

American Constitutionalism

Volume II **Rights and Liberties**

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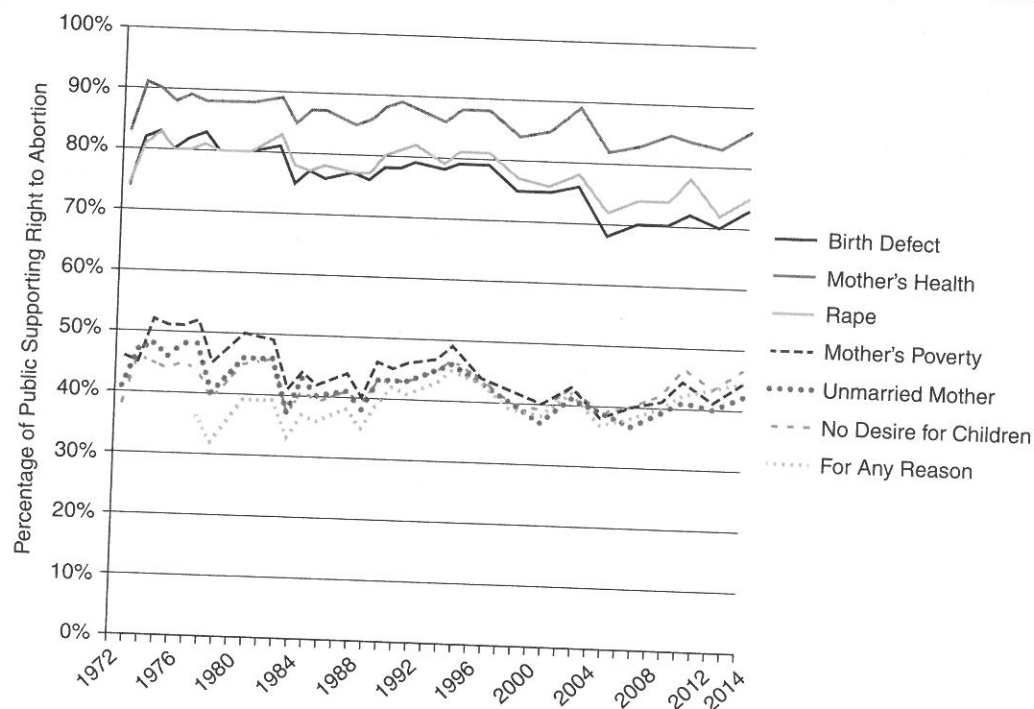


Figure 9-2 Public Support for Abortion Rights, 1972–2014

Source: General Social Survey.

also changed shape during the 1970s. Before *Roe*, opposition to abortion was led largely by Catholic organizations. During the 1970s Catholics joined forces with conservative Protestants to form powerful interest groups dedicated to promoting a conservative understanding of constitutional family rights. The National Right to Life Committee, originally a Catholic organization, became nonsectarian and assumed a role as the leading political force for abortion restrictions.

Abortion

Roe v. Wade, 410 U.S. 113 (1973)

Norma McCorvey was a young unmarried woman who claimed that she became pregnant after being raped. McCorvey sought an abortion, but Texas law at the time permitted pregnancies to be terminated only for the "purpose of saving the life of the mother." Using the pseudonym Jane Roe, McCorvey sought an injunction against Henry Wade, the state attorney for Dallas County, Texas, that would forbid him from enforcing the state laws

against abortion on the ground that they were unconstitutional. A three-judge panel declared the Texas law void for vagueness. Texas appealed to the U.S. Supreme Court.

The Supreme Court by a 7–2 vote ruled the Texas ban on abortion unconstitutional. Justice Blackmun's majority opinion maintained that the right of privacy discussed in *Griswold v. Connecticut* (1965) encompassed the right to terminate a pregnancy. The majority opinions in *Roe* assume that the crucial question is whether the fetus is a person. Is this correct? States may ban animal sacrifices, even though no one thinks dogs are protected by the Fourteenth Amendment. Conversely, no state requires people to donate kidneys to needy persons. Is either of these analogies helpful in thinking about abortion? What is the source of the constitutional right in the opinions that follow? Does *Roe* follow from *Griswold* as easily as Justice Stewart suggests? Might *Griswold* be right and *Roe* wrong? On what logic? Justice Blackmun, who in the 1950s served as resident counsel for the Mayo Clinic in Rochester, Minnesota, divides pregnancy into trimesters. What is the significance of the trimester system? Does this system have sound constitutional roots, or is the trimester system further proof that *Roe* is illegitimate judicial legislation?

In *Doe v. Bolton* (1973), a companion case to *Roe v. Wade*, the Supreme Court considered Georgia laws that limited abortion to circumstances involving a serious health threat to the mother, required the woman seeking an abortion to be a Georgia resident, mandated that three doctors certify that the reason for the abortion was legitimate, and required that the abortion be performed in a hospital. These provisions were typical of abortion reform laws passed during the 1960s. All were declared unconstitutional by the same 7–2 majority. Justice Blackmun's majority opinion declared, "The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview."

JUSTICE BLACKMUN delivered the opinion of the Court.

...

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to

discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. . . .

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. . . . Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. . . . Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. . . .

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of



Illustration 9-1 Alternative to *Roe v. Wade*.

Source: Paul Conrad, "Alternative to *Roe v. Wade*," *Los Angeles Times*, November 21, 1988, II5. © Copyright, Paul Conrad Estate.

conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to life birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

...
The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, ... the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. ... These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut* (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy

at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. ... [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. ...

...
Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," ... and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. ...

...
The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. ... If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. ...

The Constitution does not define "person" in so many words. ... But in nearly all [constitutional references to "person" in] these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.

All this, together with our observation that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.

...
Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

...
With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at

approximately the end of the first trimester. This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

...

JUSTICE STEWART, concurring.

... *Griswold* stands as one in a long line of . . . cases decided under the doctrine of substantive due process, and I now accept it as such.

...

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving v. Virginia* (1967) . . . ; *Griswold v. Connecticut* (1965) . . . ; *Pierce v. Society of Sister* (1925) . . . ; *Meyer v. Nebraska* (1923) . . . As recently as last Term, in *Eisenstadt v. Baird* (1972), we recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. . . .

...

JUSTICE DOUGLAS, concurring.

...

The Ninth Amendment obviously does not create federally enforceable rights. It merely says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But a catalogue of these rights includes customary, traditional, and time-honored rights,

amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. Many of them, in my view, come within the meaning of the term "liberty" as used in the Fourteenth Amendment.

First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.

...

Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.

...

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.

...

... The "liberty" of the mother, though rooted as it is in the Constitution, may be qualified by the State. . . . But where fundamental personal rights and liberties are involved, the corrective legislation must be "narrowly drawn to prevent the supposed evil." . . .

...

The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the "liberty" and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of group controls over the physician-patient relationship is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on the physician and patient in abortion cases denies them their "liberty," viz., their right of privacy, without any compelling, discernible state interest.

...

CHIEF JUSTICE BURGER, concurring.

...

I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to

life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

...
With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgments. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant woman more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing women and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

...
JUSTICE REHNQUIST, dissenting.

...
If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth

Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. . . . The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical Co.* (1955). . . . The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective. . . . But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

...
The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . .

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. . . . By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. . . .

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

Amendment out of the Constitution. I must respectfully disagree with this view, for when I was sworn in as Attorney General of the United States, I took an oath to uphold and defend the Constitution. That responsibility applies to all parts of the constitution, including the Second Amendment. . . .

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

Dick Heller, a special police officer in Washington, DC, applied for a license to keep a handgun in his home. The District of Columbia at the time banned all handguns but permitted the chief of police to issue a license for one year. When Heller was denied a permit he and several other citizens of the District challenged the constitutionality of the prohibition in federal court. The local district court dismissed their appeal, but that dismissal was reversed by the Court of Appeals for the District of Columbia. The appellate court decision found that Heller had an individual right to carry a gun for self-defense and that the total ban on handguns violated the Second Amendment. The District of Columbia appealed to the U.S. Supreme Court.

The Supreme Court by a 5–4 vote affirmed the Court of Appeals’ decision that Heller had a Second Amendment right to have a handgun in his home. Justice Scalia’s majority opinion maintained that both the text and the history of the Second Amendment support an individual’s right to bear arms. Both Justice Scalia and Justice Stevens rely heavily on the original meaning of constitutional provisions. Are they the same kind of originalists who simply interpret the same materials differently, or are they different kinds of originalists who place different emphasis on different materials? To what extent do you believe that historical materials, rather than policy preferences, drive each analysis? Consider also the implications of Heller. What gun regulations would you predict would be unconstitutional after Heller? To what extent are you basing those predictions on your beliefs about judicial policy preferences or the language in the judicial opinions?

JUSTICE SCALIA delivered the opinion of the Court.

. . .

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, “Because a well regulated Militia is

necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”

. . .

Logic demands that there be a link between the stated purpose and the command. . . . But apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. . . .

. . .

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.

. . .

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.”

. . .

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.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that “bear arms” had in the 18th century. In numerous instances, “bear arms” was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which 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. . . .

Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.

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. . . .

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two of them—Pennsylvania and Vermont—clearly adopted individual rights unconnected to militia service. Pennsylvania's Declaration of Rights of 1776 said: "That the people have a right to bear arms for the defence of themselves, and the state. . . ." . . . In 1777, Vermont adopted the identical provision, except for inconsequential differences in punctuation and capitalization. . . .

That . . . of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right. . . .

[V]irtually all interpreters of the Second Amendment in the century after its enactment interpreted the amendment as we do.

St. George Tucker's version of *Blackstone's Commentaries* . . . conceived of the Blackstonian arms right as necessary for self-defense. . . . Tucker elaborated on the Second Amendment: "This may be considered as the true palladium of liberty. . . . The right to self-defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." . . . He believed that the English game laws had abridged the right by prohibiting "keeping a gun or other engine for the destruction of game."

Antislavery advocates routinely invoked the right to bear arms for self-defense. Joel Tiffany, for example, citing Blackstone's description of the right, wrote that "the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed." . . .

Like 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. . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. . . . [N]othing 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 arms.

[T]he 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.

...

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. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. 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. . . .

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.

...

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.

...

The preamble to the Second Amendment makes three important points. It identifies the preservation of

the militia as the Amendment’s purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be “well regulated.” In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence. 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 Amendment’s 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. . . . 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 Court . . . overlooks the significance of the way the Framers used the phrase “the people.” . . . In the First Amendment, no words define the class of individuals entitled to speak, to publish, or to worship; in that Amendment it is only the right peaceably to assemble, and to petition the Government for a redress of grievances, that is described as a right of “the people.” These rights contemplate collective action. . . . Likewise, although the act of petitioning the Government is a right that can be exercised by individuals, it is primarily collective in nature. For if they are to be effective, petitions must involve groups of individuals acting in concert.

Similarly, the 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.

...
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." ... 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. The absence of any reference to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble.

...
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, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a "law-abiding, responsible citizen[n]" the right to keep and use weapons in the home for self-defense is "off the table." ... Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

...
JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

... [T]he protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are—whether they do or do not include an independent interest in self-defense—the majority's view cannot be correct unless it can show

that the District's regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.

... [A] legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted. In these circumstances, the District's law falls within the zone that the Second Amendment leaves open to regulation by legislatures.

...
... The majority is wrong when it says that the District's law is unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." ... How could that be? It certainly would not be unconstitutional under, for example, a "rational basis" standard, which requires a court to uphold regulation so long as it bears a "rational relationship" to a "legitimate governmental purpose."

...
I would simply adopt an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally 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. ... Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. ...

In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. ...

...

No one doubts the constitutional importance of the statute's basic objective, saving lives. . . .

[Justice Breyer then discussed the evidence that the District relied on when imposing the handgun ban and the evidence indicating whether such bans are effective in practice. On the basis of this evidence, he concluded:]

...

The upshot is a set of studies and counterstudies that, at most, could leave a judge uncertain about the proper policy conclusion. But from respondent's perspective any such uncertainty is not good enough. That is because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact. And, given that constitutional allocation of decisionmaking responsibility, the empirical evidence presented here is sufficient to allow a judge to reach a firm *legal* conclusion.

...

In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive alternatives. . . . Here I see none.

The reason there is no clearly superior, less restrictive alternative to the District's handgun ban is that the ban's very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that *any* handgun he sees is an *illegal* handgun. And there is no plausible way to achieve that objective other than to ban the guns.

...

. . . [A]ny measure less restrictive in respect to the use of handguns for self-defense will, to that same extent, prove less effective in preventing the use of handguns for illicit purposes. If a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to commit suicide or engage in acts of domestic violence. . . . If it is indeed the case, as the District believes, that the number of guns contributes to the number of gun-related crimes, accidents, and deaths, then, although there may be less restrictive, *less effective* substitutes for an outright ban, there is no less restrictive *equivalent* of an outright ban.

...

. . . [T]he District law is tailored to the life-threatening problems it attempts to address. The law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition.

The area that falls within its scope is totally urban. . . . That urban area suffers from a serious handgun-fatality problem. The District's law directly aims at that compelling problem. And there is no less restrictive way to achieve the problem-related benefits that it seeks.

...

. . . [T]he majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems. The majority says that it leaves the District "a variety of tools for combating" such problems. It fails to list even one seemingly adequate replacement for the law it strikes down. I can understand how reasonable individuals can disagree about the merits of strict gun control as a crime-control measure, even in a totally urbanized area. But I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order. . . .

D. Personal Freedom and Public Morality

The main front of the constitutional culture wars began to change at the turn of the twenty-first century. The constitutional politics and law of abortion were relatively static from *Planned Parenthood v. Casey* (1993) to the 2010 midterm elections. Public attention turned to gay rights—in particular, federal and state constitutional protections for same-sex marriage. Important skirmishes are also currently taking place over the constitutional right to die. After the 2010 election, however, many state legislatures made renewed attempts to ban most if not all abortions. Between 2010 and 2015 states passed 288 new abortion restrictions, nearly as many as were passed between 1995–2010.²³ Several states are embarked on campaigns to shut down all abortion clinics in their jurisdiction. Some federal courts have sustained these efforts, and those decisions are being appealed to the U.S. Supreme Court.

23. See Elizabeth Nash, Rachel Benson Gold, Gwendolyn Rathbun, and Zohra Ansari-Thomas, "Laws Affecting Reproductive Health and Rights: 2015 State Policy Review," Guttmacher Institute, <http://www.guttmacher.org/statecenter/updates/2015/statetrends42015.html> (visited February 21, 2016).