# Wichita State University
# Pre-Law Discussion

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All students are invited to attend a "mock law-school class" focused on the meaning and scope of the Second Amendment. For those who wish to prepare for the "class," please read the following edited case and consider the questions and the "hypothetical" problem which follow.

## District of Columbia v, Heller
**554 U.S. 570 (2008)**

Justice SCALIA delivered the opinion of the Court.

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and dissembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities.

[Respondent Dick Heller, a D.C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center, wished to keep a handgun at home. He filed a lawsuit in District Court challenging these provisions under the Second Amendment. The District Court dismissed respondent's complaint, but the Court of Appeals directed the District Court to enter summary judgment for respondent.]

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *** The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause, *** Logic demands that there be a link between the stated purpose and the command. [That] requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause. *** But apart from that, clarifying a prefatory clause does not limit or expand the scope of the operative clause. Therefore, while we will begin our textual

analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.

Operative Clause

"Right of the People." The first salient feature of the operative clause is that it codifies a "right of the people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment Assembly-and-Petition Clause and in the Fourth Amendment Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology *** All three of these instances unambiguously refer to individual not "collective" rights, or rights that may be exercised only through participation in some corporate body. *** What is more in all [other] provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset. [This] contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people" – those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people." We start therefore with a strong presumption that the Second Amendment right. is exercised individually and belongs to all Americans.

* * * *

We turn to the phrases "keep arms" and 'bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody," Johnson, 1095. *** Thus the most natural reading of "keep Arms" in the Second Amendment is to "have weapons,"

At the time of the founding, as now, to "bear" meant to "carry." When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose— confrontation, *** Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization. *** Nine state constitutional provisions written in the 18th century or the first two decades of the 19th,* * * enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state." It is clear from those formulations that "bear arms" did not refer only to carrying a weapon in an organized military unit.

Meaning of the Operative Clause. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. *** Between the Restoration and the Glorious Revolution, the Stuart Kings Charles Il and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed. *** This right has long been understood to be the predecessor to our Second Amendment.

By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone [cited] the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen, [describing it as] "the natural right of resistance and self-preservation" *** Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence. And, of course, what the Stuarts had tried to do to their political enemies, George Ill had tried to do to the colonists.

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. [We now determine] whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause. ***

Relationship between Prefatory Clause and Operative Clause

*** The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people. It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down,

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.

[P]etitioners' interpretation does not even achieve the narrower purpose that prompted codification of the right. If, as they believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia, [then] it does not assure the existence of a "citizens' militia" as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force. *** Thus, if petitioners are correct, the Second Amendment protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them. It guarantees a select militia of the sort the Stuart kings found useful, but not the people's militia that was the concern of the founding generation.

Justice STEVENS places overwhelming reliance upon this Court's decision in *United States v. Miller,* 307 U.S. 174 (1939). [According to Justice STEVENS, Miller held that] the Second Amendment "protects the right to keep and bear arms for certain military purposes, but that it does not curtail the legislatures power to regulate the nonmilitary use and ownership of Weapons."

[But] Miller did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a Second Amendment challenge two men's federal convictions for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was [that] the type of weapon at issue was not eligible for Second Amendment protection: In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." 307 U.S. at 178 (emphasis added). "Certainly," the Court continued, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." Ibid. [H]ad the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. *** We therefore read Miller to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.

Like most rights, the right secured by the Second Amendment is not unlimited. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of army *** We also recognize another important limitation on the right to keep and carry arms. Miller said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S. at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

We turn finally to the law at issue here. [As we have demonstrated,] the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home. “the most preferred firearm in the nation to 'keep' and use for protection of one’s home and family," 478 F3d, at 400, would fail constitutional muster. *** Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

[T]he District’s requirement (as applied to respondent’s handgun) that firearms in the home be rendered and kept inoperable at all times [makes] it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.

Before this Court petitioners have stated that "if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified," by which they apparently mean if he is not a felon and is not insane. Respondent

conceded at oral argument that he does not "have a problem [with] licensing" and that the District's law is permissible so long as it is "not enforced in an arbitrary and capricious manner." We therefore assume that petitioners' issuance of a license will satisfy respondent's prayer for relief and do not address the licensing requirement.

Justice BREYER [criticizes] us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. *** Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. [The Second Amendment] is the very product of an interest-balancing by the people— which Justice BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. [But] the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct. [Affirmed.]

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

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a

national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major federal firearms law. Upholding a conviction under that Act, this Court held that, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." Miller, 307 U.S. at 178. The view of the Amendment we took in Miller—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.

*** The preamble to the Second Amendment [is] comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence. [1] Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies. While the need for state militias has not been a matter of significant public interest for almost two centuries, that fact should not obscure the contemporary concerns that animated the Framers.

The parallels between the Second Amendment and these state declarations, and the Second Amendments omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont did expressly protect such civilian uses at the time. Article XIII of Pennsylvania's 1776 Declaration of Rights announced that "the people have a right to bear arms for the defence of themselves and the state"; § 43 of the Declaration assured that "the inhabitants of this state shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed," And Article XV of the 1777 Vermont Declaration of Rights guaranteed "[t]hat the people have a right to bear arms for the defence of themselves and the State." The contrast between those two declarations and the Second Amendment reinforces the clear statement of purpose announced in the Amendment's preamble. It confirms that the Framers' single-minded focus in crafting the constitutional guarantee "to keep and bear arms" was on military uses of firearms, which they viewed in the context of service in state militias.

The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. *** The Court today tries to denigrate the importance of this clause of

[1] The Virginia Declaration of Rights ¶13 (1776), provided: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power." (Maryland, Delaware, and New Hampshire had similar provisions.)

the Amendment by beginning its analysis with the Amendment's operative provision and returning to the preamble merely "to ensure that our reading of the operative clause is consistent with the announced purpose." That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted. *** Without identifying any language in the text that even mentions civilian uses of firearms, the Court proceeds to "find" its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court's approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.

[T]he words "the people" in the Second Amendment refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.

Although the Court's discussion of [the words "to keep and bear Arms"] treats them as two "phrases" – as if they read "to keep" and "to bear" -- they describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities. *** The term "bear arms" is a familiar idiom; when used unadorned by any additional words, its meaning is "to serve as a soldier, do military service, fight." 1 Oxford English Dictionary 634 (2d ed. 1989). It is derived from the Latin arma ferre, which, translated literally, means "to bear [ferre] war equipment [arma]" *** Had the Framers wished to expand the meaning of the phrase "bear arms" to encompass civilian possession and use, they could have done so by the addition of phrases such as "for the defense of themselves," as was done in the Pennsylvania and Vermont Declarations of Rights. The unmodified use of "bear arms," by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts. *** When, as in this case, there is no [qualifier], the most natural meaning is the military one; and, in the absence of any qualifier, it is all the more appropriate to look to the preamble to confirm the natural meaning of the text.

The Amendment's use of the term "keep" in no way contradicts the military meaning conveyed by the phrase "bear arms" and the Amendment's preamble. To the contrary, a number of state militia laws in effect at the time of the Second Amendment's drafting used the term "keep" to describe the requirement that militia members store their arms at their homes, ready to be used for service when necessary. The Virginia military law; for example, ordered that "every one of the said officers, non-commissioned officers, and privates, shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer." Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2. "[K]eep and bear arms" thus perfectly describes the responsibilities of a framing-era militia member,

> [T]he single right that [the clause describes] is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary. *** When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia.

Two themes relevant to our current interpretive task ran through the debates on the original Constitution. "On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States." *Perpich v. Department of Defense,* 496 U.S. 334, 340 (1990). On the other hand* the Framers recognized the dangers inherent in relying on inadequately trained militia members "as the primary means of providing for the common defense," Perpich, 496 U.S. at 340. *** In order to respond to those twin concerns, a compromise was reached: Congress would be authorized to raise and support a national Army and Navy; and also to organize, arm, discipline, and provide for the calling forth of "the Militia," U.S. Const. Art. I, § 8, cls. 12-16. The President, at the same time, was empowered as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Art. II, 2. But, with respect to the militia, a significant reservation was made to the States: [the] States respectively would retain the right to appoint the officers and to train the militia in accordance with the discipline prescribed by Congress. Art. I, § 8, cl. 16.

But the original Constitutions retention of the militia and its creation of divided authority over that body did not prove sufficient to allay fears about the dangers posed by a standing army [because] it did not prevent Congress from providing for the militias disarmament. *** This sentiment was echoed at a number of state ratification conventions; indeed, it was one of the primary objections to the original Constitution voiced by its opponents.

* * * *

[James] Madison, charged with the task of assembling the proposals for amendments sent by the ratifying States, was the principal draftsman of the Second Amendment. [His] decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When [his draft proposal] was debated and modified, it is reasonable to assume that all participants in the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court’s announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding.

[Dissenting opinion of Justice Breyer, with whom Justice Stevens, Justice Souter and Justice Ginsburg join, omitted.]

## Questions

1) How would you describe the "issue" before the Supreme Court? (What were the important facts, and what law was the Court called upon to interpret?)
2) What is meant by the distinction between the "operative clause" and the "prefatory clause" of the Second Amendment?
3) Can you think of any special significance of the fact that the first case the Supreme Court chose to review regarding interpretation of the Second Amendment originated in the District of Columbia rather than some other city?
4) How would you describe the key differences in interpretation described by Justice Scalia and Justice Stevens?
5) What are some of the major issues that were left to be decided in future cases?
6) What arguments would you expect each side to make if presented by the "hypothetical" problem described below?

## Hypothetical

New York City prohibits its residents from possessing a handgun without a license, and the only license the City makes available to most residents allows its holder to possess her handgun only in her home or en route to one of seven shooting ranges within the city. The City thus bans its residents from transporting a handgun to any place outside city limits—even if the handgun is unloaded and locked in a container separate from its ammunition, and even if the owner seeks to transport it only to a second home for the core constitutionally protected purpose of self-defense, or to a more convenient out-of-city shooting range to hone its safe and effective use.

The City asserts that its transport ban promotes public safety by limiting the presence of handguns on city streets. But the City put forth no empirical evidence that transporting an unloaded handgun, locked in a container separate from its ammunition, poses a meaningful risk to public safety. Moreover, even if there were such a risk, the City's restriction poses greater safety risks by encouraging residents who are leaving town to leave their handguns behind in vacant homes, and it serves only to increase the frequency of handgun transport within city limits by forcing many residents to use an in-city range rather than more convenient ranges elsewhere.

The question presented is: Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.