were ordinarily expected to report for duty armed with weapons "of the kind in common use at the time," but the Court did not indicate that this referred to anything other than what *Miller*'s test called "ordinary military equipment." In the twenty-first century (unlike the eighteenth), civilians do not commonly use standard military equipment like M-16s.[4]

Heller also cites historical materials supporting the conclusion that the Second Amendment protects a right to keep firearms for private purposes such as self defense, and this evidence has been amplified by several amici with arguments leading to this conclusion.

Finally, Heller argues that if the Court rejects his proposed test, the appropriate constitutional test for laws regulating the right to keep arms would be strict scrutiny, which requires that certain fundamental rights may not be infringed unless they are narrowly tailored to serve a compelling government interest.

The Bush Administration's Proposed Non-Decision. The Bush Administration filed an *amicus curiae* brief urging that the case be remanded for further consideration by the lower courts.[5] Consistent with a 2004 opinion from the Justice Department's Office of Legal Counsel, the Administration agrees with Heller that the Second Amendment protects an individual right to possess firearms for self-protection. The Administration, however, argues that the Court of Appeals applied the wrong legal test when it adopted a categorical rule under which handguns may not be banned. According to this *amicus* brief,

3. Respondent's brief in District of Columbia v. Heller, No. 07-290 (U.S. Supreme Court), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_Respondent.pdf.
4. For another argument that *Miller* can be read to limit Second Amendment rights to commonly used civilian weapons, see of the amicus brief of Charles J. Cooper, et al., on behalf of several former Justice Department officials, in support of respondents in District of Columbia v. Heller, No. 07-290 (U.S. Supreme Court), pp. 29-33 *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_RespondentAmCuFmrDOJSnrOfficials.pdf.
5. Bush Administration's *amicus curiae* brief in District of Columbia v. Heller, No. 07-290 (U.S. Supreme Court), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_PetitionerAmCuUSA.pdf.

the Court of Appeals' test (which prevents the government from banning guns that are descended from founding-era weapons and that have military utility) would cast constitutional doubt on important federal laws, including the current machinegun statute.

The Administration also rejects Heller's proposed test (categorical protection for weapons commonly used by civilians and potentially useful in militia service), as well as Heller's alternative argument that strict scrutiny should be applied. Instead, the Administration urges the Court to adopt a more relaxed intermediate scrutiny approach derived from the field of election law. Under certain cases in that field, the government is permitted to impose reasonable restrictions on First Amendment rights in order to serve important regulatory interests. Because the government is authorized to regulate the militia, just as it is authorized to regulate elections, the Administration suggests that these cases provide an appropriate analogy. The Administration goes on to argue that this new test should be applied in the first instance by the lower courts, which might need to consider additional legal or factual issues, such as whether D.C.'s laws permit its residents to load their weapons and reassemble or unlock them in response to a sudden intrusion.

This legal argument is little more than sleight of hand. D.C.'s laws plainly forbid residents of the city from keeping an operable firearm in their homes for self-protection. In any case, the Supreme Court does not need the assistance of the lower courts to interpret these laws. Furthermore, if the Court were to adopt the Administration's proposed intermediate scrutiny test, the Justices would be better situated than the lower courts to apply that extremely vague test to this case. If the Second Amendment protects an individual right to have weapons for self-protection, as the Administration says it does, D.C.'s ban on all operable firearms must be unconstitutional under any meaningful level or type of scrutiny. The Supreme Court already has all the facts it needs to decide whether or not the Second Amendment protects such a right.[6]

The Original Meaning of the Second Amendment. In an *amicus* brief filed on behalf of the Second Amendment Foundation, I argue that the Court should take a different approach to the case.[7]

The test suggested in *Miller* is unworkable when applied to modern gun control statutes. *Miller* asked whether the gun at issue in that case was "part of the ordinary military equipment or [one whose] use could contribute to the common defense." This test points directly toward protection of standard-issue infantry rifles like the fully automatic M-16 and might even be read to include more lethal weapons like rocket launchers. The ambiguous opinion in *Miller* suggested this test but did not clearly adopt it, and the Court should decline to extend *Miller*'s suggestion beyond the facts of that case, as it often does when language in a prior opinion seems to point in an unacceptable direction.

Instead, the Court should focus on the original meaning of the Second Amendment, whose purpose is to prevent Congress from using its Article I authorities, including its authority to regulate the militia, to disarm American citizens.

The text of the Second Amendment does not imply that the right to arms is confined in any way to militia-related purposes. The most significant grammatical feature of the Second Amendment is that its preamble ("A well regulated Militia, being necessary to the security of a free State…") is an absolute phrase. Such constructions are grammatically independent of the rest of the sentence and do not qualify any word in the operative clause to which they are appended. The usual function of absolute constructions is to convey some information about the circumstances surrounding the statement in the main clause.

Another very significant grammatical feature of the Second Amendment is that the operative clause

6. For a detailed critique of the Administration's position, see brief of Bradford Berenson et al., on behalf of the Goldwater Institute, in District of Columbia v. Heller, No. 07-290 (U.S. Supreme Court), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_RespondentAmCuGoldwaterInst.pdf.
7. Brief of Nelson Lund, on behalf of the Second Amendment Foundation, in District of Columbia v. Heller, No. 07-290 (U.S. Supreme Court), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_RespondentAmCu2ndAmendFound.pdf.

("…the right of the people to keep and bear Arms, shall not be infringed") is a command. Because nothing in that command is grammatically qualified by the prefatory assertion, the operative clause has the same meaning that it would have had if the preamble had been omitted or even if the preamble were demonstrably false.

Consider a simple example. Suppose that a college dean announces: "The teacher being ill, class is cancelled." Nothing about the dean's prefatory statement, including its truth or falsity, can qualify or modify the operative command. If the teacher called in sick to watch a ball game, the cancellation of the class remains unaffected. If someone misunderstood a phone message and inadvertently misled the dean into thinking the teacher would be absent, the dean's order is not thereby modified.

The Second Amendment's grammatical structure is identical, and so are the consequences. Whatever a well-regulated militia may be, or even if such a thing no longer exists, the right of the people to keep and bear arms "shall not be infringed." What's more, whether or not such a militia can contribute to the security of a free state, the right of the people to keep and bear arms remains unaffected. Indeed, even if it could be proved beyond all doubt that *disarming* the people is necessary to the security of a free state, the right of the people to keep and bear arms would remain unchanged.

Undoubtedly, new information or changed opinions about the preamble's assertion might suggest the need to issue a new command. If, for example, the dean discovered that the teacher wasn't going to be absent after all, he might make a new announcement reversing his earlier decision. Similarly, if the American people came to believe that civilian disarmament laws were necessary to promote public safety, Congress or the state legislatures might initiate a repeal of the Second Amendment under Article V. In both cases, a new command would be needed because the truth or falsity of the preamble's assertion cannot alter the original, operative command. It is true, of course, that a grammatically absolute phrase—like countless other forms of contextual evidence—may sometimes help to resolve ambiguities in the operative command to which it is appended; but such contextual evidence cannot change the meaning of the command.

Another textual indication that the preamble does not limit the operative language is provided by the Second Amendment's use of "Militia" and "the people." These are different words with different meanings. The militia has always been a small subset of "the people" whose right to keep and bear arms is protected by the Second Amendment. James Madison, for example, estimated that the militia comprised about one-sixth of the population when the Constitution was adopted. Most obviously, women were not part of the 18th century militia. Women, however, have always been citizens and thus part of "the people," as the Supreme Court has recognized. Just as women have always been covered by the First Amendment's "right of the people" to assemble and petition for redress of grievances and the Fourth Amendment's "right of the people" to be secure from unreasonable searches and seizures, women have always had the same Second Amendment rights as men.

Even if one mistakenly supposed that "the people" referred to in the First, Second, and Fourth Amendments included only those citizens with full political rights (thus excluding women), the militia and the people would not come close to being coextensive bodies of individuals. Under the 1792 Militia Act, for example, the militia included large numbers of men who did not have full political rights, and the law exempted many men who did have full political rights.

All of this points to another fatal defect in D.C.'s interpretation of the Second Amendment. The Constitution allows Congress to exempt *everyone* from militia duties, as the Supreme Court has recognized. It would be absurd to think that Congress could abolish the right of "the people" to keep arms simply by abolishing the militia. Nor can the right to keep arms be limited to contexts in which its exercise contributes to the functioning of an organized militia that Congress is not even required to maintain.

There must, of course, be some logical relationship between the Second Amendment's preamble and its operative clause. Focus again on the language of the Constitution. One obvious way for a militia to be well regulated is for it to be well trained or well disciplined as a military organization, and the framers of the Second Amendment no doubt meant to conjure thoughts of such an organization.

The Second Amendment, however, added absolutely nothing to Congress's sweeping Article I authority to provide for military training and discipline. This is significant because there is another meaning of "well regulated" that is actually more relevant in this context.

To see why, note that any possible contribution of the Second Amendment to a well-regulated militia must arise from governmental *inaction* (that is, from *not* adopting regulations that infringe the right of the people to keep and bear arms). Furthermore, the term "well regulated" need not mean *heavily* regulated or *more* regulated. On the contrary, it is perfectly possible for the government to engage in *excessive* regulation or *inappropriate* regulation, and such regulations are just what the Second Amendment forbids.

As its operative clause makes clear, the Second Amendment simply forbids one kind of inappropriate regulation (among the infinite possible regulations) that Congress might be tempted to enact under its sweeping authority to make all laws "necessary and proper" for executing its Article I militia powers (or perhaps other delegated powers). What is that one kind of inappropriate regulation? Disarming the citizens from among whom a traditional militia—a part-time body of citizens available for emergency military duties—must be constituted.

The history of the Second Amendment confirms this limited and indirect—though real—relationship between a well-regulated militia and the constitutional right to arms. At the Philadelphia Convention, qualms were repeatedly expressed about the danger of standing armies in peacetime, along with a preference for maintaining the traditional militia as an alternative to professional armies composed of paid troops. It was also recognized, however, that a traditional militia could not, by itself, adequately provide for the nation's security, even in peacetime. Accordingly, the delegates put no significant limits on federal military authority in the constitution they proposed.

During the subsequent ratification debates, the massive transfer of military authority to the federal government became one of the chief Anti-Federalist complaints. The Federalists who controlled the First Congress, however, were no more willing than the Philadelphia Convention had been to curtail federal authority in this field. As Madison noted when introducing his initial draft of the Bill of Rights in the House of Representatives, he was averse to reconsidering the principles and substance of the powers given to the new government, but he was quite prepared to incorporate provisions for the security of rights to which no one would object.

Consistent with Madison's view—though not with D.C.'s interpretation of the Second Amendment—Congress rejected proposals to put substantive limits on congressional authority over the militia. What the First Congress was quite willing to do, and what it did do in the Second Amendment, was to make explicit the utterly noncontroversial denial of federal power to infringe the right of the people to keep and bear arms.

When Congress sent the Bill of Rights to the states for ratification, it described its provisions as "declaratory and restrictive clauses" meant to prevent misconstruction or abuse of the Constitution's powers. The Second Amendment has both declaratory and restrictive elements. The words of praise for the militia in the Second Amendment are simply a *declaration* of respect for the traditional militia system, which might—or, in practice, might *not*—provide an alternative to the standing armies that many citizens feared. That explains both why the declaratory preamble was included and why the Amendment was carefully drafted to ensure that the *restriction* on federal infringement of the people's right to arms is not dependent on its actually contributing to the maintenance of a well-regulated militia.

The Supreme Court has often recognized that the Constitution contains language whose omission would not have changed the meaning of the document. Perhaps the best example came from the very same draftsmen who gave us the Second Amendment. The Tenth Amendment simply reaffirms what was already established by the original Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Court concluded long ago that the Tenth Amendment changed nothing in the Constitution and that its purpose was only to allay fears of federal overreaching. Accordingly, it is not at all anomalous

that the Second Amendment—drafted by the same Congress and adopted at the same time—includes a reassuring comment about the militia that was not meant to change or limit the effects of the operative clause to which it was appended.

Respect for the original meaning of the Second Amendment requires that its language be applied—faithfully and appropriately—to contemporary society, which is, in important respects, quite different from that of two centuries ago. With respect to the right to arms, the concern that was foremost for the founding generation—fear of a tyrannical federal government—has subsided. At the same time, the military power of the government has become overwhelming, which greatly diminishes, though does not eliminate, the potential of an armed citizenry to deter governmental oppression.

Even more important, a significant gap has developed between civilian and military small arms. Eighteenth century Americans commonly used the same arms for civilian and military purposes, but today's infantry and organized militia are equipped with an array of highly lethal weaponry that civilians do not employ for self-defense or other lawful purposes. The Constitution does not require the Supreme Court to blind itself to that reality or to hold that the civilian population has a right to keep every weapon that the militia can expect to find useful if called to active duty.

Nor should the Court blind itself to other contemporary realities, the most important of which is the problem of criminal violence and the inability of the government to control it. Rather than focus exclusively on 18th century comments about maintaining an armed counterweight to the armies of a potentially tyrannical federal government, the Court should recognize that the broader purpose of the Second Amendment emerges readily from the Constitution's founding principles.

Those founding principles are summed up in the familiar liberal axioms set out in the Declaration of Independence. In liberal theory, the most fundamental of all rights is the right of self-defense. Among the political theorists most often cited by major American writers during the founding period, there was unanimous agreement about the centrality of the right of self-defense. To take just one example, Blackstone said: "Self-defence 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."

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

This corollary to the central premise of liberal political theory is consistent with evidence about 18th century attitudes. Blackstone, for example, characterized the English right to arms as a "public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." Just as one would expect from the fundamental principle of liberal theory, Blackstone makes no distinction between oppression by the government itself and oppression that the government fails to prevent. If anything, his language seems to refer more easily to the ineradicable phenomenon of criminal violence, experienced by all free societies, than to the extraordinary instances of governmental oppression that call for armed resistance.

In America, a similarly broad understanding of the purpose of the right to arms was articulated repeatedly during the founding period in state constitutions, in proposals for a federal bill of rights, and by distinguished statesmen. The natural right of self-defense is the most fundamental right known to liberal theory, and the Second Amendment is our Constitution's most direct legal expression of Blackstone's insight that "in vain would [basic rights such as that of personal security] be declared, ascertained, and protected by the dead letter of the laws, if the [English] constitution had provided no other method to secure their actual enjoyment."

It would not be easy to find a more vivid illustration of Blackstone's point than the District of

Columbia, where every effort has been made to disarm the citizenry. According to what Blackstone called "the dead letter of the laws," personal security must be very well assured in a city where almost nobody except agents of the government is authorized to possess an operable firearm. The reality is far different, and nothing in the Constitution requires the Supreme Court to ignore that reality.

In the 21st century, the most salient purpose of the Second Amendment is to protect the people's ability to defend themselves against violent criminals. Accordingly, the District of Columbia must be required to offer justifications for gun control statutes that go far beyond fashionable slogans and unsubstantiated appeals to hypothetical salutary effects on public safety. Any other approach would trivialize the fundamental right protected by the Second Amendment.

The D.C. Code unequivocally forbids American citizens to keep an operable firearm in their own homes for the protection of their own lives. Under no standard of review that respects the fundamental nature of the Second Amendment right could this prohibition possibly be upheld.

A Narrow Decision? If the Supreme Court accepts D.C.'s principal contention—that civilians have no constitutional right to possess firearms except in connection with militia service—the Second Amendment will essentially become a dead letter. The states might retain a theoretical right to keep up militia forces at their own expense, but the federal government has never sought to prevent them from doing so. Furthermore, if Congress ever wanted to do so, it presumably could induce the desired abolition of state militias by offering financial inducements in the form of conditional grants, just as it has induced states to raise the drinking age to 21 by threatening to cut off highway funding to those that do not comply.

If the Court recognizes a right to the private possession and use of firearms, the significance of the case will depend on how it defines the nature and scope of the right. D.C.'s laws are so highly restrictive that a decision upholding them is likely to mean that virtually any gun control regime will be regarded as the kind of reasonable regulation that the government is free to adopt. This would leave the Second Amendment with little practical significance.

If the Court strikes down D.C.'s regulations (or adopts the Bush Administration's invitation to remand the case), a great many important questions are likely to remain open. Because this would be the first case in history in which the federal courts invalidated a gun control statute under the Second Amendment, the Court would probably write its opinion narrowly. And because D.C.'s statute is apparently the most restrictive in the nation, such an opinion would probably not provide clear guidance to lower courts faced with challenges to less restrictive statutes.

Another reason to expect that an opinion invalidating D.C.'s statutes would be narrowly written arises from a question not directly raised in this case. Originally, the Bill of Rights affected only federal laws like the one at issue in this case. By the end of the 20th century, the Supreme Court had applied most provisions of the Bill of Rights to state (and local) laws as well, using an "incorporation" doctrine derived from Fourteenth Amendment substantive due process. During this time, the Court also decided that a few Bill of Rights provisions do not apply to the state governments. The Court has never decided whether or not substantive due process renders the Second Amendment applicable to the state and local governments.

Except for the regulations at issue in this case, the federal government has adopted few laws imposing significant restrictions on civilian access to ordinary firearms. Most of the laws that might be vulnerable to plausible Second Amendment challenges have been adopted by state and local governments, and the "incorporation" issue will undoubtedly be presented to the Court if it strikes down the federal statutes at issue in this case.

Recognizing this, the Court will probably be cautious about making definitive statements that could have unforeseen consequences with respect to a wide variety of statutory schemes that it has not yet had occasion to examine in detail. But it should not hesitate to affirm the core right to protect one's home and family against the criminal predators who pay no attention at all to disarmament statutes like those at issue in this case.

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