4. Incorporation and the right to keep and bear arms. 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." Is the Second Amendment one of the original Bill of Rights that ought to be incorporated against the States through the Fourteenth Amendment Due Process Clause? In United States v. Cruikshank, 92 U.S. 542 (1876), the Court vacated the convictions of members of a white mob for dispossessing African-Americans of their guns, holding that the Second Amendment did not apply except as against the federal government. But in subsequent challenges to federal gun regulations, the Court, interpreting the Amendment narrowly in light of its preamble, declined to enforce the Amendment to protect gun possession or use unconnected to military purposes. In United States v. Miller, 307 U.S. 174 (1939), for example, the Court upheld a conviction under the National Firearms Act, holding that the regulated weapons lacked any "reasonable relationship to the preservation or efficiency of a well regulated militia."

In Heller, District of Columbia v. Heller, 551 U.S. 570, 128 S.Ct. 2783 (2008), the Supreme Court for the first time in the Nation's constitutional history enforced the Amendment expressly as a matter of individual right. Holding that Miller did not foreclose "adoption of the original understanding of the Second Amendment," the Court invalidated, by a vote of 5-4, a D.C. law that effectively banned the possession of handguns. Because D.C. is governed by the federal government, the Court did not need to reach the question whether the Second Amendment is incorporated under due process so as to apply to state or city gun ordinances. But the articulation of the right in Heller has given rise to heated debate about whether the right to bear arms fits the criteria for other rights that have been incorporated against the states under the Due Process Clause or (as some gun rights advocates have suggested) under the Privileges and Immunities Clause.

Writing for the Court in Heller, Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito, downplayed the decision's late arrival in the Nation's constitutional history: "It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods."

Justice Scalia's majority opinion began by reviewing the linguistic and historical meaning of the right to keep and bear arms, concluding that it confers individual rather than collective rights and is unconnected to militia service: "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's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ('The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'). All three of these instances unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body. [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."

Turning to the meaning of the phrase "to keep and bear Arms," Justice Scalia concluded that "Arms" means the same now as in the 18th century: "The 1773 edition of Samuel Johnson's dictionary defined 'arms' as 'weapons of offence, or armour of defence.' [The] term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity." Again looking to Johnson's dictionary, he concluded further that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons,'" again with no necessary connection to a
militia. And while he read the phrase “bear Arms” to imply the carrying of a weapon for the purpose of offensive or defensive confrontation, he suggested that this “in no way connotes participation in a structured military organization.” Justice Scalia concluded: “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. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’”

Turning to the prefatory clause, “A well regulated Militia, being necessary to the security of a free State,” Justice Scalia asked, “Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew. [That] history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights. [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.”

Finding that post-Ratification history supported this historical account, Justice Scalia then turned to the aftermath of the Civil War, when “there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. [Blacks] were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks’ constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. [It] was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.”

Justice Scalia’s majority opinion cautioned that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” He noted the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” But, turning to the D.C. law at issue, he found it incapable of constitutional defense: “[T]he law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable. [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,’ would fail constitutional muster.” He concluded: “We are aware of the problem of handgun violence in this country. [The] Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. 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.”

Justice STEVENS dissented, joined by Justices Souter, Ginsburg and Breyer, taking a very different view of the founding text and history: “The question presented by this case is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right. Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in United States v. Miller (1939; p. 371 above) provide a clear answer to that question.

“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. [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.”

Justice BREYER filed a separate dissent, joined by Justices Stevens, Souter and Ginsburg. Justice Breyer, like Justice Stevens, argued that the Second Amendment does not protect an interest in individual self-defense, but also argued that D.C.’s regulation would survive the proper degree of scrutiny even assuming the Amendment did apply. Under an appropriate balancing of interests, “which focuses upon the presence of handguns in high-crime urban areas,” Justice Breyer argued, the D.C. ordinance “represents a permissible legislative response to a serious, indeed life-threatening, problem,” and is “tailored to” that problem because it “concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles.” Justice Breyer found no evidence that the Framers of the Second Amendment viewed “handguns in particular” as central to the Second Amendment, much less that they would have extended the Amendment to the “right to keep loaded handguns in homes to confront intruders in urban settings.”

How far does the right established in Heller extend? Does the Second Amendment bar regulations less restrictive than D.C.’s effective ban on posses-
sion of handguns? Consider Heller’s possible application to laws that limit the type of weapons individuals may possess (e.g., a ban on personal possession of machine guns and automatic rifles but not handguns or shotguns); laws that restrict the classes of persons who may handle guns (e.g., a ban on gun possession by minors or persons with a history of criminal activity or mental illness); and laws that limit the manner in which guns are handled (e.g., a ban on concealed carry or carrying while intoxicated, or a requirement that guns be stored unloaded). After Heller, will the Court apply strict or more deferential scrutiny to such regulations? And will such laws be widely invalidated or broadly upheld? For discussion, see Volokh, “Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda,” 56 UCLA L. Rev. 1443 (2009); Tushnet, “Permissible Gun Regulations After Heller: Some Speculations About Method and Outcomes,” 56 UCLA L. Rev. 1425 (2009).