No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA *ET AL.*,

PETITIONERS,

v.

DICK ANTHONY HELLER,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR STATE FIREARM ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions — D.C. Code secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

INTERESTS OF THE *AMICI*[1]

The forty State Firearm Associations[2] on whose behalf this brief is filed represent the interests of millions of citizens, members, and firearm owners across the United States. The Associations' members come from all walks of life and represent interests

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

[2] The rifle and pistol associations represented include: Alabama State Rifle & Pistol Ass'n, Arizona State Rifle & Pistol Ass'n, California Rifle & Pistol Ass'n, Colorado State Shooting Ass'n, Connecticut State Rifle & Revolver Ass'n, Delaware State Sportsmen's Ass'n, Georgia Sport Shooting Ass'n, Hawaii Rifle Ass'n, Idaho State Rifle & Pistol Ass'n, Illinois State Rifle Association, Indiana State Rifle & Pistol Ass'n, Kansas State Rifle Association, League of Kentucky Sportsmen, Inc., Louisiana Shooting Ass'n, Pine Tree State Rifle & Pistol Ass'n (Maine), Maryland State Rifle & Pistol Ass'n, Gun Owners Action League (Massachusetts), Michigan Rifle & Pistol Ass'n, Minnesota Rifle & Revolver Ass'n, Mississippi State Firearm Owners Ass'n, Missouri Sport Shooting Ass'n, Montana Rifle & Pistol Ass'n, Nebraska Shooting Sports Ass'n, Nevada State Rifle & Pistol Ass'n, Gun Owners of New Hampshire, Ass'n of New Jersey Rifle & Pistol Clubs, New Mexico Shooting Sports Ass'n, New York State Rifle & Pistol Ass'n, North Carolina Rifle & Pistol Ass'n, Ohio Rifle & Pistol Ass'n, Oklahoma Rifle Ass'n, Oregon State Shooting Ass'n, Penn. Rifle & Pistol Ass'n, Penn. Federation of Sportsmen Clubs, Rhode Island State Rifle & Revolver Ass'n, Gun Owners of South Carolina, Texas State Rifle Association, Utah State Rifle & Pistol Ass'n, Virginia Shooting Sports Ass'n, West Virginia State Rifle & Pistol Ass'n, Wisconsin Rifle & Pistol Ass'n, and Wyoming State Shooting Ass'n (collectively "State Firearm Associations").

across the political spectrum. Some members are merely interested in preserving the American tradition of responsible, law-abiding firearm ownership. Other members are simply hunters and conservationists. Many members participate in the United States' Civilian Marksmanship Program and competitions, a longstanding federal program designed to promote individual skill and proficiency with military arms through affiliation with the *amici* State Firearm Associations, and by which participants may purchase surplus military firearms directly from the United States government.

The decision below recognized that citizens have an historical right to possess firearms free from infringement by the federal government. The State Firearm Associations agree with this conclusion and are interested in this case.

SUMMARY OF THE ARGUMENT

Private firearm ownership is an essential element of the free society the framers envisioned and remains integral to the fabric of the United States to this day. As other *amici* will detail, the individual right existed long before the Articles of Confederation and has continued uninterrupted as a vital means of protecting and defending not only the individual citizens and states, but the Nation itself. In particular, the value and necessity of private, individual firearm ownership is reflected by the close relationship between State Firearm Associations, their members, and the national government in their continuing efforts to assure a proficient, armed populace. For more than a century, the federal government and the *amici* State Firearm Associations have worked together, under the

auspices of the Civilian Marksmanship Program, to train civilians in the use of firearms and distribute likely hundreds of thousands of surplus military firearms to the civilian population. In addition to acknowledging the individual right to firearm ownership, this practice demonstrates that the "militia" spoken of in the Second Amendment is, ultimately, nothing more than an assemblage of private citizens prepared to pick up arms when their state or country needs them.

The *amici curiae* agree with Respondent Heller and his other supporting *amici* who urge that the right memorialized in the Second Amendment was intended to recognize that Heller and all citizens of the Unites States, as an absolute minimum, enjoy the right to keep firearms. Thus, as a resident of the District of Columbia, Heller's right to keep a handgun peaceably in his home for his own defense under the Second Amendment is no less assured to him than his right to a jury trial under the Seventh Amendment. Significantly, however, the Second Amendment was adopted as part of a broader effort to restrain encroachment of federal authority.

This brief submits that the individual right of United States citizens to keep and bear arms enjoys three separate layers of constitutional protection: (1) the exclusion of direct firearm regulation from the federal government's powers as enumerated under Article I, Section 8, of the Constitution; (2) the Ninth and Tenth Amendments' reassurance that the "people" retained all rights not assigned to the federal government; and (3) the Second Amendment's direct affirmation that the basic right to keep arms is

among those rights specifically retained by the "people" of the United States.

The Court has repeatedly confirmed the limits of federal power and, until recently, Congress acknowledged its lack of power, as attested to by its limited attempts to prohibit the private ownership of firearms. In fact, Congress did not seek to prohibit private firearm ownership as an exercise of its commerce power for almost two hundred years. Rather than restrict rights during that period, Congress actually facilitated private firearm ownership, as evidenced by its implementation of the Civilian Marksmanship Program in 1903. Thus, Congress acknowledged not only the individual right to keep arms, but that right's historic role in assuring private and national security. While this case uniquely arises out of the District of Columbia, where the federal government exercises a police power not found elsewhere, Heller retains his right as a law-abiding national citizen to keep arms for lawful purposes.

ARGUMENT

I. THE PRIVATE POSSESSION OF FIREARMS WAS FUNCTIONALLY SIGNIFICANT TO THE FOUNDING OF THE UNITED STATES.

This Nation is the product of violent struggle on the part of scholars and rebels united by their common pursuit of individual liberty. As discussed in greater detail in Respondent's Brief, the right to keep and bear arms was both the flashpoint of the Revolution and also essential to ensuring the revolutionaries' eventual victory. *See* Brief for Respondent Heller at 19-30. After rising up and triumphing over the British to preserve, among other

things, their right to arms, it could hardly be expected that the states or the people would then willingly surrender the very tools that had won them their freedom. Indeed, the Constitution, as ratified two years later, conspicuously withheld the power to regulate the private ownership of firearms from the federal government. By all indications, the federal government had no interest in regulating firearm ownership and indeed, the new citizens would not ratify a Constitution that said otherwise.

The framers intended the Bill of Rights as a further assurance to skeptical citizens that the federal government's power would never extend beyond the areas assigned to it in Article I of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803) ("That those limits may not be mistaken . . . the Constitution is written"). The Ninth and Tenth Amendments unambiguously reaffirmed this, making it clear that the states and the people retained any and all rights and powers not surrendered to the federal government. If the framers meant to preserve state authority over only the questions of who might own what types of firearms, those amendments alone were sufficient. But the framers went further. Indeed, they used the Second Amendment to simultaneously recognize the widespread and essential role of law-abiding possession of firearms among the populace and to reassure the states and their citizens, yet again, that they would be free of federal regulation in this area. The Federalists even cited the widespread phenomena of privately held arms to ease citizens' fears over the powers that would be concentrated in the national government. The Federalist No. 46 (James Madison).

The framers recognized that all national citizens enjoyed a general right to keep arms, as that term was then understood.[3] As detailed below, in addition to the plain Constitutional text and the history surrounding its adoption, this Court and Congress subsequently recognized the limits of federal power. Until relatively recently, Congress never attempted to prohibit the possession of firearms apart from encouraging efforts to maintain a private population of citizens proficient in the use of military arms. The notion that Congress has always enjoyed the assigned but unused power to prohibit the ownership of arms by any national or state citizen is untenable in view of this history and the text of the Second, Ninth and Tenth Amendments.

II. THE CONSTITUTION, TOGETHER WITH THE BILL OF RIGHTS, REPRESENTS A PROFOUND NATIONAL COMMITMENT TO BOTH INDIVIDUAL LIBERTY AND STATE SOVEREIGNTY.

In its brief as *amicus curiae*, the United States concedes that the court of appeals correctly held that the Second Amendment protects an individual right to possess firearms, but then argues that the individual right is subject to nearly plenary exceptions as to what firearms might be owned and by whom. *See* Brief for the United States as *Amicus Curiae* at 8, 20-26.[4] While the United States is

[3] Then, as now, the term "arms" was generally understood to include any individually employed weapon designed to expel a projectile by means of a propellant. *E.g., State v. Huntley*, 25 N.C. 418 (1893); *Ortiz v. Comm.*, 681 A.2d 152, 155 (Pa. 1996).

[4] For reasons that go unexplained, the Solicitor General's position on the standard of scrutiny differs from that which the

clearly right when it recognizes that the framers acknowledged a preexisting individual right in the Second Amendment, and it might well be right when it argues that the framers understood that the individual right would be subject to generally recognized exceptions for certain individuals, such as felons, it can posit no reading that would leave a citizen, such as Respondent Heller, without the right to keep a pistol in his own home. While Petitioner and their supporting *amici* debate whether any right exists at all and what "reasonable regulation" might be attempted, they appear largely to ignore the severe limits on federal power that the framers envisioned.

As demonstrated below, the framework implemented through the Constitution and Bill of Rights leads to the conclusion that the framers intended for the states, not the federal government, to dictate the exceptions. Upon examination, it becomes clear that, as Respondent Heller contends, the Second Amendment reaffirms an individual's right to possess arms, including handguns, for private use. This is especially true in cases, such as those arising outside the District of Columbia, where

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Attorney General publicly directed all United States' Attorneys to follow as recently as 2001. While the Solicitor General cites the Attorney General's memorandum as allowing for any reasonable restriction on firearms, the Attorney General actually provided for reasonable restrictions on firearms in only two specific categories: "to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse." Office of the Attorney General, Memorandum to All United States' Attorneys (November 9, 2001).

Congress ventures beyond its enumerated powers and attempts to regulate in an area that is reserved to the states and the people. In such instances, Congress occupies its lowest ebb of power.

A. The Federal Government is a Government of Limited Powers that *Do Not* Include the Power to Directly Regulate Firearm Ownership or Possession.

"It is incontestable," as a general matter, "that the Constitution established a system of 'dual sovereignty.'" *Printz v. United States*, 521 U.S 898, 918 (1997). Under this system, the federal government has limited, enumerated powers. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *M'Culloch v. Maryland*, 17 U.S. 316, 405 (1819). Indeed, the Constitution's conferral upon Congress of only the discrete, enumerated powers found in Article I, Section 8 limits federal power, recognizing that the balance of authority was reserved to the people and to the states, respectively. *See Printz*, 521 U.S at 918.

During the course of ratification debates, the Federalists continually reassured the anti-Federalists, who feared that the federal government would annihilate state governments, of the clearly established limits of the federal government's powers.[5] At Pennsylvania's ratification convention,

[5] For example, in Federalist 78, Alexander Hamilton refuted the charge that Congress could not be trusted to control its power:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is

for example, James Wilson argued that the Necessary and Proper Clause was limited to effectuating federal policy within the enumerated powers of Article 1, Section 8.[6] As discussed in greater detail below, Wilson and other Federalists believed that there was no need for an additional Bill of Rights because the federal government was a "government possessed of enumerated powers."[7] It was a simple, but powerful concept: the federal government possessed only the powers given it under the Constitution and ***nothing*** more.

The powers assigned to Congress conspicuously ***did not*** include the power to regulate the possession of firearms, as the Senate itself has recognized. *See* Report of the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Congress, Second Session

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> greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

The Federalist No. 78 (Alexander Hamilton); *see also* General Charles Pinckney, South Carolina Convention, January 18, 1788 (excerpt reprinted in YOUNG, THE ORIGIN OF THE SECOND AMENDMENT 217 (2nd ed. 1995) (Golden Oak Books) [hereafter Young]) ("The general government has no powers but what are expressly granted to it.").

[6] *See* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 448-49, 468 (Elliot, Jonathan, ed. 1888) [hereafter Elliot].

[7] James Wilson, Pennsylvania Convention, November 28, 1787(excerpt reprinted in Young, at 114).

(S. REP. NO. 88-618) (February 1982).[8] Citing no authority, the United States' Brief baldly assumes a general federal power—apparently undiscovered throughout the nineteenth and most of the twentieth centuries—"to protect the public safety by identifying and proscribing particularly dangerous weapons." Brief for the United States as *Amicus Curiae* at 21.[9]

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[8] "The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner." *Id.*

[9] Notably, the few states supporting the Petitioner appear to take an opposite view. *See* Brief for New York, Hawaii, Maryland, Massachusetts, New Jersey, and Puerto Rico as *Amicus Curiae* at 1-2. In so doing, although the issue of selective incorporation is not before this Court, these *amici*, relying on cases that were decided when this Court's views on selective incorporation were in their early stage, argue against incorporation of the Second Amendment. *See id.* at 2 (citing *Presser v. Illinois*, 116 U.S.. 252, 265 (1886) and *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). Nonetheless, *amici's* arguments are irrelevant, as the Second Amendment directly applies to the national citizens of the District of Columbia, just as assuredly as the Seventh Amendment applies. *See Pernell v. Southall Realty*, 416 U.S. 363, 370, 94 S. Ct. 1723, 1727 (1974) ("The Seventh Amendment provides: 'In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ..' Like other provisions of the Bill of Rights, it is fully applicable to courts established by Congress in the District of Columbia."); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5, 19 S. Ct. 580, 582 (1899) ("It is beyond doubt, at the present day, that the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.").

To be sure, Congress may impose generally applicable taxes on firearms, issue firearm patents, and even regulate the interstate shipment of firearms through the U.S. Mail. But where Congress attempts to regulate the private ownership or possession of arms, however, it steps outside the bounds of its enumerated powers found in Article I, Section 8. Indeed, in addition to reaching beyond Congress' limited power, which the framers promised would never happen, such attempts also collide with the subsequent, more detailed reassurances found in the Bill of Rights. Those reassurances, implemented as a reinforcement in case the federal government breaks its promise to only act within its enumerated powers, leave the "people" free to keep arms, at a minimum, and the states free to provide additional protections or to impose additional requirements.

B. The Bill of Rights, as a Whole, Further Reaffirmed Congress' Confinement to the Areas of Specific Authority Enumerated in Article I, Section 8.

Together, the Ninth and Tenth Amendments express the Constitution's overarching purpose to "divide[] authority between federal and state governments for the protection of individuals." *See New York v. United States*, 505 U.S. 144, 181 (1992). To understand that purpose, it is necessary to review the amendments' historical context.

While the Constitution's proponents insisted that the federal government was limited to its enumerated powers found in Article I, Section 8, the people were distrustful. Having already endured firsthand the consequences of unwanted government intrusion, the people demanded additional

assurances. So, in order to secure ratification over the protests of James Madison, Congress promised a Bill of Rights. ROBERT GOLDWIN, FROM PARCHMENT TO POWER 75-153 (1997).

Thus, "federalism [was intended to] secure[] to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). The right of law-abiding citizens to keep arms was obviously one of those liberties. Indeed, the Ninth, Tenth and Second Amendments were paramount among the assurances demanded by the people in order to secure ratification. While the Ninth Amendment gave direction on how to read the Constitution, making it clear that the failure to enumerate a certain right did not somehow preclude its existence, the Tenth Amendment reassured the states and their citizens that they kept, unequivocally, any powers that they did not surrender. *See U.S. Public Workers v. Mitchell*, 330 U.S. 75 (1947). Meanwhile, the Second Amendment carved out—with great specificity—an express and individual right to keep firearms, a right that belongs to all of "the people."

The new citizens saw firearm ownership as their only reliable means of holding the federal government to its other promises. If the Constitution and Bill of Rights were, respectively, the first and second guarantees of their rights, firearms represented a third, decidedly *tangible* last resort available to them if and when Congress inevitably reversed course and asserted powers not reserved to it. *See* The Federalist No. 46 (James Madison).

C. The Second Amendment Simply Confirmed A Right That Already Existed.

The right of the new citizens to keep arms was not new. Evidencing the prevailing right to keep arms, Thomas Jefferson included the unequivocal right in a 1776 draft of the Virginia Constitution: "No freeman shall ever be debarred the use of arms (within his own lands or tenements)." 1 Papers of Jefferson 344, 353, 363 (C.J. Boyd, Ed., 1950). This right had nothing to do with militias, but instead reflected the simple and unqualified understanding that a free citizen has the right to a firearm, if he so chooses.

The ratification debates provide even more evidence that individual citizens not only enjoyed a pre-Constitution right to keep arms, but that they viewed it an essential. Massachusetts, for example, put forth an amendment assuring "that the said constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1453, 1469-71 (John P. Kaminski, *et. al.* Eds.). Other states offered their own absolute prohibitions against federal regulation of firearms as well, underscoring the great importance that the new citizens assigned to this particular right.[10] One is left to wonder whether

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[10] Zacharia Johnson, a delegate to the Virginia ratifying convention, argued that "[t]he people are not to be disarmed of their weapons. They are left in full possession of them." Zacharia Johnson, delegate to Virginia Ratifying Convention, Elliot, 3:645-46. Another amendment offered at the Pennsylvania ratifying convention made it clear "that the people have a right to bear arms for the defense of themselves and

the vast majority of western states would have consented to join the Union if they had any textual basis for suspecting that the federal government would arrogate to itself the power to determine what firearms its citizens might own.

Alexander Hamilton also understood the vital importance of preserving the pre-Constitution right to arms:

> If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government . . . . [I]f the persons entrusted with supreme power become usurpers, . . . [t]he citizens must rush tumultuously to arms . . . .

The Federalist No. 28 (Alexander Hamilton). Many of the nation's other founding fathers shared Hamilton's view, including Samuel Adams,[11] James Madison,[12] and Noah Webster.[13]

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their own state, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597-98. Additionally, New Hampshire sought an amendment asserting that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion." *See* NEIL H. COGAN, COMPLETE BILL OF RIGHTS 181 (1997).

[11] SAMUEL ADAMS, DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, at 86-87 (Pierce & Hale, eds., Boston, 1850) (the "Constitution

III. THIS COURT AND CONGRESS HAVE BOTH RECOGNIZED THE LIMITS TO FEDERAL POWER.

A. This Court's Precedent Forecloses a Wandering Application of the Commerce Power in this Arena.

To be sure, the Constitution allows Congress the power to regulate interstate commerce. U.S. Const. art. I. This power cannot be read so expansively, however, as to invalidate the Tenth Amendment. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995). Unlike its power to tax and spend, which is subject only to the "general welfare" limitation, the Commerce Clause empowers Congress to "regulate commercial commerce with foreign nations, and among the several states, and with Indian tribes." U.S. Const. art. I, § 8 cl.3. Nothing more. Nothing less. Indeed, if Congress were permitted, under the guise of the regulation of commerce, to exercise a *de facto* police power, there would be no end to the expansion of legislation; the

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shall never be construed to authorize Congress . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms.").

[12] The Federalist No. 46 (James Madison) (the advantage "which Americans possess over the people of almost every other nation" is the "advantage of being armed.").

[13] NOAH WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (Philadelphia 1787) ("The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States.").

states would be mere federal appendages; and the citizens would be denied the privileges and immunities of *state* citizenship. *See Lopez*, 514 U.S. at 566 (noting that the Constitution withholds "from Congress a plenary police power that would authorize enactment of every type of legislation").

As Justice Holmes once famously explained, "the health and safety of the people of a state are primarily for the state to guard and protect." *Lochner v. New York*, 198 U.S. 45, 73 (1905) (Holmes, J., dissenting).[14] The federal government may facilitate and encourage private firearm ownership as much as it wants—and is arguably obligated to do so pursuant to Article I, Section 8, Clause 16 of the Constitution—but it may not regulate it outside the narrow scope of its commerce power or other enumerated powers. Indeed, any argument for an expansive reading of the commerce power is particularly inappropriate where, as where, the Constitution has declared a fixed national policy to the contrary. *See Printz v. United States*, 521 U.S. 898, 936 (1997) (Thomas, J., concurring).

An analogy is useful. In *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson's concurring opinion envisioned presidential power on a continuum. The President's power is at its highest level "[w]hen the President acts pursuant to an express or implied authorization of Congress." *Id.* at 635. The President's power is at a midpoint

[14] A state might well conclude, like Switzerland has, that every competent adult citizen should be compelled to keep a particular gun in his or her home. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 273 (1983). Another state, however, might conclude otherwise.

when the President and Congress have concurrent authority, but Congress is silent. *See id.* at 637. Finally, the President's power is at its lowest ebb "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." *Id.*

Applying the reasoning found in *Youngstown* to Congressional power, Congress' power is surely at its zenith when regulating pursuant to a power enumerated under Article I, Section 8.[15] Thus, an exercise of the power to establish rules for bankruptcy does not infringe any reserved right of the states or the people. Congress' power to regulate is at a midpoint when it regulates pursuant to the Commerce Clause in an area that is neither specifically assigned to it nor foreclosed to it by the Constitution. Accordingly, an effort to establish, for example, a national drug enforcement standard is not assigned to the federal government, but can be argued not to conflict with an acknowledged, reserved right of the states or the people to keep harmful drugs or to regulate the use thereof, respectively.[16] Congress' power is at its lowest ebb when it ventures outside the powers enumerated in Article I, Section 8 and attempts to enact preclusive regulation in an area foreclosed to it and assigned to the states and assured to "the people," such as the regulation of firearm ownership. Congress has no more basis for claiming an authority under the Commerce Clause to regulate the mere possession of a firearm than it does

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[15] Thus, Congress can oversee the patenting of firearms or regulate the shipment of firearms across state lines through the U.S. Mail.

[16] *See Gonzales v. Raich*, 545 U.S. 1 (2005).

directing the quartering of troops during time of peace.

An effort by Congress to invoke its commerce power may survive where it addresses a topic less clearly wrested from it in the constitutional text. No one questions that Congress has the power to regulate commerce *qua* commerce. Thus, it could be argued that Congress might demand that one engaged in the business of selling firearms make and keep records of his transactions, participate in a background check, and decline to complete a transfer to those who can make no claim or right to possession.[17]

B. Congress' Limited Role in Regulating the Private Ownership of Firearms is an Historic Fact.

An overview of federal regulation of firearms quickly reveals Congress' respect for its lack of enumerated power private over firearm ownership, as well as its respect for the accompanying protections of the Tenth and Second Amendments. Indeed, the federal government did not even attempt

[17] "Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms]." Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA L.REV. 65, 96 (1983); *see also* Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 Law & Contemp. Probs. 151 (1986) (agreeing that "violent criminals, children, and those of unsound mind may be deprived of firearms . . . "); Don B. Kates, Jr., HANDGUN PROHIBITION AND THE ORIGINAL MEANING OF THE SECOND AMENDMENT, 82 MICH. L. REV. 204, 266 (1983) ("Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them.").

to regulate the private ownership of firearms for almost 150 years. Even then, until the 1980s, firearms policy was left to the state except insofar as firearms themselves were used in commerce or were transferred on a commercial level.

Congress' first major foray into gun control was the National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5801 et seq.) ("NFA"). Congress passed the NFA in response to the use of deadly weapons by the criminal underworld, seeking to discourage commerce of machine guns, sawed-off shotguns, and silencers by imposing burdensome taxes on their transfer. *See* 26 U.S.C. § 5861; National Firearms Act: Hearings on H.R. 9066 before the H. Comm. on Ways and Means, 73d Cong., 2d Sess., at 4-5 (1934). Thus, the NFA was an expression of Congress' taxing power under Article I, Section 8 and not an outright ban. Significantly, the Act did not effect a general prohibition of any sort, but instead imposed a tax on a narrow category of firearms.

Four years later, Congress passed the Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250 (1938) ("FFA"). The FFA required those engaged in the commercial sale of firearms and using channels of interstate and foreign commerce to submit to licensing and to keep records of their transactions. *Id.* Additionally, it forbade felons and fugitives from owning a gun. *Id.* To be sure, a colorable argument exists that felons and fugitives present a clear and present danger to commerce, among other things,

and are universally forbidden from possessing arms by state law. *Id.*[18]

Congress' next major legislation involving arms came thirty years later when it enacted the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921 *et seq.*) ("GCA"). The GCA extended the NFA's *taxation* of firearms and introduced new licensing requirements. *Id.* The GCA also expanded the list of persons who were prohibited from possessing firearms, prohibited the sale of handguns to out-of-state residents, and imposed strict penalties on persons convicted of carrying a firearm during the commission of a felony. *Id.* Once again, the GCA was not an outright ban on firearm ownership.

It was not until the mid-1980's that Congress, for the first time, purported to prohibit the possession, without more, of a firearm by a citizen without any attendant connection to interstate commerce. *See* Firearm Owners' Protection Act, Pub. L. No. 99-308 (codified at 18 U.S.C. § 921 *et seq.*). Even then, this prohibition was itself limited and did not effect a complete ban because only machine guns manufactured or registered after 1986 were prohibited. All such firearms registered before that date still could be possessed by and transferred to law-abiding citizens.

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[18] Underscoring the scrutiny to which claims of commerce power are subjected, however, the Supreme Court has been cautious in its reading of the restrictions on former felons, in view of Tenth Amendment restrictions on the exercise of commerce power. *United States v. Bass*, 404 U.S. 336, 344 (1971) (reading Act to require the prohibited possession to have a commerce nexus).

In 1990, Congress enacted the Gun-Free School Zones Act of 1990, Pub.L. 101-647, 18 U.S.C. § 922(q). As the name describes, the law purportedly made it unlawful for any individual knowingly to possess a firearm in a school zone as an expression of the commerce power. The Act was found unconstitutional *United States v. Lopez*, 514 U.S. 549 (1995) as exceeding Congress' authority under the Commerce Clause.[19]

The historical reluctance of Congress to delve into the possession of arms by individual citizens reaches far beyond the period canvassed in *Lopez*. The Second Amendment reflects a basic rejection of the national government exercising this authority over the individual or the states. *E.g.*, *Presser v. Illinois*, 166 U.S. 252 (1886).

The revolution that gave birth to this Constitution began on an April afternoon in rural Massachusetts. History has largely forgotten why

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[19] In 1993, Congress also enacted the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536, which amended the GCA and required federally licensed firearm dealers to check the National Instant Criminal Background Check System ("NICS") before selling a handgun to a prospective purchaser. Once again, Congress made no attempt to ban firearms outright, and acted only within the narrow confines of its commerce power over those federally licensed to engage in the commercial sale of firearms. The next year, in 1994, Congress enacted the so-called Assault Weapons Ban, Pub. L. 103-322, which implemented a ten-year ban on certain semi-automatic weapons manufactured after the date of the legislation's enactment. Thus, the ban was not an outright ban on ownership, as individuals who previously possessed the weapons were not affected by the law. The Assault Weapons Ban expired on September 13, 2004, as part of the law's sunset provision.

the confrontation took place: The British Governor had concluded that the inhabitants of Concord were too heavily armed. *See* Letter of F. Smith, British Officer, to Governor Gage, April 22, 1775. He dispatched a force to collect and destroy the colonists' firearms and munitions. On arriving at Lexington, the force was confronted by "people drawn up in military order." After that confrontation, the force proceeded to Concord and destroyed what arms could be found. The farmers and other residents then shot and killed many of the force on its return march to Boston. It is unimaginable that these same citizens would have endorsed a Constitution that would have authorized the *new* national government to do precisely the same thing that the British regime had attempted.

IV. CONGRESS HAS ACKNOWLEDGED ITS ROLE OF SUPPORTING PRIVATE OWNERSHIP OF FIREARMS AMONG THE CITIZENRY.

Discussion of the individual right to possess firearms often focuses on protection for the individual's person and property and the protection of the individual states. These are, to be sure, very important purposes underlying the Second Amendment. But they are not the only purposes. More than a century ago President Theodore Roosevelt, Congress, and military leaders recognized that the consequence of a citizenry untrained in firearm use is a citizenry equally unprepared to protect the Nation. Moreover, as Respondent Heller points out, private firearm ownership is essential to the enabling the "militia" spoken of in the Second Amendment. *See* Brief for Respondent Heller at 14-18. While much is made of the rights of individuals

versus the rights of militias, it is ultimately a distinction without difference. As envisioned by the framers and demonstrated by this nation's laws and history, a "militia" is nothing more than individual firearm owners who are prepared, when their state or country needs them, to pick up arms.[20]

American history is replete with examples of the federal government working cooperatively with the states, the National Rifle Association, these *amici* and their members to assure a proficient armed civilian populace. This cooperative relationship is reflected by the United States' Civilian Marksmanship Program ("CMP"), as originally codified at 10 U.S.C. § 4308, through which the government has used state Firearm Associations, including the *amici*, as official conduits to arm and train individual citizens for more than a century.

As this Court has held, the American *people* constitute "the reserved military force . . . of the United States."[21] Indeed, an estimated fifty-two million American adults own a firearm, compared to just 1.5 million active duty military personnel.[22] Congress is explicitly charged with providing for that "reserved military force" under Article I, Section 8,

[20] *See* AKHIL AMAR, THE BILL OF RIGHTS 51 (1998) ("[T]he militia is identical to 'the people.'"); WILLIAM RAWLE, VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 153 (2d ed. 1829) ("In a people permitted and accustomed to bear arms, we have the rudiments of a militia.").

[21] *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *see also Miller v. United States,* 307 U.S. 174, 179 (1939) ("[T]he militia" are not "troops" or "standing armies" but "civilians primarily").

[22] *See* Lisa M. Hepburn, *The U.S. Gun Stock: Results From the National Firearms Survey*, INJURY PREVENTION 15, (2007), *available at* http://injuryprevention.bmj.com/cgi/reprint/13/1/15.

Clause 16 of the Constitution, and the CMP provides the vehicle by which Congress can satisfy its obligation.[23] If and when the United States confronts a challenge to its sovereignty or security that exceeds the standing army's immediate capacity, the call for support will inevitably go out to civilians. When those individuals respond, the CMP provides the means of assuring that—whether they are doctors, lawyers, farmers, or ice cream vendors—they own a firearm and know how to shoot it accurately.[24]

History supports the fear that the nation's troops lacked marksmanship training. For example, it is estimated that in the Battle of the Little Big Horn in 1876, George Custer's doomed Seventh Cavalry fired no less than 42,000 rounds but only dispatched between forty to fifty of the opposing force.[25]

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[23] *See* David B. Kopel and Christopher C. Little, *Communitarians, Neorepublicans, and Gun: Assessing the Case for Firearms Prohibition*, 56 MARYLAND L. REV. 438, 480 (1997); (stating that CMP was initiated "for the purpose of improving marksmanship skills among citizens in order that those called to military service might be more proficient marksmen and require less training").

[24] "The CMP provides and encourages voluntary marksmanship training for persons who are not reached by training programs of the Armed Forces and who might be called into service in an emergency." 32 C.F.R. § 544.4(b).

[25] Greg Michno, *Guns of the Little Big Horn*, WILD WEST MAGAZINE 29, 34 (1998). In a similar vein, two Union officers formed the National Rifle Association ("NRA") in 1871 to promote marksmanship as a reaction to the poor marksmanship of their Civil War Troops." Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 767 (2005) (citation omitted). The structure established through the NRA and state firearm

Looking ahead to times when civilian help would be needed, President Roosevelt "wanted youth to learn the ideals of telling the truth and shooting straight."[26] At his urging, in 1903 Congress established the National Board for the Promotion of Rifle Practice ("NBPRP") to educate the public about firearm safety and marksmanship.[27] In 1905 President Roosevelt signed Public Law 149 into effect, authorizing the sale of surplus military rifles, ammunition, and related equipment to the civilian state Firearm Associations.[28] In ensuing years, the military also made military pistols available for civilian purchase through the same program.[29]

President Roosevelt made clear in his State of the Union Address in 1906 that he saw private ownership of firearms and strong support by state firearm associations, including the *amici*, as critical

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associations would later provide the mechanism to enable the CMP.

[26] *See* Kopel and Little, supra note 21 (quoting Vaughn R. Croft, Editorial, *Marksmanship Programs Was and Is Needed, Helpful*, PANTAGRAPH (Bloomington, Ill.), May 14, 1995, at A-13.).

[27] *Id.*; *see also* CIVILIAN MARKSMANSHIP: PROMOTION OF PRACTICE WITH RIFLE ARMS, ARMY REG. 920-20 (Mar. 19, 1990) [hereinafter Civilian Marksmanship].

[28] *See* 10 U.S.C. § 4308(a)(5). In 1961 alone, over 77,000 rifles, 37,000 pistols, and 4300 shotguns were sold to the public through the CMP. *Gavett v. Alexander*, 477 F.Supp. 1035, 1039 n.6 (D.D.C. 1979).

[29] *See* BILL JENKINS, U.S. MILITARY MATCH AND MARKSMANSHIP AUTOMATIC PISTOLS 26 (2005).

in guaranteeing the United States' continuing military strength:

> Congress has most wisely provided for a National Board for the promotion of rifle practice. Excellent results have already come from this law, but it does not go far enough. Our Regular Army is so small that in any great war we should have to trust mainly to volunteers; and in such event these volunteers should already know how to shoot . . . . We should establish shooting galleries in all the large public and military schools, should maintain national target ranges in different parts of the country, and should in every way encourage the formation of rifle clubs throughout all parts of the land.[30]

In a step toward President Roosevelt's goal, Congress passed the National Defense Act of 1916. The Act authorized the War Department to distribute arms and ammunition to the state firearm associations, provided funds for the operation of government shooting ranges, and opened all military ranges to civilian shooters.[31] Additionally, the Act created the Office of the Director of Civilian Marksmanship ("DCM"), the forerunner of the CMP.[32] The National Defense Authorization Act of 1996 transferred the DCM's function to a new,

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[30] President Theodore Roosevelt, State of the Union Address (Dec. 3, 1906).

[31] *See* Johnson, *supra* note 24 at 769 (citation omitted).

[32] *Id.*

private non-profit corporation, the CMP.[33] In conjunction with the State Firearm Associations, the CMP conducts various national matches, including rifle and pistol competitions, training, and volunteer military training across the nation, and continues to facilitate private acquisition of surplus military rifles and pistols.[34]

The CMP's immediate purpose was to provide the armed forces with recruits that had firearms training upon enlistment.[35] This goal was achieved: a federal study conducted at the outset of the Vietnam conflict found that program participants were substantially better marksman than those soldiers who had not participated in the program.[36] This is particularly important with regard to pistols, which demand greater skill to fire accurately, but have

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[33] *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (codified as amended in scattered sections of 36 U.S.C. and 10. US.C.). For the sake of simplicity, the Brief henceforth refers to both the CMP and DCM as "CMP."

[34] JAMES B. WHISKER, THE CITIZEN SOLDIER AND UNITED STATES MILITARY POLICY 38 (1979).

[35] *See* Civilian Marksmanship*, supra* note 6 at 3 ("The purpose of the [DCM] is to promote practice in the use of rifled arms by citizens . . . subject to induction into the U.S. Armed Forces.").

[36] *See* ARTHUR D. LITTLE, INC., A STUDY OF THE ACTIVITIES AND MISSIONS OF THE NBPRP [NATIONAL BOARD FOR THE PROMOTION OF RIFLE PRACTICE], REPORT TO THE DEPARTMENT OF THE ARMY, No. C-67431 (Jan. 1966), *reprinted in* 123 Cong. Rec. 23, 784, 23, 786 (1977) [hereinafter NBPRP Study]. Additionally, the study revealed that a soldier with previous firearms skills was less likely to be wounded or killed in combat. *Id.* Moreover, the study found that the soldiers with prior CMP experience were more confident, were better potential combat soldiers and that, in sum, the Army had profited by the NBPRP. *Id.*

become an indispensable part of the military arsenal.[37] The CMP's second but equally important purpose was to support and encourage the armed populace called for by the Constitution and federal statute. U.S. Const. art. I, §8.16; 10 U.S.C. § 311.

The notion that individual American citizens will be called to protect their homeland is hardly a hypothetical concept. Throughout the past hundred years, private citizens and the state firearm associations, including the *amici*, have fulfilled the CMP's second purpose. During World War II, for example, private firearm ownership provided much needed protection for the United States at home, in stark contrast to Great Britain which found that its lack of privately-owned firearms left the country acutely vulnerable to looming invasion.[38]

When the United States deployed the National Guard overseas during World War II, private citizens replaced them domestically, serving without any pay and mustering with their own firearms.[39] State governors called for civilian help in 1942 and six hundred thousand men—and some women—patrolled for the next eighteen months.[40] Meanwhile, panic

[37] *See, e.g.* RALPH HAGAN, THE LIBERATOR PISTOL 41-47 (1996) (discussing the U.S. military's distribution of pistols to civilian populations in strategic points around the world post-World War II).

[38] Dan Gifford and Dave Kopel, *D-Day Was Almost A German Holiday*, SECOND AMENDMENT PROJECT (June 14, 2004), *available at* http://www.davekopel.com/2A/OpEds/D-Day-was-almost-a-German-holiday.htm.

[39] Robert Dowlut and Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 197 (1982).

[40] *Id.*

broke out in Great Britain: restrictive gun controls enacted in 1921 had disarmed the public, leaving a defenseless British populace to combat German invasion.[41] The British government advertised in American newspapers, declaring that "British civilians, faced with the threat of invasion, desperately need arms for the defense of their homes," and begged Americans to send "pistols, rifles, revolvers and shotguns."[42]

More recently, the United States military called upon state firearm associations, including the *amici*, for vital marksmanship training. In 2004, for example, members of the Texas State Rifle Association, a CMP affiliate, taught high power rifle marksmanship to troops from the Army's First Cavalry Division immediately before their departure for Iraq.[43] The civilian trainers, comprising a diverse group including a John Deere employee, a chemist, and an insurance salesman, had honed their own marksmanship skills through CMP sponsored shooting competitions, using their own firearms that they had acquired directly from the federal government through the CMP. [44]

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[41] *Id.*

[42] *Id.*

[43] Robert Lanham, *TSRA Rifle Team Teaches Army Squad Designated Marksmen at Camp Bullis*, TSRA SPORTSMAN 10 (May/June 2004).

[44] *Id.* Similar trainings have taken place across the country as the Army Marksmanship Unit works with the CMP to develop a program by which civilian instructors who have honed their skills through CMP programs and private firearm ownership are able to share their knowledge with soldiers preparing for combat abroad. *Civilian Instructors to Support Army*

V. THE FEDERAL GOVERNMENT'S POWER OVER THE DISTRICT OF COLUMBIA IS SUBJECT TO SPECIFIC CONSTITUTIONAL LIMITATIONS.

The federal government's authority — via the District of Columbia — to regulate firearms arises here under a unique limited police power that does not exist on the other side of the Potomac or anywhere else in the United States. *See Berman v. Parker*, 348 U.S. 26, 31-32 (1954). This authority, however, is "[s]ubject to specific constitutional limitations." *See id.* at 32; District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 87 Stat. 774, 302 (1973)("The legislative power of the District shall extend to all rightful subjects of legislation within the District *consistent with the Constitution of the United States* and the provisions of this Act.") (emphasis added).

"Constitutional limitations" are clearly implicated in this case, where the District is attempting to limit Heller's right as a national citizen, under the protection of the Second Amendment, to keep arms in his home. While Respondent Heller may not claim any separate Tenth Amendment right as a citizen of a state, he hardly needs to, as the amendment applies directly to the federal government.[45]

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Marksmanship Training, THE FIRST SHOT (May 2005), *available at* http://www.odcmp.org/0505/default.asp?page=SDM.

[45] While the Seventh Amendment has not been selectively incorporated through the Fourteenth Amendment, it is directly applicable in the District of Columbia. *See Pernell v. Southall*

This concept is supported by the fact that, in 1789, the framers had no reason to anticipate that there would be any need of exceptions to the Ninth, Tenth and Second Amendments. Indeed, the District of Columbia was not founded until July 16, 1790. The framers envisioned having a district which would contain the "Seat of Government," *see* Article I, Section 8, but they made no provisions to ensure that its future citizens would be exempt from the protections afforded to the citizens of the states by the Bill of Rights.

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Realty, 416 U.S. 363, 370, 94 S. Ct. 1723, 1727 (1974); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5, 19 S. Ct. 580, 582 (1899) ("It is beyond doubt . . . that the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.).

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

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