

**Journal
on
Firearms
&
Public Policy**

CENTER FOR THE STUDY OF FIREARMS & PUBLIC POLICY

a project of the Second Amendment Foundation

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Journal on Firearms & Public Policy

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The First Cornerstone: The Heller Decision	1
The Second Cornerstone: The McDonald Decision	
Justice Alito	54
Justice Thomas	89
The Third Cornerstone: Moore v. Madigan Decision	132
The Forth Cornerstone: Palmer v. D.C. Decision	145

Journal on Firearms and Public Policy

Volume 27

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CENTER FOR THE STUDY OF FIREARMS & PUBLIC POLICY
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The Second Amendment jurisprudence of the 21st Century has evolved since 2008 in an almost incomprehensible fashion.

There are four cornerstones to the foundation that is being laid that will guarantee and expand the individual right to keep and bear arms that is codified in the Second Amendment to the U.S. Constitution.

In 2008, the U.S. Supreme Court determined that the Second Amendment granted an individual right. The handgun ban in the District of Columbia was declared unconstitutional in *Washington, D.C., et al. v. Heller*.

In 2010, the U. S. Supreme Court held that the handgun ban in the city of Chicago was unconstitutional in *McDonald v. Chicago*. The individual right to keep and bear arms is incorporated under the Fourteenth Amendment, which guarantees equal protection and the privileges of American citizenship.

In 2012, the U.S. Court of Appeals, 7th Circuit, declared that the ban on the carry of firearms in Illinois violated the rights guaranteed by the Second Amendment.

In 2015, the U.S. District Court for the District of Columbia held that the ban on the carry of firearms was unconstitutional.

There are dozens more cases that have expanded and defined Second Amendment rights. Not all of them are as groundbreaking as the four above but they each add to the expanding definition of

the right to keep and bear arms that is taking place. *Bateman v. Perdue* overturned the Emergency Powers handgun ban in North Carolina. *Jackson v. King* held that a legal alien resident of a state had the right to purchase a firearms and *Winbigler v. WCHA* said that a federal housing project could not ban firearm possession by residents.

There are also cases in various stages of litigation contesting the interstate sale of firearms, the handgun roster in California, the restrictive licensing schemes in Illinois, California, and Washington, D.C., as well as free speech in advertising and discussing firearms. For a current list of the cases that the Second Amendment Foundation is funding please visit our website: www.saf.org.

**In The
Supreme Court of the United States**

◆
DISTRICT OF COLUMBIA ET AL.

v.

HELLER

◆
**Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

◆
June 26, 2008

◆

SYLLABUS

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed this suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

Held:

1. The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. Pp. 2–53.

(a) The Amendment’s prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause’s text and history demonstrate that it connotes an individual right to keep and bear arms. Pp. 2–22.

(b) The prefatory clause comports with the Court’s interpretation of the operative clause. The “militia” comprised all males physically capable of acting in concert for the common defense. The Antifederalists feared that the Federal Government would disarm the people in order to disable this citizens’ militia, enabling a politicized standing army or a select militia to rule. The response was to deny Congress power to abridge the ancient right of individuals to keep and bear arms, so that the ideal of a citizens’ militia would be preserved. Pp. 22–28.

(c) The Court’s interpretation is confirmed by analogous arms bearing rights in state constitutions that preceded and immediately followed the Second Amendment. Pp. 28–30.

(d) The Second Amendment’s drafting history, while of dubious interpretive worth, reveals three state Second Amendment proposals that unequivocally referred to an individual right to bear arms. Pp. 30–32.

(e) Interpretation of the Second Amendment by scholars, courts and legislators, from immediately after its ratification through the late 19th century also supports the Court’s conclusion. Pp. 32–47.

(f) None of the Court’s precedents forecloses the Court’s interpretation. Neither *United States v. Cruikshank*, 92 U. S. 542, 553, nor *Presser v. Illinois*, 116 U. S. 252, 264–265, refutes the individual rights interpretation. *United States v. Miller*, 307 U. S. 174, does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, *i.e.*, those in common use for lawful purposes. Pp. 47–54.

2. Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court’s opinion should not 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. *Miller's* holding that the sorts of weapons protected are those “in common use at the time” finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons. Pp. 54–56.

3. The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the Second Amendment. The District’s total ban on handgun possession in the home amounts to a prohibition on an entire class of “arms” that Americans overwhelmingly choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. Because *Heller* conceded at oral argument that the D. C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and does not address the licensing requirement. Assuming he is not disqualified from exercising Second Amendment rights, the District must permit *Heller* to register his handgun and must issue him a license to carry it in the home. Pp. 56–64. 478 F. 3d 370, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

**DECISION OF THE SUPREME COURT
OF THE UNITED STATES
IN WASHINGTON, D.C., ET AL. V. HELLER**

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

I

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. See D. C. Code §§7–2501.01(12), 7–2502.01(a), 7–2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. See §§22–4504(a), 22–4506. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, “unloaded and disassembled or bound by a trigger lock or similar device” unless they are located in a place of business or are being used for lawful recreational activities. See §7–2507.02.¹

Respondent Dick Heller is a D. C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of “functional firearms within the home.” App. 59a. The District Court dismissed respondent’s complaint, see *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (2004). The Court of Appeals for the District of Columbia Circuit, construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense,² reversed, see *Parker v. District of Columbia*, 478 F. 3d 370, 401 (2007). It held that the Second Amendment protects an individual right to possess firearms and that the city’s total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even

when necessary for self-defense, violated that right. See *id.*, at 395, 399–401. The Court of Appeals directed the District Court to enter summary judgment for respondent.

We granted certiorari. 552 U. S. (2007).

II

We turn first to the meaning of the Second Amendment.

A

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*, 282 U. S. 716, 731 (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today’s dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. See Brief for Petitioners 11–12; *post*, at 1 (STEVENS, J., dissenting). Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. See Brief for Respondent 2–4.

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.” See J. Tiffany, *A Treatise on Government and Constitutional Law* §585, p. 394 (1867); Brief for Professors of Linguistics and English as *Amici Curiae* 3 (hereinafter Linguists’ Brief). Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose. See generally Volokh, *The Commonplace Second Amendment*, 73

N. Y. U. L. Rev. 793, 814–821 (1998).

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, “A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed.” That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause (“The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence.” The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Darris, *A General Treatise on Statutes* 268–269 (P. Potter ed. 1871) (hereinafter *Darris*); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 42–45 (2d ed. 1874).³ “It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.” J. Bishop, *Commentaries on Written Laws and Their Interpretation* §51, p. 49 (1882) (quoting *Rex v. Marks*, 3 East, 157, 165 (K. B. 1802)). Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.⁴

1. Operative Clause

a. **“Right of the People.”** The first salient feature of the operative clause is that it codifies a “right of the people.” The unamended Constitution and the Bill of Rights use the phrase “right of the people” two other times, in the First Amendment’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.⁵

Three provisions of the Constitution refer to “the people” in a context other than “rights”—the famous preamble (“We the people”), §2 of Article I (providing that “the people” will choose members of the House), and the Tenth Amendment (providing

that those powers not given the Federal Government remain with “the States” or “the people”). Those provisions arguably refer to “the people” acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a “right” attributed to “the people” refer to anything other than an individual right.⁶

What is more, in all six other provisions of the Constitution that mention “the people,” the term unambiguously refers to all members of the political community, not an unspecified subset. As we said in *United States v. Verdugo-Urquidez*, 494 U. S. 259, 265 (1990):

“[T]he people’ seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”

This contrasts markedly with the phrase “the militia” in the prefatory clause. As we will describe below, the “militia” in colonial America consisted of a subset of “the people”—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to “keep and bear Arms” in an organized militia therefore fits poorly with the operative clause’s description of the holder of that right as “the people.”

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

b. “Keep and bear Arms.” We move now from the holder of the right—“the people”—to the substance of the right: “to keep and bear Arms.”

Before addressing the verbs “keep” and “bear,” we interpret their object: “Arms.” The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined “arms” as “weapons of offence, or armour of defence.” 1 Dictionary of the English Language 107 (4th ed.) (hereinafter Johnson). Timothy Cunningham’s important 1771 legal dictionary defined “arms” as “any thing that a man wears for

his defence, or takes into his hands, or useth in wrath to cast at or strike another.” 1 A New and Complete Law Dictionary (1771); see also N. Webster, *American Dictionary of the English Language* (1828) (reprinted 1989) (hereinafter Webster) (similar).

The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. For instance, Cunningham’s legal dictionary gave as an example of usage: “Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms.” See also, *e.g.*, An Act for the trial of Negroes, 1797 Del. Laws ch. XLIII, §6, p. 104, in 1 *First Laws of the State of Delaware* 102, 104 (J. Cushing ed. 1981 (pt. 1)); see generally *State v. Duke*, 42 Tex. 455, 458 (1874) (citing decisions of state courts construing “arms”). Although one founding-era thesaurus limited “arms” (as opposed to “weapons”) to “instruments of offence *generally* made use of in war,” even that source stated that all firearms constituted “arms.” 1 J. Trusler, *The Distinction Between Words Esteemed Synonymous in the English Language* 37 (1794) (emphasis added).

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U. S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States*, 533 U. S. 27, 35–36 (2001), the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

We turn to the phrases “keep arms” and “bear arms.” Johnson defined “keep” as, most relevantly, “[t]o retain; not to lose,” and “[t]o have in custody.” Johnson 1095. Webster defined it as “[t]o hold; to retain in one’s power or possession.” No party has apprised us of an idiomatic meaning of “keep Arms.” Thus, the most natural reading of “keep Arms” in the Second Amendment is to “have weapons.”

The phrase “keep arms” was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to “keep Arms” as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain

penalties, one of which was that they were not permitted to “keep arms in their houses.” 4 Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone); see also 1 W. & M., c. 15, §4, in 3 Eng. Stat. at Large 422 (1689) (“[N]o Papist . . . shall or may have or keep in his House . . . any Arms . . .”); 1 Hawkins, Treatise on the Pleas of the Crown 26 (1771) (similar). Petitioners point to militia laws of the founding period that required militia members to “keep” arms in connection with militia service, and they conclude from this that the phrase “keep Arms” has a militia-related connotation. See Brief for Petitioners 16–17 (citing laws of Delaware, New Jersey, and Virginia). This is rather like saying that, since there are many statutes that authorize aggrieved employees to “file complaints” with federal agencies, the phrase “file complaints” has an employment-related connotation. “Keep arms” was simply a common way of referring to possessing arms, for militiamen *and everyone else*.⁷

At the time of the founding, as now, to “bear” meant to “carry.” See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with “arms,” however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In *Muscarello v. United States*, 524 U. S. 125 (1998), in the course of analyzing the meaning of “carries a firearm” in a federal criminal statute, JUSTICE GINSBURG wrote that “[s]urely a most familiar meaning is, as the Constitution’s Second Amendment . . . indicate[s]: ‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’” *Id.*, at 143 (dissenting opinion) (quoting Black’s Law Dictionary 214 (6th ed. 1998)). We think that JUSTICE GINSBURG accurately captured the natural meaning of “bear arms.” 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.”⁸ It is clear from those formulations that “bear arms” did not refer only to carrying a weapon in an organized military unit. Justice James Wilson interpreted the Pennsylvania Constitution’s arms-bearing right, for example, as a recognition of the natural right of defense “of one’s person or house”—what he called the law of “self preservation.”² *Collected Works of James Wilson* 1142, and n. x (K. Hall & M. Hall eds. 2007) (citing Pa. Const., Art. IX, §21 (1790)); see also T. Walker, *Introduction to American Law* 198 (1837) (“Thus the right of self-defence [is] guaranteed by the [Ohio] constitution”); see also *id.*, at 157 (equating Second Amendment with that provision of the Ohio Constitution). That was also the interpretation of those state constitutional provisions adopted by pre-Civil War state courts.⁹ These provisions demonstrate—again, in the most analogous linguistic context—that “bear arms” was not limited to the carrying of arms in a militia.

The phrase “bear Arms” also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: “to serve as a soldier, do military service, fight” or “to wage war.” See Linguists’ Brief 18; *post*, at 11 (STEVENS, J., dissenting). But it *unequivocally* bore that idiomatic meaning only when followed by the preposition “against,” which was in turn followed by the target of the hostilities. See 2 Oxford 21. (That is how, for example, our Declaration of Independence ¶28, used the phrase: “He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country”) Every example given by petitioners’ *amici* for the idiomatic meaning of “bear arms” from the founding period either includes the preposition “against” or is not clearly idiomatic. See Linguists’ Brief 18–23. Without the preposition, “bear arms” normally meant (as it continues to mean today) what JUSTICE GINSBURG’s opinion in *Muscarello* said.

In any event, the meaning of “bear arms” that petitioners and JUSTICE STEVENS propose is *not even* the (sometimes) idiomatic meaning. Rather, they manufacture a hybrid definition, whereby “bear arms” connotes the actual carrying of arms (and therefore is not really an idiom) but only in the service of an organized militia. No dictionary has ever adopted that definition, and we have been apprised of no source that indicates that it carried that meaning at the time of the founding. But it is easy to see why petitioners and the dissent are driven to the hybrid definition. Giving “bear

Arms” its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed. See L. Levy, *Origins of the Bill of Rights* 135 (1999). Worse still, the phrase “keep and bear Arms” would be incoherent. The word “Arms” would have two different meanings at once: “weapons” (as the object of “keep”) and (as the object of “bear”) one-half of an idiom. It would be rather like saying “He filled and kicked the bucket” to mean “He filled the bucket and died.” Grotesque.

Petitioners justify their limitation of “bear arms” to the military context by pointing out the unremarkable fact that it was often used in that context—the same mistake they made with respect to “keep arms.” It is especially unremarkable that the phrase was often used in a military context in the federal legal sources (such as records of congressional debate) that have been the focus of petitioners’ inquiry. Those sources would have had little occasion to use it *except* in discussions about the standing army and the militia. And the phrases used primarily in those military discussions include not only “bear arms” but also “carry arms,” “possess arms,” and “have arms”—though no one thinks that those *other* phrases also had special military meanings. See Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 *Tex. L. Rev.* 237, 261 (2004). The common references to those “fit to bear arms” in congressional discussions about the militia are matched by use of the same phrase in the few nonmilitary federal contexts where the concept would be relevant. See, e.g., 30 *Journals of Continental Congress* 349–351 (J. Fitzpatrick ed. 1934). Other legal sources frequently used “bear arms” in nonmilitary contexts.¹⁰ Cunningham’s legal dictionary, cited above, gave as an example of its usage a sentence unrelated to military affairs (“Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms”). And if one looks beyond legal sources, “bear arms” was frequently used in nonmilitary contexts. See Cramer & Olson, *What Did “Bear Arms” Mean in the Second Amendment?*, 6 *Georgetown J. L. & Pub. Pol’y* (forthcoming Sept. 2008), online at <http://papers.ssrn.com/abstract=1086176> (as visited June 24, 2008, and available in Clerk of Court’s case file) (identifying numerous nonmilitary uses of “bear arms” from the founding period).

JUSTICE STEVENS points to a study by *amici* supposedly showing that the phrase “bear arms” was most frequently used in the military context. See *post*, at 12–13, n. 9; Linguists’ Brief 24. Of

course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts. Moreover, the study's collection appears to include (who knows how many times) the idiomatic phrase "bear arms against," which is irrelevant. The *amici* also dismiss examples such as "bear arms . . . for the purpose of killing game" because those uses are "expressly qualified." Linguists' Brief 24. (JUSTICE STEVENS uses the same excuse for dismissing the state constitutional provisions analogous to the Second Amendment that identify private-use purposes for which the individual right can be asserted. See *post*, at 12.) That analysis is faulty. A purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass (except, apparently, in some courses on Linguistics). If "bear arms" means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage ("for the purpose of self-defense" or "to make war against the King"). But if "bear arms" means, as the petitioners and the dissent think, the carrying of arms only for military purposes, one simply cannot add "for the purpose of killing game." The right "to carry arms in the militia for the purpose of killing game" is worthy of the mad hatter. Thus, these purposive qualifying phrases positively establish that "to bear arms" is not limited to military use.¹¹

JUSTICE STEVENS places great weight on James Madison's inclusion of a conscientious-objector clause in his original draft of the Second Amendment: "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Creating the Bill of Rights 12 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit). He argues that this clause establishes that the drafters of the Second Amendment intended "bear Arms" to refer only to military service. See *post*, at 26. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.¹² In any case, what JUSTICE STEVENS would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes

have been almost overwhelming.” P. Brock, *Pacifism in the United States* 359 (1968); see M. Hirst, *The Quakers in Peace and War* 336–339 (1923); 3 T. Clarkson, *Portraiture of Quakerism* 103–104 (3d ed. 1807). The Pennsylvania Militia Act of 1757 exempted from service those “*scrupling the use of arms*”—a phrase that no one contends had an idiomatic meaning. See 5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders eds. 1898) (emphasis added). Thus, the most natural interpretation of Madison’s deleted text is that those opposed to carrying weapons for potential violent confrontation would not be “compelled to render military service,” in which such carrying would be required.¹³

Finally, JUSTICE STEVENS suggests that “keep and bear Arms” was some sort of term of art, presumably akin to “hue and cry” or “cease and desist.” (This suggestion usefully evades the problem that there is no evidence whatsoever to support a military reading of “keep arms.”) JUSTICE STEVENS believes that the unitary meaning of “keep and bear Arms” is established by the Second Amendment’s calling it a “right” (singular) rather than “rights” (plural). See *post*, at 16. There is nothing to this. State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular “right,” and the First Amendment protects the “right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances.” See, e.g., Pa. Declaration of Rights §§IX, XII, XVI, in 5 Thorpe 3083–3084; Ohio Const., Arts. VIII, §§11, 19 (1802), in *id.*, at 2910–2911.¹⁴ And even if “keep and bear Arms” were a unitary phrase, we find no evidence that it bore a military meaning. Although the phrase was not at all common (which would be unusual for a term of art), we have found instances of its use with a clearly nonmilitary connotation. In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm private citizens (not militia members) as “a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defense.” 49 *The London Magazine or Gentleman’s Monthly Intelligencer* 467 (1780). In response, another member of Parliament referred to “the right of bearing arms for personal defence,” making clear that no special military meaning for “keep and bear arms” was intended in the discussion. *Id.*, at 467–468.¹⁵

c. Meaning of the Operative Clause. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of

the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it “shall not be infringed.” As we said in *United States v. Cruikshank*, 92 U. S. 542, 553 (1876), “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed. . . .”¹⁶

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. See J. Malcolm, *To Keep and Bear Arms* 31–53 (1994) (hereinafter Malcolm); L. Schworer, *The Declaration of Rights, 1689*, p. 76 (1981). Under the auspices of the 1671 Game Act, for example, the Catholic James II had ordered general disarmaments of regions home to his Protestant enemies. See Malcolm 103–106. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed: “That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.” 1 W. & M., c. 2, §7, in 3 Eng. Stat. at Large 441 (1689). This right has long been understood to be the predecessor to our Second Amendment. See E. Dumbauld, *The Bill of Rights and What It Means Today* 51 (1957); W. Rawle, *A View of the Constitution of the United States of America* 122 (1825) (hereinafter Rawle). It was clearly an individual right, having nothing whatever to do with service in a militia. To be sure, it was an individual right not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament. See Schworer, *To Hold and Bear Arms: The English Perspective*, in Bogus 207, 218; but see 3 J. Story, *Commentaries on the Constitution of the United States* §1858 (1833) (hereinafter Story) (contending that the “right to bear arms” is a “limitatio[n] upon the power of parliament” as well). But it was secured to them as individuals, according to “libertarian political principles,” not as members of a fighting force. Schworer, *Declaration of Rights*, at 283; see also *id.*, at 78; G. Jellinek, *The Declaration of the Rights of Man and of Citizens*

49, and n. 7 (1901) (reprinted 1979).

By the time of the founding, the right to have arms had become fundamental for English subjects. See Malcolm 122–134. Blackstone, whose works, we have said, “constituted the preeminent authority on English law for the founding generation,” *Alden v. Maine*, 527 U. S. 706, 715 (1999), cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. See 1 Blackstone 136, 139–140 (1765). His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, “the natural right of resistance and self-preservation,” *id.*, at 139, and “the right of having and using arms for self-preservation and defence,” *id.*, at 140; see also 3 *id.*, at 2–4 (1768). Other contemporary authorities concurred. See G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17–18, 27 (3d ed. 1782); 2 J. de Lolme, The Rise and Progress of the English Constitution 886–887 (1784) (A. Stephens ed. 1838); W. Blizard, Desultory Reflections on Police 59–60 (1785). Thus, the right secured in 1689 as a result of the Stuarts’ abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760’s and 1770’s, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that “[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence.” A Journal of the Times: Mar. 17, New York Journal, Supp. 1, Apr. 13, 1769, in Boston Under Military Rule 79 (O. Dickerson ed. 1936); see also, *e.g.*, Shippen, Boston Gazette, Jan. 30, 1769, in 1 The Writings of Samuel Adams 299 (H. Cushing ed. 1968). They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone’s Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the “right of self-preservation” as permitting a citizen to “repe[] force by force” when “the intervention of society in his behalf, may be too late to prevent an injury.” 1 Blackstone’s Commentaries 145–146, n. 42 (1803) (hereinafter Tucker’s Blackstone). See also W. Duer,

Outlines of the Constitutional Jurisprudence of the United States 31–32 (1833).

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, *e.g.*, *United States v. Williams*, 553 U. S. (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause.

The prefatory clause reads: “A well regulated Militia, being necessary to the security of a free State”

a. **“Well-Regulated Militia.”** In *United States v. Miller*, 307 U. S. 174, 179 (1939), we explained that “the Militia comprised all males physically capable of acting in concert for the common defense.” That definition comports with founding-era sources. See, *e.g.*, Webster (“The militia of a country are the able bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations”); *The Federalist* No. 46, pp. 329, 334 (B. Wright ed. 1961) (J. Madison) (“near half a million of citizens with arms in their hands”); Letter to Destutt de Tracy (Jan. 26, 1811), in *The Portable Thomas Jefferson* 520, 524 (M. Peterson ed. 1975) (“[T]he militia of the State, that is to say, of every man in it able to bear arms”).

Petitioners take a seemingly narrower view of the militia, stating that “[m]ilitias are the state and congressionally-regulated military forces described in the Militia Clauses (art. I, §8, cls. 15–16).” Brief for Petitioners 12.

Although we agree with petitioners’ interpretive assumption that “militia” means the same thing in Article I and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create (“to raise . . . Armies”; “to provide . . . a Navy,” Art. I, §8, cls. 12–13), the militia is assumed by Article I already to be *in existence*. Congress is given the power to

“provide for calling forth the militia,” §8, cl. 15; and the power not to create, but to “organiz[e]” it—and not to organize “a” militia, which is what one would expect if the militia were to be a federal creation, but to organize “the” militia, connoting a body already in existence, *ibid.*, cl. 16. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. That is what Congress did in the first militia Act, which specified that “each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia.” Act of May 8, 1792, 1 Stat. 271. To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.

Finally, the adjective “well-regulated” implies nothing more than the imposition of proper discipline and training. See Johnson 1619 (“Regulate”: “To adjust by rule or method”); Rawle 121–122; cf. Va. Declaration of Rights §13 (1776), in 7 Thorpe 3812, 3814 (referring to “a wellregulated militia, composed of the body of the people, trained to arms”).

b. “Security of a Free State.” The phrase “security of a free state” meant “security of a free polity,” not security of each of the several States as the dissent below argued, see 478 F. 3d, at 405, and n. 10. Joseph Story wrote in his treatise on the Constitution that “the word ‘state’ is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community.” 1 Story §208; see also 3 *id.*, §1890 (in reference to the Second Amendment’s prefatory clause: “The militia is the natural defence of a free country”). It is true that the term “State” elsewhere in the Constitution refers to individual States, but the phrase “security of a free state” and close variations seem to have been terms of art in 18th-century political discourse, meaning a “‘free country’ ” or free polity. See Volokh, “Necessary to the Security of a Free State,” 83 Notre Dame L. Rev. 1, 5 (2007); see, e.g., 4 Blackstone 151 (1769); Brutus Essay III (Nov. 15, 1787), in *The Essential Antifederalist* 251, 253 (W. Allen & G. Lloyd

eds., 2d ed. 2002). Moreover, the other instances of “state” in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States—“each state,” “several states,” “any state,” “that state,” “particular states,” “one state,” “no state.” And the presence of the term “foreign state” in Article I and Article III shows that the word “state” did not have a single meaning in the Constitution.

There are many reasons why the militia was thought to be “necessary to the security of a free state.” See 3 Story §1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. The Federalist No. 29, pp. 226, 227 (B. Wright ed. 1961) (A. Hamilton). Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

3. Relationship between Prefatory Clause and Operative Clause

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. See, *e.g.*, Letters from The Federal Farmer III (Oct. 10, 1787), in 2 The Complete Anti-Federalist 234, 242 (H. Storing ed. 1981). John Smilie, for example, worried not only that Congress’s “command of the militia” could be used to create a “select militia,” or to have “no militia at all,” but also, as a separate concern, that “[w]hen a select militia is formed; the people in general may be disarmed.” 2 Documentary History of the Ratification of the Constitution 508–509 (M. Jensen ed.

1976) (hereinafter Documentary Hist.). Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people. See, *e.g.*, A Pennsylvanian III (Feb. 20, 1788), in *The Origin of the Second Amendment* 275, 276 (D. Young ed., 2d ed. 2001) (hereinafter Young); White, To the Citizens of Virginia, Feb. 22, 1788, in *id.*, at 280, 281; A Citizen of America, (Oct. 10, 1787) in *id.*, at 38, 40; Remarks on the Amendments to the federal Constitution, Nov. 7, 1788, in *id.*, at 556. It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. JUSTICE BREYER's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms, see *post*, at 36, is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's *codification*; it was the *central component* of the right itself.

Besides ignoring the historical reality that the Second Amendment was not intended to lay down a "novel principl[e]" but rather codified a right "inherited from our English ancestors," *Robertson v. Baldwin*, 165 U. S. 275, 281 (1897), petitioners' interpretation does not even achieve the narrower purpose that prompted codification of the right. If, as they believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia, see Brief for Petitioners 8—if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment's guarantee—it does not assure the existence of a "citizens' militia" as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force.¹⁷ That is why the first Militia Act's requirement that only whites enroll

caused States to amend their militia laws to exclude free blacks. See Siegel, *The Federal Government's Power to Enact Color-Conscious Laws*, 92 *Nw. U. L. Rev.* 477, 521–525 (1998). Thus, if petitioners are correct, the Second Amendment protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them. It guarantees a select militia of the sort the Stuart kings found useful, but not the people's militia that was the concern of the founding generation.

B

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 . . ." §XIII, in 5 Thorpe 3082, 3083 (emphasis added). In 1777, Vermont adopted the identical provision, except for inconsequential differences in punctuation and capitalization. See *Vt. Const.*, ch. 1, §15, in 6 *id.*, at 3741.

North Carolina also codified a right to bear arms in 1776: "That the people have a right to bear arms, for the defence of the State . . ." Declaration of Rights §XVII, in *id.*, at 2787, 2788. This could plausibly be read to support only a right to bear arms in a militia—but that is a peculiar way to make the point in a constitution that elsewhere repeatedly mentions the militia explicitly. See §§14, 18, 35, in 5 *id.*, 2789, 2791, 2793. Many colonial statutes required individual arms-bearing for public-safety reasons—such as the 1770 Georgia law that "for the security and *defence of this province* from internal dangers and insurrections" required those men who qualified for militia duty individually "to carry fire arms" "to places of public worship." 19 *Colonial Records of the State of Georgia* 137–139 (A. Candler ed. 1911 (pt. 2)) (emphasis added). That broad public-safety understanding was the connotation given to the North Carolina right by that State's Supreme Court in 1843. See *State v. Huntly*, 3 *Ired.* 418, 422–423.

The 1780 Massachusetts Constitution presented another variation on the theme: "The people have a right to keep and to bear arms for the common defence. . . ." Pt. First, Art. XVII, in 3 Thorpe 1888, 1892. Once again, if one gives narrow meaning to the

phrase “common defence” this can be thought to limit the right to the bearing of arms in a state-organized military force. But once again the State’s highest court thought otherwise. Writing for the court in an 1825 libel case, Chief Justice Parker wrote: “The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.” *Commonwealth v. Blanding*, 20 Mass. 304, 313–314. The analogy makes no sense if firearms could not be used for any individual purpose at all. See also Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 244 (1983) (19th-century courts never read “common defence” to limit the use of weapons to militia service).

We therefore believe that the most likely reading of all four of these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes. Other States did not include rights to bear arms in their pre-1789 constitutions—although in Virginia a Second Amendment analogue was proposed (unsuccessfully) by Thomas Jefferson. (It read: “No freeman shall ever be debarred the use of arms [within his own lands or tenements].”¹⁸ 1 *The Papers of Thomas Jefferson* 344 (J. Boyd ed. 1950)).

Between 1789 and 1820, nine States adopted Second Amendment analogues. Four of them—Kentucky, Ohio, Indiana, and Missouri—referred to the right of the people to “bear arms in defence of themselves and the State.” See n. 8, *supra*. Another three States—Mississippi, Connecticut, and Alabama—used the even more individualistic phrasing that each citizen has the “right to bear arms in defence of himself and the State.” See *ibid*. Finally, two States—Tennessee and Maine—used the “common defence” language of Massachusetts. See Tenn. Const., Art. XI, §26 (1796), in 6 Thorpe 3414, 3424; Me. Const., Art. I, §16 (1819), in 3 *id.*, at 1646, 1648. 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. And with one possible exception that we discuss in Part II–D–2, 19th-century courts and commentators interpreted these state constitutional provisions to protect an individual right to use arms for selfdefense. See n. 9, *supra*; *Simpson v. State*, 5 Yer. 356, 360 (Tenn. 1833).

The historical narrative that petitioners must endorse would thus treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an overreading of the prefatory clause.

C

JUSTICE STEVENS relies on the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one. But even assuming that this legislative history is relevant, JUSTICE STEVENS flatly misreads the historical record.

It is true, as JUSTICE STEVENS says, that there was concern that the Federal Government would abolish the institution of the state militia. See *post*, at 20. That concern found expression, however, *not* in the various Second Amendment precursors proposed in the State conventions, but in separate structural provisions that would have given the States concurrent and seemingly nonpreemptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so. See Veit 17, 20 (Virginia proposal); 4 J. Eliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 244, 245 (2d ed. 1836) (reprinted 1941) (North Carolina proposal); see also 2 *Documentary Hist.* 624 (Pennsylvania minority's proposal). The Second Amendment precursors, by contrast, referred to the individual English right already codified in two (and probably four) State constitutions. The Federalist-dominated first Congress chose to reject virtually all major structural revisions favored by the Antifederalists, including the proposed militia amendments. Rather, it adopted primarily the popular and uncontroversial (though, in the Federalists' view, unnecessary) individual-rights amendments. The Second Amendment right, protecting only individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia. See, e.g., *Centinel, Revived*, No. XXIX, *Philadelphia Independent Gazetteer*, Sept. 9, 1789, in Young 711, 712.

JUSTICE STEVENS thinks it significant that the Virginia, New York, and North Carolina Second Amendment proposals were “embedded . . . within a group of principles that are distinctly military in meaning,” such as statements about the danger of standing armies. *Post*, at 22. But so was the highly influential minority

proposal in Pennsylvania, yet that proposal, with its reference to hunting, plainly referred to an individual right. See 2 Documentary Hist. 624. Other than that erroneous point, JUSTICE STEVENS has brought forward absolutely no evidence that those proposals conferred only a right to carry arms in a militia. By contrast, New Hampshire's proposal, the Pennsylvania minority's proposal, and Samuel Adams' proposal in Massachusetts unequivocally referred to individual rights, as did two state constitutional provisions at the time. See Veit 16, 17 (New Hampshire proposal); 6 Documentary Hist. 1452, 1453 (J. Kaminski & G. Saladino eds. 2000) (Samuel Adams' proposal). JUSTICE STEVENS' view thus relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.

D

We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. Before proceeding, however, we take issue with JUSTICE STEVENS' equating of these sources with post-enactment legislative history, a comparison that betrays a fundamental misunderstanding of a court's interpretive task. See *post*, at 27, n. 28. "Legislative history," of course, refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. *Ibid.* "Post-enactment legislative history," *ibid.*, a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. As we will show, virtually all interpreters of the Second Amendment in the century after its enactment interpreted the amendment as we do.

1. Post-ratification Commentary

Three important founding-era legal scholars interpreted the Second Amendment in published writings. All three understood it

to protect an individual right unconnected with militia service.

St. George Tucker's version of Blackstone's Commentaries, as we explained above, conceived of the Blackstonian arms right as necessary for self-defense. He equated that right, absent the religious and class-based restrictions, with the Second Amendment. See 2 Tucker's Blackstone 143. In Note D, entitled, "View of the Constitution of the United States," 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." 1 *id.*, at App. 300 (ellipsis in original). He believed that the English game laws had abridged the right by prohibiting "keeping a gun or other engine for the destruction of game." *Ibid.*; see also 2 *id.*, at 143, and nn. 40 and 41. He later grouped the right with some of the individual rights included in the First Amendment and said that if "a law be passed by congress, prohibiting" any of those rights, it would "be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused . . ." 1 *id.*, at App. 357. It is unlikely that Tucker was referring to a person's being "accused" of violating a law making it a crime to bear arms in a state militia.¹⁹

In 1825, William Rawle, a prominent lawyer who had been a member of the Pennsylvania Assembly that ratified the Bill of Rights, published an influential treatise, which analyzed the Second Amendment as follows:

"The first [principle] is a declaration that a well regulated militia is necessary to the security of a free state; a proposition from which few will dissent. . . .

"The corollary, from the first position is, that the right of the people to keep and bear arms shall not be infringed.

"The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power,

either should attempt it, this amendment may be appealed to as a restraint on both.” Rawle 121–122.²⁰

Like Tucker, Rawle regarded the English game laws as violating the right codified in the Second Amendment. See *id.*, 122–123. Rawle clearly differentiated between the people’s right to bear arms and their service in a militia: “In a people permitted and accustomed to bear arms, we have the rudiments of a militia, which properly consists of armed citizens, divided into military bands, and instructed at least in part, in the use of arms for the purposes of war.” *Id.*, at 140. Rawle further said that the Second Amendment right ought not “be abused to the disturbance of the public peace,” such as by assembling with other armed individuals “for an unlawful purpose”—statements that make no sense if the right does not extend to *any* individual purpose.

Joseph Story published his famous Commentaries on the Constitution of the United States in 1833. JUSTICE STEVENS suggests that “[t]here is not so much as a whisper” in Story’s explanation of the Second Amendment that favors the individual-rights view. *Post*, at 34. That is wrong. Story explained that the English Bill of Rights had also included a “right to bear arms,” a right that, as we have discussed, had nothing to do with militia service. 3 Story §1858. He then equated the English right with the Second Amendment:

“§1891. A similar provision [to the Second Amendment] in favour of protestants (for to them it is confined) is to be found in the bill of rights of 1688, it being declared, ‘that the subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law.’ But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege.” (Footnotes omitted.)

This comparison to the Declaration of Right would not make sense if the Second Amendment right was the right to use a gun in a militia, which was plainly not what the English right protected. As the Tennessee Supreme Court recognized 38 years after Story wrote his Commentaries, “[t]he passage from Story, shows clearly that this right was intended . . . and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.” *Andrews v. State*, 50 Tenn. 165, 183 (1871). Story’s Commentaries also cite as support Tucker and

Rawle, both of whom clearly viewed the right as unconnected to militia service. See 3 Story §1890, n. 2; §1891, n. 3. In addition, in a shorter 1840 work Story wrote: “One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.” *A Familiar Exposition of the Constitution of the United States* §450 (reprinted in 1986).

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.” *A Treatise on the Unconstitutionality of American Slavery* 117–118 (1849); see also L. Spooner, *The Unconstitutionality of Slavery* 116 (1845) (right enables “personal defence”). In his famous Senate speech about the 1856 “Bleeding Kansas” conflict, Charles Sumner proclaimed:

“The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached. And yet such is the madness of the hour, that, in defiance of the solemn guarantee, embodied in the Amendments to the Constitution, that ‘the right of the people to keep and bear arms shall not be infringed,’ the people of Kansas have been arraigned for keeping and bearing them, and the Senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed—of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment.” *The Crime Against Kansas, May 19–20, 1856, in American Speeches: Political Oratory from the Revolution to the Civil War* 553, 606–607 (2006).

We have found only one early 19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary. “The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such [militia-

related] purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it.” B. Oliver, *The Rights of an American Citizen* 177 (1832).

2. Pre-Civil War Case Law

The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service. In *Houston v. Moore*, 5 Wheat. 1, 24 (1820), this Court held that States have concurrent power over the militia, at least where not preempted by Congress. Agreeing in dissent that States could “organize, discipline, and arm” the militia in the absence of conflicting federal regulation, Justice Story said that the Second Amendment “may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested.” *Id.*, at 51–53. Of course, if the Amendment simply “protect[ed] the right of the people of each of the several States to maintain a well-regulated militia,” *post*, at 1 (STEVENS, J., dissenting), it would have enormous and obvious bearing on the point. But the Court and Story derived the States’ power over the militia from the nonexclusive nature of federal power, not from the Second Amendment, whose preamble merely “confirms and illustrates” the importance of the militia. Even clearer was Justice Baldwin. In the famous fugitive-slave case of *Johnson v. Tompkins*, 13 F. Cas. 840, 850, 852 (CC Pa. 1833), Baldwin, sitting as a circuit judge, cited both the Second Amendment and the Pennsylvania analogue for his conclusion that a citizen has “a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either.”

Many early 19th-century state cases indicated that the Second Amendment right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions. A Virginia case in 1824 holding that the Constitution did not extend to free blacks explained that “numerous restrictions imposed on [blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right

to bear arms.” *Aldridge v. Commonwealth*, 2 Va. Cas. 447, 449 (Gen. Ct.). The claim was obviously not that blacks were prevented from carrying guns in the militia.²¹ See also *Waters v. State*, 1 Gill 302, 309 (Md. 1843) (because free blacks were treated as a “dangerous population,” “laws have been passed to prevent their migration into this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness”). An 1829 decision by the Supreme Court of Michigan said: “The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose.” *United States v. Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940) (hereinafter Blume). It is not possible to read this as discussing anything other than an individual right unconnected to militia service. If it did have to do with militia service, the limitation upon it would not be any “unlawful or unjustifiable purpose,” but any nonmilitary purpose whatsoever.

In *Nunn v. State*, 1 Ga. 243, 251 (1846), the Georgia Supreme Court construed the Second Amendment as protecting the “*natural* right of self-defence” and therefore struck down a ban on carrying pistols openly. Its opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right:

“The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta!”

Likewise, in *State v. Chandler*, 5 La. Ann. 489, 490 (1850), the

Louisiana Supreme Court held that citizens had a right to carry arms openly: “This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.”

Those who believe that the Second Amendment preserves only a militia-centered right place great reliance on the Tennessee Supreme Court’s 1840 decision in *Aymette v. State*, 21 Tenn. 154. The case does not stand for that broad proposition; in fact, the case does not mention the word “militia” at all, except in its quoting of the Second Amendment. *Aymette* held that the state constitutional guarantee of the right to “bear” arms did not prohibit the banning of concealed weapons. The opinion first recognized that both the state right and the federal right were descendants of the 1689 English right, but (erroneously, and contrary to virtually all other authorities) read that right to refer only to “protect[ion of] the public liberty” and “keep[ing] in awe those in power,” *id.*, at 158. The court then adopted a sort of middle position, whereby citizens were permitted to carry arms openly, unconnected with any service in a formal militia, but were given the right to use them only for the military purpose of banding together to oppose tyranny. This odd reading of the right is, to be sure, not the one we adopt—but it is not petitioners’ reading either. More importantly, seven years earlier the Tennessee Supreme Court had treated the state constitutional provision as conferring a right “of all the free citizens of the State to keep and bear arms for their defence,” *Simpson*, 5 Yer., at 360; and 21 years later the court held that the “keep” portion of the state constitutional right included the right to personal self-defense: “[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace.” *Andrews*, 50 Tenn., at 178; see also *ibid.* (equating state provision with Second Amendment).

3. Post-Civil War Legislation.

In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. See generally S. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876* (1998) (hereinafter Halbrook); Brief for

Institute for Justice as *Amicus Curiae*. Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive.

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. A Report of the Commission of the Freedmen's Bureau in 1866 stated plainly: "[T]he civil law [of Kentucky] prohibits the colored man from bearing arms. . . . Their arms are taken from them by the civil authorities. . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed*." H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236. A joint congressional Report decried:

"in some parts of [South Carolina], armed parties are, without proper authority, engaged in seizing all firearms found in the hands of the freemen. Such conduct is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.' The freedmen of South Carolina have shown by their peaceful and orderly conduct that they can safely be trusted with fire-arms, and they need them to kill game for subsistence, and to protect their crops from destruction by birds and animals. Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, p. 229 (1866) (Proposed Circular of Brigadier General R. Saxton).

The view expressed in these statements was widely reported and was apparently widely held. For example, an editorial in *The Loyal Georgian* (Augusta) on February 3, 1866, assured blacks that "[a]ll men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." Halbrook 19.

Congress enacted the Freedmen's Bureau Act on July 16, 1866. Section 14 stated:

“[T]he right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery. . . .” 14 Stat. 176–177.

The understanding that the Second Amendment gave freed blacks the right to keep and bear arms was reflected in congressional discussion of the bill, with even an opponent of it saying that the founding generation “were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.” Cong. Globe, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis).

Similar discussion attended the passage of the Civil Rights Act of 1871 and the Fourteenth Amendment. For example, Representative Butler said of the Act: “Section eight is intended to enforce the well-known constitutional provision guaranteeing the right of the citizen to ‘keep and bear arms,’ and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same.” H. R. Rep. No. 37, 41st Cong., 3d Sess., pp. 7–8 (1871). With respect to the proposed Amendment, Senator Pomeroy described as one of the three “indispensable” “safeguards of liberty . . . under the Constitution” a man’s “right to bear arms for the defense of himself and family and his homestead.” Cong. Globe, 39th Cong., 1st Sess., 1182 (1866). Representative Nye thought the Fourteenth Amendment unnecessary because “[a]s citizens of the United States [blacks] have equal right to protection, and to keep and bear arms for self-defense.” *Id.*, at 1073 (1866).

It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.

4. Post-Civil War Commentators.

Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service. The most famous was the judge and professor Thomas Cooley, who wrote a massively popular 1868 *Treatise on Constitutional Limitations*. Concerning the Second Amendment it said:

“Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms. . . . The alternative to a standing army is ‘a well-regulated militia,’ but this cannot exist unless the people are trained to bearing arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been very little occasion to discuss that subject by the courts.” *Id.*, at 350.

That Cooley understood the right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms, is made even clearer in his 1880 work, *General Principles of Constitutional Law*. The Second Amendment, he said, “was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people.” *Id.*, at 270. In a section entitled “The Right in General,” he continued:

“It might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.” *Id.*, at 271.

All other post-Civil War 19th-century sources we have found concurred with Cooley. One example from each decade will convey

the general flavor:

“[The purpose of the Second Amendment is] to secure a well-armed militia. . . . But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms. . . . The clause is analogous to the one securing the freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libellous abuse, is protected.” J. Pomeroy, *An Introduction to the Constitutional Law of the United States* 152– 153 (1868) (hereinafter Pomeroy).

“As the Constitution of the United States, and the constitutions of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons, when not on a journey, or as travellers, from *wearing or carrying concealed weapons*, be constitutional. There has been a great difference of opinion on the question.” 2 J. Kent, *Commentaries on American Law* *340, n. 2 (O. Holmes ed., 12th ed. 1873) (hereinafter Kent).

“Some general knowledge of firearms is important to the public welfare; because it would be impossible, in case of war, to organize promptly an efficient force of volunteers unless the people had some familiarity with weapons of war. The Constitution secures the right of the people to keep and bear arms. No doubt, a citizen who keeps a gun or pistol under judicious precautions, practices in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right. No doubt, a person whose residence or duties involve peculiar peril may keep a pistol for prudent self-defence.” B. Abbott, *Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land* 333 (1880) (hereinafter Abbott).

“The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection to the person, it represents among all nations

power coupled with the exercise of a certain jurisdiction. . . . [I]t was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed.” J. Ordronaux, *Constitutional Legislation in the United States* 241–242 (1891).

E

We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment.

United States v. Cruikshank, 92 U. S. 542, in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government. The opinion explained that the right “is not a right granted by the Constitution [or] in any manner dependent upon that instrument for its existence. The second amendment . . . means no more than that it shall not be infringed by Congress.” 92 U. S., at 553. States, we said, were free to restrict or protect the right under their police powers. The limited discussion of the Second Amendment in *Cruikshank* supports, if anything, the individual-rights interpretation. There was no claim in *Cruikshank* that the victims had been deprived of their right to carry arms in a militia; indeed, the Governor had disbanded the local militia unit the year before the mob’s attack, see C. Lane, *The Day Freedom Died* 62 (2008). We described the right protected by the Second Amendment as “bearing arms for a lawful purpose”²² and said that “the people [must] look for their protection against any violation by their fellow-citizens of the rights it recognizes” to the States’ police power. 92 U. S., at 553. That discussion makes little sense if it is only a right to bear arms in a state militia.²³

Presser v. Illinois, 116 U. S. 252 (1886), held that the right to keep and bear arms was not violated by a law that forbade “bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.” *Id.*, at 264–265. This does not refute the individual-rights interpretation of the Amendment; no one supporting that interpretation has contended that States may not ban such groups. JUSTICE STEVENS presses *Presser* into service to support his view that the right to bear arms is limited to service in the militia by joining *Presser*’s brief discussion of the Second Amendment with a later portion of the opinion making the seemingly relevant (to the

Second Amendment) point that the plaintiff was not a member of the state militia. Unfortunately for JUSTICE STEVENS' argument, that later portion deals with the *Fourteenth Amendment*; it was the *Fourteenth Amendment* to which the plaintiff's non-membership in the militia was relevant. Thus, JUSTICE STEVENS' statement that *Presser* "suggested that. . . nothing in the Constitution protected the use of arms outside the context of a militia," *post*, at 40, is simply wrong.

Presser said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.

JUSTICE STEVENS places overwhelming reliance upon this Court's decision in *United States v. Miller*, 307 U. S. 174 (1939). "[H]undreds of judges," we are told, "have relied on the view of the amendment we endorsed there," *post*, at 2, and "[e]ven if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself . . . would prevent most jurists from endorsing such a dramatic upheaval in the law," *post*, at 4. And what is, according to JUSTICE STEVENS, the holding of *Miller* that demands such obeisance? That the Second Amendment "protects the right to keep and bear arms for certain military purposes, but that it does not curtail the legislature's power to regulate the nonmilitary use and ownership of weapons." *Post*, at 2.

Nothing so clearly demonstrates the weakness of JUSTICE STEVENS' case. *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a Second Amendment challenge two men's federal indictment for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was *not* that the defendants were "bear[ing] arms" not "for . . . military purposes" but for "nonmilitary use," *post*, at 2. Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*." 307 U. S., at 178 (emphasis added).

“Certainly,” the Court continued, “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” *Ibid.* Beyond that, the opinion provided no explanation of the content of the right.

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that “have some reasonable relationship to the preservation or efficiency of a well regulated militia”). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. JUSTICE STEVENS can say again and again that *Miller* did “not turn on the difference between muskets and sawed-off shotguns, it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns,” *post*, at 42–43, but the words of the opinion prove otherwise. The most JUSTICE STEVENS can plausibly claim for *Miller* is that it declined to decide the nature of the Second Amendment right, despite the Solicitor General’s argument (made in the alternative) that the right was collective, see Brief for United States, O. T. 1938, No. 696, pp. 4–5. *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.

It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment. JUSTICE STEVENS claims, *post*, at 42, that the opinion reached its conclusion “[a]fter reviewing many of the same sources that are discussed at greater length by the Court today.” Not many, which was not entirely the Court’s fault. The defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court’s consideration of the Second Amendment). See Frye, *The Peculiar Story of United States v. Miller*, 3 N. Y. U. J. L. & Liberty 48, 65–68 (2008). The Government’s brief spent two pages discussing English legal sources, concluding “that at least the carrying of weapons without lawful occasion or excuse was always a crime” and that (because of the class-based restrictions and the prohibition on terrorizing people with dangerous or unusual weapons) “the early

English law did not guarantee an unrestricted right to bear arms.” Brief for United States, O. T. 1938, No. 696, at 9–11. It then went on to rely primarily on the discussion of the English right to bear arms in *Aymette v. State*, 21 Tenn. 154, for the proposition that the only uses of arms protected by the Second Amendment are those that relate to the militia, not self-defense. See Brief for United States, O. T. 1938, No. 696, at 12–18. The final section of the brief recognized that “some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property,” and launched an alternative argument that “weapons which are commonly used by criminals,” such as sawed-off shotguns, are not protected. See *id.*, at 18–21. The Government’s *Miller* brief thus provided scant discussion of the history of the Second Amendment—and the Court was presented with no counter-discussion. As for the text of the Court’s opinion itself, that discusses *none* of the history of the Second Amendment. It assumes from the prologue that the Amendment was designed to preserve the militia, 307 U. S., at 178 (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their members were expected to possess, *id.*, at 178–182. Not a word (*not a word*) about the history of the Second Amendment. This is the mighty rock upon which the dissent rests its case.²⁴

We may as well consider at this point (for we will have to consider eventually) *what* types of weapons *Miller* permits. Read in isolation, *Miller*’s phrase “part of ordinary military equipment” could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act’s restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller*’s “ordinary military equipment” language must be read in tandem with what comes after: “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” 307 U. S., at 179. The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. “In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.” *State v. Kessler*, 289 Ore. 359, 368, 614 P. 2d 94, 98 (1980) (citing G. Neumann, *Swords and Blades*

of the American Revolution 6–15, 252–254 (1973)). Indeed, that is precisely the way in which the Second Amendment’s operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right, see Part III, *infra*.²⁵

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment’s guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, see *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931), and it was not until after World War II that we held a law invalid under the Establishment Clause, see *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U. S. 203 (1948). Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. See *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). It is demonstrably not true that, as JUSTICE STEVENS claims, *post*, at 41–42, “for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial.” For most of our history the question did not present itself.

III

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. See, *e.g.*, *Sheldon*, in 5 Blume 346; Rawle 123; Pomeroy 152–153; Abbott 333. 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. See, *e.g.*, *State v. Chandler*, 5 La. Ann., at 489–490; *Nunn v. State*, 1 Ga., at 251;

see generally 2 Kent *340, n. 2; *The American Students' Blackstone* 84, n. 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.²⁶

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” 307 U. S., at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.” See 4 Blackstone 148–149 (1769); 3 B. Wilson, *Works of the Honourable James Wilson* 79 (1804); J. Dunlap, *The New-York Justice* 8 (1815); C. Humphreys, *A Compendium of the Common Law in Force in Kentucky* 482 (1822); 1 W. Russell, *A Treatise on Crimes and Indictable Misdemeanors* 271–272 (1831); H. Stephen, *Summary of the Criminal Law* 48 (1840); E. Lewis, *An Abridgment of the Criminal Law of the United States* 64 (1847); F. Wharton, *A Treatise on the Criminal Law of the United States* 726 (1852). See also *State v. Langford*, 10 N. C. 381, 383–384 (1824); *O'Neill v. State*, 16 Ala. 65, 67 (1849); *English v. State*, 35 Tex. 473, 476 (1871); *State v. Lanier*, 71 N. C. 288, 289 (1874).

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

IV

We turn finally to the law at issue here. As we have said, the

law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights,²⁷ banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” 478 F. 3d, at 400, would fail constitutional muster.

Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban. And some of those few have been struck down. In *Nunn v. State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). See 1 Ga., at 251. In *Andrews v. State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol “publicly or privately, without regard to time or place, or circumstances,” 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of long guns. *Ibid.* See also *State v. Reid*, 1 Ala. 612, 616–617 (1840) (“A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional”).

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are

the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. The District argues that we should interpret this element of the statute to contain an exception for self-defense. See Brief for Petitioners 56–57. But we think that is precluded by the unequivocal text, and by the presence of certain other enumerated exceptions: “Except for law enforcement personnel . . . , each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.” D. C. Code §7–2507.02. The nonexistence of a self-defense exception is also suggested by the D. C. Court of Appeals' statement that the statute forbids residents to use firearms to stop intruders, see *McIntosh v. Washington*, 395 A. 2d 744, 755–756 (1978).²⁸

Apart from his challenge to the handgun ban and the trigger-lock requirement respondent asked the District Court to enjoin petitioners from enforcing the separate licensing requirement “in such a manner as to forbid the carrying of a firearm within one's home or possessed land without a license.” App. 59a. The Court of Appeals did not invalidate the licensing requirement, but held only that the District “may not prevent [a handgun] from being moved throughout one's house.” 478 F. 3d, at 400. It then ordered the District Court to enter summary judgment “consistent with [respondent's] prayer for relief.” *Id.*, at 401. Before this Court petitioners have stated that “if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified,” by which they apparently mean if he is not a felon and is not insane. Brief for Petitioners 58. Respondent conceded at oral argument that he does not “have a problem with . . . licensing” and that the District's law is permissible so long as it is “not enforced in an arbitrary and capricious manner.” Tr. of Oral Arg. 74–75. We therefore assume that petitioners' issuance of a license will satisfy respondent's prayer for relief and do not address the licensing requirement.

JUSTICE BREYER has devoted most of his separate dissent to the handgun ban. He says that, even assuming the Second

Amendment is a personal guarantee of the right to bear arms, the District's prohibition is valid. He first tries to establish this by founding-era historical precedent, pointing to various restrictive laws in the colonial period. These demonstrate, in his view, that the District's law "imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted." *Post*, at 2. Of the laws he cites, only one offers even marginal support for his assertion. A 1783 Massachusetts law forbade the residents of Boston to "take into" or "receive into" "any Dwelling House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building" loaded firearms, and permitted the seizure of any loaded firearms that "shall be found" there. Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts p. 218. That statute's text and its prologue, which makes clear that the purpose of the prohibition was to eliminate the danger to firefighters posed by the "depositing of loaded Arms" in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law's application in that case). In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home. The other laws JUSTICE BREYER cites are gunpowder-storage laws that he concedes did not clearly prohibit loaded weapons, but required only that excess gunpowder be kept in a special container or on the top floor of the home. *Post*, at 6–7. Nothing about those fire-safety laws undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.

JUSTICE BREYER points to other founding-era laws that he says "restricted the firing of guns within the city limits to at least some degree" in Boston, Philadelphia and New York. *Post*, at 4 (citing Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America, 25 Law & Hist. Rev. 139, 162 (2007)). Those laws provide no support for the severe restriction in the present case. The New York law levied a fine of 20 shillings on anyone who fired a gun in certain places (including houses) on New Year's Eve and the first two days of January, and was aimed at preventing the "great Damages . . . frequently done

on [those days] by persons going House to House, with Guns and other Firearms and being often intoxicated with Liquor.” 5 Colonial Laws of New York 244–246 (1894). It is inconceivable that this law would have been enforced against a person exercising his right to self-defense on New Year’s Day against such drunken hooligans. The Pennsylvania law to which JUSTICE BREYER refers levied a fine of 5 shillings on one who fired a gun or set off fireworks in Philadelphia without first obtaining a license from the governor. See Act of Aug. 26, 1721, §4, in 3 Stat. at Large 253–254. Given Justice Wilson’s explanation that the right to self-defense with arms was protected by the Pennsylvania Constitution, it is unlikely that this law (which in any event amounted to at most a licensing regime) would have been enforced against a person who used firearms for self-defense. JUSTICE BREYER cites a Rhode Island law that simply levied a 5-shilling fine on those who fired guns in *streets* and *taverns*, a law obviously inapplicable to this case. See An Act for preventing Mischief being done in the town of Newport, or in any other town in this Government, 1731, Rhode Island Session Laws. Finally, JUSTICE BREYER points to a Massachusetts law similar to the Pennsylvania law, prohibiting “discharg[ing] any Gun or Pistol charged with Shot or Ball in the Town of *Boston*.” Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay 208. It is again implausible that this would have been enforced against a citizen acting in self-defense, particularly given its preambulatory reference to “the *indiscreet* firing of Guns.” *Ibid.* (preamble) (emphasis added).

A broader point about the laws that JUSTICE BREYER cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties.²⁹ They are akin to modern penalties for minor public-safety infractions like speeding or jaywalking. And although such public-safety laws may not contain exceptions for self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a “Do Not Walk” sign in order to flee an attacker, or that the Government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first

place. See D. C. Code §7–2507.06.

JUSTICE BREYER moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering “interest-balancing inquiry” that “asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” *Post*, at 10. After an exhaustive discussion of the arguments for and against gun control, JUSTICE BREYER arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

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. We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America v. Skokie*, 432 U. S. 43 (1977) (*per curiam*). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people—which JUSTICE BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

JUSTICE BREYER chides us for leaving so many applications

of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. See *post*, at 42–43. But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U. S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

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

* * *

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra*, at 54–55, and n. 26. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

We affirm the judgment of the Court of Appeals.

It is so ordered.

ENDNOTES

¹ There are minor exceptions to all of these prohibitions, none of which is relevant here.

² That construction has not been challenged here.

³ As Sutherland explains, the key 18th-century English case on the effect of preambles, *Copeman v. Gallant*, 1 P. Wms. 314, 24 Eng. Rep. 404 (1716), stated that “the preamble could not be used to restrict the effect of the words of the purview.” J. Sutherland, *Statutes and Statutory Construction*, 47.04 (N. Singer ed. 5th ed. 1992). This rule was modified in England in an 1826 case to give more importance to the preamble, but in America “the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.” *Ibid.*

JUSTICE STEVENS says that we violate the general rule that every clause in a statute must have effect. *Post*, at 8. But where the text of a clause itself indicates that it does not have operative effect, such as “whereas” clauses in federal legislation or the Constitution’s preamble, a court has no license to make it do what it was not designed to do. Or to put the point differently, operative provisions should be given effect as operative provisions, and prologues as prologues.

⁴ JUSTICE STEVENS criticizes us for discussing the prologue last. *Post*, at 8. But if a prologue can be used only to clarify an ambiguous operative provision, surely the first step must be to determine whether the operative provision is ambiguous. It might be argued, we suppose, that the prologue itself should be one of the factors that go into the determination of whether the operative provision is ambiguous—but that would cause the prologue to be used to produce ambiguity rather than just to resolve it. In any event, even if we considered the prologue *along with* the operative provision we would reach the same result we do today, since (as we explain) our interpretation of “the right of the people to keep and bear arms” furthers the purpose of an effective militia no less than (indeed, more than) the dissent’s interpretation. See *infra*, at 26–27.

⁵ JUSTICE STEVENS is of course correct, *post*, at 10, that the right to assemble cannot be exercised alone, but it is still an individual right, and not one conditioned upon membership in some defined “assembly,” as he contends the right to bear arms is conditioned upon membership in a defined militia. And JUSTICE STEVENS is dead wrong to think that the right to

petition is “primarily collective in nature.” *Ibid.* See *McDonald v. Smith*, 472 U. S. 479, 482–484 (1985) (describing historical origins of right to petition).

⁶ If we look to other founding-era documents, we find that some state constitutions used the term “the people” to refer to the people collectively, in contrast to “citizen,” which was used to invoke individual rights. See Heyman, *Natural Rights and the Second Amendment*, in *The Second Amendment in Law and History* 179, 193–195 (C. Bogus ed. 2000) (hereinafter Bogus). But that usage was not remotely uniform.

See, e.g., N. C. Declaration of Rights §XIV (1776), in 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 2787, 2788 (F. Thorpe ed. 1909) (hereinafter Thorpe) (jury trial); Md. Declaration of Rights §XVIII (1776), in 3 *id.*, at 1686, 1688 (vici nage requirement); Vt. Declaration of Rights ch. 1, §XI (1777), in 6 *id.*, at 3737, 3741 (searches and seizures); Pa. Declaration of Rights §XII (1776), in 5 *id.*, at 3081, 3083 (free speech). And, most importantly, it was clearly not the terminology used in the Federal Constitution, given the First, Fourth, and Ninth Amendments.

⁷ See, e.g., 3 *A Compleat Collection of State-Tryals* 185 (1719) (“Hath not every Subject power to keep Arms, as well as Servants in his House for defence of his Person?”); T. Wood, *A New Institute of the Imperial or Civil Law* 282 (1730) (“Those are guilty of *publick* Force, who keep Arms in their Houses, and make use of them otherwise than upon Journeys or Hunting, or for Sale . . .?”); *A Collection of All the Acts of Assembly, Now in Force, in the Colony of Virginia* 596 (1733) (“Free Negroes, Mulattos, or Indians, and Owners of Slaves, seated at Frontier Plantations, may obtain Licence from a Justice of Peace, for keeping Arms, &c.”); J. Ayliffe, *A New Pandect of Roman Civil Law* 195 (1734) (“Yet a Person might keep Arms in his House, or on his Estate, on the Account of Hunting, Navigation, Travelling, and on the Score of Selling them in the way of Trade or Commerce, or such Arms as accrued to him by way of Inheritance”); J. Trusler, *A Concise View of the Common Law and Statute Law of England* 270 (1781) (“if [papists] keep arms in their houses, such arms may be seized by a justice of the peace”); *Some Considerations on the Game Laws* 54 (1796) (“Who has been deprived by [the law] of keeping arms for his own defence? What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . .?”); 3 B. Wilson, *The Works of the Honourable James Wilson* 84 (1804) (with reference to state constitutional right: “This is one of our many renewals of the Saxon regulations. ‘They were bound,’ says Mr. Selden, ‘to keep arms for the preservation of the kingdom, and of their own person’”); W. Duer, *Outlines of the Constitutional Jurisprudence of the United States* 31–32 (1833) (with reference

to colonists' English rights: "The right of every individual to keep arms for his defence, suitable to his condition and degree; which was the public allowance, under due restrictions of the natural right of resistance and self-preservation"); 3 R. Burn, Justice of the Peace and the Parish Officer 88 (1815) ("It is, however, laid down by Serjeant Hawkins, . . . that if a lessee, after the end of the term, keep arms in his house to oppose the entry of the lessor, . . ."); *State v. Dempsey*, 31 N. C. 384, 385 (1849) (citing 1840 state law making it a misdemeanor for a member of certain racial groups "to carry about his person or keep in his house any shot gun or other arms").

⁸ See Pa. Declaration of Rights §XIII, in 5 Thorpe 3083 ("That the people have a right to bear arms for the defence of themselves and the state. . ."); Vt. Declaration of Rights §XV, in 6 *id.*, at 3741 ("That the people have a right to bear arms for the defence of themselves and the State. . ."); Ky. Const., Art. XII, cl. 23 (1792), in 3 *id.*, at 1264, 1275 ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned"); Ohio Const., Art. VIII, §20 (1802), in 5 *id.*, at 2901, 2911 ("That the people have a right to bear arms for the defence of themselves and the State . . ."); Ind. Const., Art. I, §20 (1816), in 2 *id.*, at 1057, 1059 ("That the people have a right to bear arms for the defense of themselves and the State. . ."); Miss. Const., Art. I, §23 (1817), in 4 *id.*, at 2032, 2034 ("Every citizen has a right to bear arms, in defence of himself and the State"); Conn. Const., Art. I, §17 (1818), in 1 *id.*, at 536, 538 ("Every citizen has a right to bear arms in defence of himself and the state"); Ala. Const., Art. I, §23 (1819), in 1 *id.*, at 96, 98 ("Every citizen has a right to bear arms in defence of himself and the State"); Mo. Const., Art. XIII, §3 (1820), in 4 *id.*, at 2150, 2163 ("[T]hat their right to bear arms in defence of them selves and of the State cannot be questioned"). See generally Volokh, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L. & Politics 191 (2006).

⁹ See *Bliss v. Commonwealth*, 2 Litt. 90, 91–92 (Ky. 1822); *State v. Reid*, 1 Ala. 612, 616–617 (1840); *State v. Schoultz*, 25 Mo. 128, 155 (1857); see also *Simpson v. State*, 5 Yer. 356, 360 (Tenn. 1833) (interpreting similar provision with "common defence" purpose); *State v. Huntly*, 25 N. C. 418, 422–423 (1843) (same); cf. *Nunn v. State*, 1 Ga. 243, 250–251 (1846) (construing Second Amendment); *State v. Chandler*, 5 La. Ann. 489, 489–490 (1850) (same).

¹⁰ See J. Brydall, Privilegia Magnatud apud Anglos 14 (1704) (Privi lege XXXIII) ("In the 21st Year of King Edward the Third, a Proclamation Issued, that no Person should bear any Arms within London, and the Suburbs"); J. Bond, A Compleat Guide to Justices of the Peace 43 (1707)

(“Sheriffs, and all other Officers in executing their Offices, and all other persons pursuing Hu[e] and Cry may lawfully bear arms”); 1 *An Abridgment of the Public Statutes in Force and Use Relative to Scotland* (1755) (entry for “Arms”: “And if any person above described shall have in his custody, use, or bear arms, being thereof convicted before one justice of peace, or other judge competent, summarily, he shall for the first offense forfeit all such arms” (quoting 1 *Geo.* 1, c. 54, §1)); *Statute Law of Scotland Abridged* 132–133 (2d ed. 1769) (“Acts for disarming the highlands” but “exempting those who have particular licenses to bear arms”); E. de Vattel, *The Law of Nations, or, Principles of the Law of Nature* 144 (1792) (“Since custom has allowed persons of rank and gentlemen of the army to bear arms in time of peace, strict care should be taken that none but these should be allowed to wear swords”); E. Roche, *Proceedings of a Court-Martial, Held at the Council-Chamber, in the City of Cork* 3 (1798) (charge VI: “With having held traitorous conferences, and with having conspired, with the like intent, for the purpose of attacking and despoiling of the arms of several of the King’s subjects, qualified by law to bear arms”); C. Humphreys, *A Compendium of the Common Law in force in Kentucky* 482 (1822) (“[I]n this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify people unnecessarily”).

11 JUSTICE STEVENS contends, *post*, at 15, that since we assert that adding “against” to “bear arms” gives it a military meaning we must concede that adding a purposive qualifying phrase to “bear arms” can alter its meaning. But the difference is that we do not maintain that “against” *alters* the meaning of “bear arms” but merely that it *clarifies* which of various meanings (one of which is military) is intended. JUSTICE STEVENS, however, argues that “[t]he 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.’” *Post*, at 11. He therefore must establish that adding a contradictory purposive phrase can *alter* a word’s meaning.

12 JUSTICE STEVENS finds support for his legislative history inference from the recorded views of one Antifederalist member of the House. *Post*, at 26 n. 25. “The claim that the best or most representative reading of the [language of the] amendments would conform to the understanding and concerns of [the Antifederalists] is . . . highly problematic.” Rakove, *The Second Amendment: The Highest Stage of Originalism*, *Bogus* 74, 81.

13 The same applies to the conscientious-objector amendments proposed by Virginia and North Carolina, which said: “That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.” See Veit 19;

4 J. Eliot, *The Debates in the Several State Constitutions on the Adoption of the Federal Constitution* 243, 244 (2d ed. 1836) (reprinted 1941). Certainly their second use of the phrase (“bear arms in his stead”) refers, by reason of context, to compulsory bearing of arms for military duty. But their first use of the phrase (“any person religiously scrupulous of bearing arms”) assuredly did not refer to people whose God allowed them to bear arms for defense of themselves but not for defense of their country.

14 Faced with this clear historical usage, JUSTICE STEVENS resorts to the bizarre argument that because the word “to” is not included before “bear” (whereas it is included before “petition” in the First Amendment), the unitary meaning of “to keep and bear” is established. *Post*, at 16, n. 13. We have never heard of the proposition that omitting repetition of the “to” causes two verbs with different meanings to become one. A promise “to support and to defend the Constitution of the United States” is not a whit different from a promise “to support and defend the Constitution of the United States.”

15 Cf. 3 Geo., 34, §3, in 7 Eng. Stat. at Large 126 (1748) (“That the Prohibition contained . . . in this Act, of having, keeping, bearing, or wearing any Arms or Warlike Weapons . . . shall not extend . . . to any Officers or their Assistants, employed in the Execution of Justice . . .”).

16 Contrary to JUSTICE STEVENS’ wholly unsupported assertion, *post*, at 1, 17, there was no pre-existing right in English law “to use weapons for certain military purposes” or to use arms in an organized militia.

17 Article I, §8, cl. 16 of the Constitution gives Congress the power “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”

It could not be clearer that Congress’s “organizing” power, unlike its “governing” power, can be invoked even for that part of the militia not “employed in the Service of the United States.” JUSTICE STEVENS provides no support whatever for his contrary view; see *post*, at 19 n. 20. Both the Federalists and Anti-Federalists read the provision as it was written, to permit the creation of a “select” militia. See *The Federalist* No. 29, pp. 226, 227 (B. Wright ed. 1961); *Centinel*, Revived, No. XXIX, *Philadelphia Independent Gazetteer*, Sept. 9, 1789, in *Young* 711, 712.

18 JUSTICE STEVENS says that the drafters of the Virginia Declaration of Rights rejected this proposal and adopted “instead” a provision written by George Mason stressing the importance of the militia. See *post*, at

24, and n. 24. There is no evidence that the drafters regarded the Mason proposal as a substitute for the Jefferson proposal.

19 JUSTICE STEVENS quotes some of Tucker's unpublished notes, which he claims show that Tucker had ambiguous views about the Second Amendment. See *post*, at 31, and n. 32. But it is clear from the notes that Tucker located the power of States to arm their militias in the *Tenth* Amendment, and that he cited the Second Amendment for the proposition that such armament could not run afoul of any power of the federal government (since the amendment prohibits Congress from ordering disarmament). Nothing in the passage implies that the Second Amendment pertains only to the carrying of arms in the organized militia.

20 Rawle, writing before our decision in *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833), believed that the Second Amendment could be applied against the States. Such a belief would of course be nonsensical on petitioners' view that it protected only a right to possess and carry arms when conscripted by the State itself into militia service.

21 JUSTICE STEVENS suggests that this is not obvious because free blacks in Virginia had been required to muster without arms. See *post*, at 28, n. 29 (citing Siegel, *The Federal Government's Power to Enact Color-Conscious Laws*, 92 Nw. U. L. Rev. 477, 497 (1998)). But that could not have been the type of law referred to in *Aldridge*, because that practice had stopped 30 years earlier when blacks were excluded entirely from the militia by the First Militia Act. See Siegel, *supra*, at 498, n. 120. JUSTICE STEVENS further suggests that laws barring blacks from militia service could have been said to violate the "right to bear arms." But under JUSTICE STEVENS' reading of the Second Amendment (we think), the protected right is the right to carry arms to the extent one is enrolled in the militia, not the right *to be in the militia*. Perhaps JUSTICE STEVENS really does adopt the full-blown idiomatic meaning of "bear arms," in which case every man and woman in this country has a right "to be a soldier" or even "to wage war." In any case, it is clear to us that *Aldridge's* allusion to the existing Virginia "restriction" upon the right of free blacks "to bear arms" could only have referred to "laws prohibiting blacks from keeping weapons," Siegel, *supra*, at 497–498.

22 JUSTICE STEVENS' accusation that this is "not accurate," *post*, at 39, is wrong. It is true it was the indictment that described the right as "bearing arms for a lawful purpose." But, in explicit reference to the right described in the indictment, the Court stated that "The second amendment declares that it [*i.e.*, the right of bearing arms for a lawful purpose] shall not be infringed." 92 U. S., at 553.

23 With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U. S. 252, 265 (1886) and *Miller v. Texas*, 153 U. S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

24 As for the “hundreds of judges,” *post*, at 2, who have relied on the view of the Second Amendment JUSTICE STEVENS claims we endorsed in *Miller*. If so, they overread *Miller*. And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms. In any event, it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right.

25 *Miller* was briefly mentioned in our decision in *Levin v. United States*, 445 U. S. 55 (1980), an appeal from a conviction for being a felon in possession of a firearm. The challenge was based on the contention that the prior felony conviction had been unconstitutional. No Second Amendment claim was raised or briefed by any party. In the course of rejecting the asserted challenge, the Court commented gratuitously, in a footnote, that “[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller* . . . (the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia’).” *Id.*, at 65–66, n. 8. The footnote then cites several Court of Appeals cases to the same effect. It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued.

26 We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

27 JUSTICE BREYER correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. *Post*, at 8. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. See, e.g., *Engquist v. Oregon Dept. of Agriculture*, 553

U. S. , (2008) (slip op., at 9–10). In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the consti-

tutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . .”). If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

²⁸ *McIntosh* upheld the law against a claim that it violated the Equal Protection Clause by arbitrarily distinguishing between residences and businesses. See 395 A. 2d, at 755. One of the rational bases listed for that distinction was the legislative finding “that for each intruder stopped by a firearm there are four gun-related accidents within the home.” *Ibid.* That tradeoff would not bear mention if the statute did not prevent stopping intruders by firearms.

²⁹ The Supreme Court of Pennsylvania described the amount of five shillings in a contract matter in 1792 as “nominal consideration.” *Morris’s Lessee v. Smith*, 4 Dall. 119, 120 (Pa. 1792). Many of the laws cited punished violation with fine in a similar amount; the 1783 Massachusetts gunpowder-storage law carried a somewhat larger fine of £10 (200 shillings) and forfeiture of the weapon.

**In The
Supreme Court of the United States**

◆
OTIS MCDONALD, et al.,
Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.
Respondent.

◆
**Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

◆
June 28, 2010

◆

JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, III–A, and III–B, in which THE CHIEF JUSTICE, JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, and an opinion with respect to Parts II–C, IV, and V, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join.

Two years ago, in *District of Columbia v. Heller*, 554 U. S. ____ (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia’s, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States.

We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

I

Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson (Chicago petitioners) are Chicago residents who would like to keep handguns in their homes for self-defense but are prohibited from doing so by Chicago's firearms laws. A City ordinance provides that "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm." Chicago, Ill., Municipal Code §8–20–040(a) (2009). The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City. §8–20–050(c). Like Chicago, Oak Park makes it "unlawful for any person to possess . . . any firearm," a term that includes "pistols, revolvers, guns and small arms . . . commonly known as handguns." Oak Park, Ill., Municipal Code §§27–2–1 (2007), 27–1–1 (2009).

Chicago enacted its handgun ban to protect its residents "from the loss of property and injury or death from firearms." See Chicago, Ill., Journal of Proceedings of the City Council, p. 10049 (Mar. 19, 1982). The Chicago petitioners and their *amici*, however, argue that the handgun ban has left them vulnerable to criminals. Chicago Police Department statistics, we are told, reveal that the City's handgun murder rate has actually increased since the ban was enacted¹ and that Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities.²

Several of the Chicago petitioners have been the targets of threats and violence. For instance, Otis McDonald, who is in his late seventies, lives in a high-crime neighborhood. He is a community activist involved with alternative policing strategies, and his efforts to improve his neighborhood have subjected him to violent threats from drug dealers. App. 16–17; Brief for State Firearm Associations as *Amici Curiae* 20–21; Brief for State of Texas et al. as *Amici Curiae* 7–8. Colleen Lawson is a Chicago resident whose home has been targeted by burglars. "In Mrs. Lawson's judgment, possessing a handgun in Chicago would decrease her chances of suffering serious injury or death should she ever be threatened again in her home."³ McDonald, Lawson, and the other Chicago petitioners own handguns that they store outside of the city limits, but they would like to keep their handguns in their homes for protection. See App. 16–19, 43–44 (McDonald), 20–24 (C. Lawson), 19, 36 (Orlov), 20–21, 40 (D. Lawson).

After our decision in *Heller*, the Chicago petitioners and two groups⁴ filed suit against the City in the United States District Court for the Northern District of Illinois. They sought a declaration that the handgun ban and several related Chicago ordinances violate the Second and Fourteenth Amendments to the United States Constitution. Another action challenging the Oak Park law was filed in the same District Court by the National Rifle Association (NRA) and two Oak Park residents. In addition, the NRA and others filed a third action challenging the Chicago ordinances. All three cases were assigned to the same District Judge.

The District Court rejected plaintiffs' argument that the Chicago and Oak Park laws are unconstitutional. See App. 83–84; *NRA, Inc. v. Oak Park*, 617 F. Supp. 2d 752, 754 (ND Ill. 2008). The court noted that the Seventh Circuit had “squarely upheld the constitutionality of a ban on handguns a quarter century ago,” *id.*, at 753 (citing *Quilici v. Morton Grove*, 695 F.2d 261 (CA7 1982)), and that *Heller* had explicitly refrained from “opin[ing] on the subject of incorporation vel non of the Second Amendment,” *NRA*, 617 F. Supp. 2d, at 754. The court observed that a district judge has a “duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent case law may point in a different direction.” *Id.*, at 753.

The Seventh Circuit affirmed, relying on three 19th-century cases—*United States v. Cruikshank*, 92 U.S. 542 (1876), *Presserv. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894)—that were decided in the wake of this Court's interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*, 16 Wall. 36 (1873). The Seventh Circuit described the rationale of those cases as “defunct” and recognized that they did not consider the question whether the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right to keep and bear arms. *NRA, Inc. v. Chicago*, 567 F.3d 856, 857, 858 (2009). Nevertheless, the Seventh Circuit observed that it was obligated to follow Supreme Court precedents that have “direct application,” and it declined to predict how the Second Amendment would fare under this Court's modern “selective incorporation” approach. *Id.*, at 857–858 (internal quotation marks omitted).

We granted certiorari. 557 U.S. _____
(2009).

II A

Petitioners argue that the Chicago and Oak Park laws violate the right to keep and bear arms for two reasons. Petitioners' primary submission is that this right is among the "privileges or immunities of citizens of the United States" and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases*, *supra*, should now be rejected. As a secondary argument, petitioners contend that the Fourteenth Amendment's Due Process Clause "incorporates" the Second Amendment right.

Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only if that right is an indispensable attribute of *any* "civilized" legal system. Brief for Municipal Respondents 9. If it is possible to imagine a civilized country that does not recognize the right, the municipal respondents tell us, then that right is not protected by due process. *Ibid.* And since there are civilized countries that ban or strictly regulate the private possession of handguns, the municipal respondents maintain that due process does not preclude such measures. *Id.*, at 21–23. In light of the parties' far-reaching arguments, we begin by recounting this Court's analysis over the years of the relationship between the provisions of the Bill of Rights and the States.

B

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833), the Court, in an opinion by Chief Justice Marshall, explained that this question was "of great importance" but "not of much difficulty." *Id.*, at 247. In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government. See also *Lessee of Livingston v. Moore*, 7 Pet. 469, 551–552 (1833) ("[I]t is now settled that those amendments [in the Bill of Rights] do not extend to the states").

The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. The provision at issue in this case, §1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law."

Four years after the adoption of the Fourteenth Amendment, this Court was asked to interpret the Amendment's reference to "the privileges or immunities of citizens of the United States." The *Slaughter-House Cases*, *supra*, involved challenges to a Louisiana law permitting the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans. Justice Samuel Miller's opinion for the Court concluded that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*, at 79. The Court held that other fundamental rights—rights that predated the creation of the Federal Government and that "the State governments were created to establish and secure"—were not protected by the Clause. *Id.*, at 76.

In drawing a sharp distinction between the rights of federal and state citizenship, the Court relied on two principal arguments. First, the Court emphasized that the Fourteenth Amendment's Privileges or Immunities Clause spoke of "the privileges or immunities of *citizens of the United States*," and the Court contrasted this phrasing with the wording in the first sentence of the Fourteenth Amendment and in the Privileges and Immunities Clause of Article IV, both of which refer to *state* citizenship.⁵ (Emphasis added.) Second, the Court stated that a contrary reading would "radically chang[e] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people," and the Court refused to conclude that such a change had been made "in the absence of language which expresses such a purpose too clearly to admit of doubt." *Id.*, at 78. Finding the phrase "privileges or immunities of citizens of the United States" lacking by this high standard, the Court reasoned that the phrase must mean something more limited.

Under the Court's narrow reading, the Privileges or Immunities Clause protects such things as the right "to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions . . . [and to] become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State." *Id.*, at 79–80 (internal quotation marks omitted).

Finding no constitutional protection against state intrusion of the kind envisioned by the Louisiana statute, the Court upheld the

statute. Four Justices dissented. Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, criticized the majority for reducing the Fourteenth Amendment's Privileges or Immunities Clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *Id.*, at 96; see also *id.*, at 104. Justice Field opined that the Privileges or Immunities Clause protects rights that are "in their nature . . . fundamental," including the right of every man to pursue his profession without the imposition of unequal or discriminatory restrictions. *Id.*, at 96–97. Justice Bradley's dissent observed that "we are not bound to resort to implication . . . to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." *Id.*, at 118. Justice Bradley would have construed the Privileges or Immunities Clause to include those rights enumerated in the Constitution as well as some unenumerated rights. *Id.*, at 119. Justice Swayne described the majority's narrow reading of the Privileges or Immunities Clause as "turn[ing] . . . what was meant for bread into a stone." *Id.*, at 129 (dissenting opinion).

Today, many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation. See, e.g., *Saenz v. Roe*, 526 U. S. 489, 522, n. 1, 527 (1999) (THOMAS, J., dissenting) (scholars of the Fourteenth Amendment agree "that the Clause does not mean what the Court said it meant in 1873"); Amar, Substance and Method in the Year 2000, 28 *Pepperdine L. Rev.* 601, 631, n. 178 (2001) ("Virtually no serious modern scholar—left, right, and center—thinks that this [interpretation] is a plausible reading of the Amendment"); Brief for Constitutional Law Professors as *Amici Curiae* 33 (claiming an "overwhelming consensus among leading constitutional scholars" that the opinion is "egregiously wrong"); C. Black, *A New Birth of Freedom* 74–75 (1997).

Three years after the decision in the *Slaughter-House Cases*, the Court decided *Cruikshank*, the first of the three 19th-century cases on which the Seventh Circuit relied. 92 U. S. 542. In that case, the Court reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on Easter Sunday 1873. Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men.⁶ Cruikshank himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed.⁷ Ninety-seven men were indicted for participating in the massacre, but only nine went to trial. Six of the nine were acquitted

of all charges; the remaining three were acquitted of murder but convicted under the Enforcement Act of 1870, 16 Stat. 140, for banding and conspiring together to deprive their victims of various constitutional rights, including the right to bear arms.⁸

The Court reversed all of the convictions, including those relating to the deprivation of the victims' right to bear arms. *Cruikshank*, 92 U. S., at 553, 559. The Court wrote that the right of bearing arms for a lawful purpose "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence." *Id.*, at 553. "The second amendment," the Court continued, "declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress." *Ibid.* "Our later decisions in *Presser v. Illinois*, 116 U. S. 252, 265 (1886), and *Miller v. Texas*, 153 U. S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government." *Heller*, 554 U. S., at ___, n. 23 (slip op., at 48, n. 23).

C

As previously noted, the Seventh Circuit concluded that *Cruikshank*, *Presser*, and *Miller* doomed petitioners' claims at the Court of Appeals level. Petitioners argue, however, that we should overrule those decisions and hold that the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." In petitioners' view, the Privileges or Immunities Clause protects all of the rights set out in the Bill of Rights, as well as some others, see Brief for Petitioners 10, 14, 15–21, but petitioners are unable to identify the Clause's full scope, Tr. of Oral Arg. 5–6, 8–11. Nor is there any consensus on that question among the scholars who agree that the *Slaughter-House Cases*' interpretation is flawed. See *Saenz, supra*, at 522, n. 1 (THOMAS, J., dissenting).

We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.

At the same time, however, this Court's decisions in *Cruikshank*, *Presser*, and *Miller* do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment rightbinding on the States. See *Heller*, 554 U. S., at ___, n. 23 (slip op., at 48, n. 23). None of those cases "engage[d]

in the sort of Fourteenth Amendment inquiry required by our later cases.” *Ibid.* As explained more fully below, *Cruikshank*, *Presser*, and *Miller* all preceded the era in which the Court began the process of “selective incorporation” under the Due Process Clause, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.

Indeed, *Cruikshank* has not prevented us from holding that other rights that were at issue in that case are binding on the States through the Due Process Clause. In *Cruikshank*, the Court held that the general “right of the people peaceably to assemble for lawful purposes,” which is protected by the First Amendment, applied only against the Federal Government and not against the States. See 92 U. S., at 551–552. Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a “fundamental right . . . safeguarded by the due process clause of the Fourteenth Amendment.” *De Jonge v. Oregon*, 299 U. S. 353, 364 (1937). We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause.

D 1

In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. See *Hurtado v. California*, 110 U. S. 516 (1884) (due process does not require grand jury indictment); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897) (due process prohibits States from taking of private property for public use without just compensation). Five features of the approach taken during the ensuing era should be noted.

First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining v. New Jersey*, 211 U. S. 78, 99 (1908).

Second, the Court explained that the only rights protected against state infringement by the Due Process Clause were those rights “of such a nature that they are included in the conception of due process of law.” *Ibid.* See also, *e.g.*, *Adamson v. California*, 332 U. S. 46 (1947); *Betts v. Brady*, 316 U. S. 455 (1942); *Palko v. Connecticut*, 302 U. S. 319 (1937); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936); *Powell v. Alabama*, 287 U. S. 45 (1932).

While it was “possible that some of the personal rights safeguarded by the first eight Amendments against National

action [might] also be safeguarded against state action,” the Court stated, this was “not because those rights are enumerated in the first eight Amendments.” *Twining*, *supra*, at 99.

The Court used different formulations in describing the boundaries of due process. For example, in *Twining*, the Court referred to “immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.” 211 U. S., at 102 (internal quotation marks omitted). In *Snyder v. Massachusetstts*, 291 U. S. 97, 105 (1934), the Court spoke of rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” And in *Palko*, the Court famously said that due process protects those rights that are “the very essence of a scheme of ordered liberty” and essential to “a fair and enlightened system of justice.” 302 U. S., at 325.

Third, in some cases decided during this era the Court “can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection.” *Duncan v. Louisiana*, 391 U. S. 145, 149, n. 14 (1968). Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as “a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice.” *Chicago, B. & Q. R. Co.*, *supra*, at 238. Similarly, the Court found that due process did not provide a right against compelled incrimination in part because this right “has no place in the jurisprudence of civilized and free countries outside the domain of the common law.” *Twining*, *supra*, at 113.

Fourth, the Court during this era was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause. The Court found that some such rights qualified. See, *e.g.*, *Gillow v. New York*, 268 U. S. 652, 666 (1925) (freedom of speech and press); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931) (same); *Powell*, *supra* (assistance of counsel in capital cases); *DeJonge*, *supra* (freedom of assembly); *Cantwell v. Connecticut*, 310 U. S. 296 (1940) (free exercise of religion). But others did not. See, *e.g.*, *Hurtado*, *supra* (grand jury indictment requirement); *Twining*, *supra* (privilege against self-incrimination).

Finally, even when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or

remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgment by the Federal Government. To give one example, in *Betts* the Court held that, although the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, the Due Process Clause required appointment of counsel in state criminal proceedings only where “want of counsel in [the] particular case . . . result[ed] in a conviction lacking in . . . fundamental fairness.” 316 U. S., at 473. Similarly, in *Wolf v. Colorado*, 338 U. S. 25 (1949), the Court held that the “core of the Fourth Amendment” was implicit in the concept of ordered liberty and thus “enforceable against the States through the Due Process Clause” but that the exclusionary rule, which applied in federal cases, did not apply to the States. *Id.*, at 27–28, 33.

2

An alternative theory regarding the relationship between the Bill of Rights and §1 of the Fourteenth Amendment was championed by Justice Black. This theory held that §1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, e.g., *Adamson, supra*, at 71–72 (Black, J., dissenting); *Duncan, supra*, at 166 (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court’s decision in *Barron*.⁹ *Adamson*, 332 U. S., at 72 (dissenting opinion).¹⁰ Nonetheless, the Court never has embraced Justice Black’s “total incorporation” theory.

3

While Justice Black’s theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of “selective incorporation,” i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See, e.g., *Gideon v. Wainwright*, 372 U. S. 335, 341 (1963); *Malloy v. Hogan*, 378 U. S. 1, 5–6 (1964); *Pointer v. Texas*, 380 U. S. 400, 403–404 (1965); *Washington v. Texas*, 388 U. S. 14, 18 (1967); *Duncan*, 391 U. S., at 147–148; *Benton v. Maryland*, 395 U. S. 784, 794 (1969).

The decisions during this time abandoned three of the previously noted characteristics of the earlier period.¹¹ The Court made it clear that the governing standard is not whether *any* “civilized system

[can] be imagined that would not accord the particular protection.” *Duncan*, 391 U. S., at 149, n. 14. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice. *Id.*, at 149, and n. 14; see also *id.*, at 148 (referring to those “fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions” (emphasis added; internal quotation marks omitted)).

The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights.¹² Only a handful of the Bill of Rights protections remain unincorporated.¹³

Finally, the Court abandoned “the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,” stating that it would be “incongruous” to apply different standards “depending on whether the claim was asserted in a state or federal court.” *Malloy*, 378 U. S., at 10–11 (internal quotation marks omitted). Instead, the Court decisively held that incorporated Bill of Rights protections “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” *Id.*, at 10; see also *Mapp v. Ohio*, 367 U. S. 643, 655–656 (1961); *Ker v. California*, 374 U. S. 23, 33–34 (1963); *Aguilar v. Texas*, 378 U. S. 108, 110 (1964); *Pointer*, 380 U. S., at 406; *Duncan, supra*, at 149, 157–158; *Benton*, 395 U. S., at 794–795; *Wallace v. Jaffree*, 472 U. S. 38, 48–49 (1985).¹⁴

Employing this approach, the Court overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States. See, e.g., *Mapp, supra* (overruling in part *Wolf*, 338 U. S. 25); *Gideon*, 372 U. S. 335 (overruling *Betts*, 316 U. S. 455); *Malloy, supra* (overruling *Adamson*, 332 U. S. 46, and *Twining*, 211 U. S. 78); *Benton, supra*, at 794 (overruling *Palke*, 302 U. S. 319).

III

With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncan*, 391 U. S., at 149, or as we have said in a related

context, whether this right is “deeply rooted in this Nation’s history and tradition,” *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997) (internal quotation marks omitted).

A

Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day,¹⁵ and in *Heller*, we held that individual self-defense is “the *central component*” of the Second Amendment right. 554 U. S., at (slip op., at 26); see also *id.*, at (slip op., at 56) (stating that the “inherent right of self-defense has been central to the Second Amendment right”). Explaining that “the need for defense of self, family, and property is most acute” in the home, *ibid.*, we found that this right applies to handguns because they are “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” *id.*, at (slip op., at 57) (some internal quotation marks omitted); see also *id.*, at (slip op., at 56) (noting that handguns are “overwhelmingly chosen by American society for [the] lawful purpose” of self-defense); *id.*, at (slip op., at 57) (“[T]he American people have considered the handgun to be the quintessential self-defense weapon”). Thus, we concluded, citizens must be permitted “to use [handguns] for the core lawful purpose of self-defense.” *Id.*, at (slip op., at 58).

Heller makes it clear that this right is “deeply rooted in this Nation’s history and tradition.” *Glucksberg*, *supra*, at 721 (internal quotation marks omitted). *Heller* explored the right’s origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, 554 U. S., at – (slip op., at 19–20), and that by 1765, Blackstone was able to assert that the right to keep and bear arms was “one of the fundamental rights of Englishmen,” *id.*, at (slip op., at 20).

Blackstone’s assessment was shared by the American colonists. As we noted in *Heller*, King George III’s attempt to disarm the colonists in the 1760’s and 1770’s “provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.”¹⁶ *Id.*, at (slip op., at 21); see also L. Levy, *Origins of the Bill of Rights 137–143* (1999) (hereinafter *Levy*).

The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights. “During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose

rule through a standing army or select militia was pervasive in Antifederalist rhetoric.” *Heller, supra*, at (slip op., at 25) (citing Letters from the Federal Farmer III (Oct. 10, 1787), in 2 *The Complete Anti-Federalist* 234, 242 (H. Storing ed. 1981)); see also *Federal Farmer: An Additional Number of Letters to the Republican*, Letter XVIII (Jan. 25, 1788), in 17 *Documentary History of the Ratification of the Constitution* 360, 362–363 (J. Kaminski & G. Saladino eds. 1995); S. Halbrook, *The Founders’ Second Amendment* 171–278 (2008). Federalists responded, not by arguing that the right was insufficiently important to warrant protection but by contending that the right was adequately protected by the Constitution’s assignment of only limited powers to the Federal Government. *Heller, supra*, at (slip op., at 25–26); cf. *The Federalist* No. 46, p. 296 (C. Rossiter ed. 1961) (J. Madison). Thus, Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government. See Levy 143–149; J. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 155–164 (1994). But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution. See 1 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 327–331 (2d ed. 1854); 3 *id.*, at 657–661; 4 *id.*, at 242–246, 248–249; see also Levy 26–34; A. Kelly & W. Harbison, *The American Constitution: Its Origins and Development* 110, 118 (7th ed. 1991). This is surely powerful evidence that the right was regarded as fundamental in the sense relevant here.

This understanding persisted in the years immediately following the ratification of the Bill of Rights. In addition to the four States that had adopted Second Amendment analogues before ratification, nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820. *Heller, supra*, at ___ (slip op., at 27–30). Founding-era legal commentators confirmed the importance of the right to early Americans. St. George Tucker, for example, described the right to keep and bear arms as “the true palladium of liberty” and explained that prohibitions on the right would place liberty “on the brink of destruction.” 1 *Blackstone’s Commentaries*, Editor’s App. 300 (S. Tucker ed. 1803); see also W. Rawle, *A View of the Constitution of the United States of America*, 125–126 (2d ed. 1829) (reprint 2009); 3 J. Story, *Commentaries on the Constitution of the United*

States §1890, p. 746 (1833) (“The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them”).

B 1

By the 1850’s, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense. See M. Doubler, *Civilian in Peace, Soldier in War* 87–90 (2003); Amar, *Bill of Rights* 258–259. Abolitionist authors wrote in support of the right. See L. Spooner, *The Unconstitutionality of Slavery* 66 (1860) (reprint 1965); J. Tiffany, *A Treatise on the Unconstitutionality of American Slavery* 117–118 (1849) (reprint 1969). And when attempts were made to disarm “Free-Soilers” in “Bloody Kansas,” Senator Charles Sumner, who later played a leading role in the adoption of the Fourteenth Amendment, proclaimed that “[n]ever was [the rifle] more needed in just self-defense than now in Kansas.” *The Crime Against Kansas: The Apologies for the Crime: The True Remedy*, Speech of Hon. Charles Sumner in the Senate of the United States 64–65 (1856). Indeed, the 1856 Republican Party Platform protested that in Kansas the constitutional rights of the people had been “fraudulently and violently taken from them” and the “right of the people to keep and bear arms” had been “infringed.” *National Party Platforms 1840–1972*, p. 27 (5th ed. 1973).¹⁷

After the Civil War, many of the over 180,000 African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks. See *Heller*, 554 U. S., at (slip op., at 42); E. Foner, *Reconstruction: America’s Unfinished Revolution 1863–1877*, p. 8 (1988) (hereinafter Foner). The laws of some States formally prohibited African Americans from possessing firearms. For example, a Mississippi law provided that “no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife.” *Certain Offenses of*

Freedmen, 1865 Miss. Laws p. 165, §1, in 1 Documentary History of Reconstruction 289 (W. Fleming ed. 1950); see also Regulations for Freedmen in Louisiana, in *id.*, at 279–280; H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866) (describing a Kentucky law); E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 40 (1871) (describing a Florida law); *id.*, at 33 (describing an Alabama law).¹⁸

Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves. In the first session of the 39th Congress, Senator Wilson told his colleagues: “In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country.” 39th Cong. Globe 40 (1865). The Report of the Joint Committee on Reconstruction—which was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents shortly after Congress approved the Fourteenth Amendment¹⁹—contained numerous examples of such abuses. See, *e.g.*, Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, pp. 219, 229, 272, pt. 3, pp. 46, 140, pt. 4, pp. 49–50 (1866); see also S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 23–24, 26, 36 (1865). In one town, the “marshal [took] all arms from returned colored soldiers, and [was] very prompt in shooting the blacks whenever an opportunity occur[red].” H. R. Exec. Doc. No. 70, at 238 (internal quotation marks omitted). As Senator Wilson put it during the debate on a failed proposal to disband Southern militias: “There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description.” 39th Cong. Globe 915 (1866).²⁰

Union Army commanders took steps to secure the right of all citizens to keep and bear arms,²¹ but the 39th Congress concluded that legislative action was necessary. Its efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental.

The most explicit evidence of Congress’ aim appears in §14 of the Freedmen’s Bureau Act of 1866, which provided that “the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition,

enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery.” 14 Stat. 176–177 (emphasis added).²² Section 14 thus explicitly guaranteed that “all the citizens,” black and white, would have “the constitutional right to bear arms.”

The Civil Rights Act of 1866, 14 Stat. 27, which was considered at the same time as the Freedmen’s Bureau Act, similarly sought to protect the right of all citizens to keep and bear arms.²³ Section 1 of the Civil Rights Act guaranteed the “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.” *Ibid.* This language was virtually identical to language in §14 of the Freedmen’s Bureau Act, 14 Stat. 176–177 (“the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal”). And as noted, the latter provision went on to explain that one of the “laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal” was “the constitutional right to bear arms.” *Ibid.* Representative Bingham believed that the Civil Rights Act protected the same rights as enumerated in the Freedmen’s Bureau bill, which of course explicitly mentioned the right to keep and bear arms. 39th Cong. Globe 1292. The unavoidable conclusion is that the Civil Rights Act, like the Freedmen’s Bureau Act, aimed to protect “the constitutional right to bear arms” and not simply to prohibit discrimination. See also Amar, Bill of Rights 264–265 (noting that one of the “core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances” of freedmen who had been stripped of their arms and to “affirm the full and equal right of every citizen to self-defense”).

Congress, however, ultimately deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court’s pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks.²⁴ Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866. See *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375, 389 (1982); see also Amar, Bill of Rights 187; Calabresi, Two Cheers

for Professor Balkin's Originalism, 103 Nw. U. L. Rev. 663, 669–670 (2009).

In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Senator Samuel Pomeroy described three “indispensable” “safeguards of liberty under our form of Government.” 39th Cong. Globe 1182. One of these, he said, was the right to keep and bear arms:

“Every man . . . should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete.” *Ibid.*

Even those who thought the Fourteenth Amendment unnecessary believed that blacks, as citizens, “have equal right to protection, and to keep and bear arms for self-defense.” *Id.*, at 1073 (Sen. James Nye); see also Foner 258–259.²⁵

Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental. In an 1868 speech addressing the disarmament of freedmen, Representative Stevens emphasized the necessity of the right: “Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty.” “The fourteenth amendment, now so happily adopted, settles the whole question.” Cong. Globe, 40th Cong., 2d Sess., 1967. And in debating the Civil Rights Act of 1871, Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South. See Halbrook, *Freedmen* 120–131. Finally, legal commentators from the period emphasized the fundamental nature of the right. See, e.g., T. Farrar, *Manual of the Constitution of the United States of America* §118, p. 145 (1867) (reprint 1993); J. Pomeroy, *An Introduction to the Constitutional Law of the United States* §239, pp. 152–153 (3d ed. 1875).

The right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified. In 1868, 22 of the 37 States in the Union had state

constitutional provisions explicitly protecting the right to keep and bear arms. See Calabresi & Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?* 87 *Texas L. Rev.* 7, 50 (2008).²⁶ Quite a few of these state constitutional guarantees, moreover, explicitly protected the right to keep and bear arms as an individual right to self-defense. See Ala. Const., Art. I, §28 (1868); Conn. Const., Art. I, §17 (1818); Ky. Const., Art. XIII, §25 (1850); Mich. Const., Art. XVIII, §7 (1850); Miss. Const., Art. I, §15 (1868); Mo. Const., Art. I, §8 (1865); Tex. Const., Art. I, §13 (1869); see also Mont. Const., Art. III, §13 (1889); Wash. Const., Art. I, §24 (1889); Wyo. Const., Art. I, §24 (1889); see also *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986). What is more, state constitutions adopted during the Reconstruction era by former Confederate States included a right to keep and bear arms. See, e.g., Ark. Const., Art. I, §5 (1868); Miss. Const., Art. I, §15 (1868); Tex. Const., Art. I, §13 (1869). A clear majority of the States in 1868, therefore, recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government.²⁷

In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

2

Despite all this evidence, municipal respondents contend that Congress, in the years immediately following the Civil War, merely sought to outlaw “discriminatory measures taken against freedmen, which it addressed by adopting a non-discrimination principle” and that even an outright ban on the possession of firearms was regarded as acceptable, “so long as it was not done in a discriminatory manner.” Brief for Municipal Respondents 7. They argue that Members of Congress overwhelmingly viewed §1 of the Fourteenth Amendment “as an antidiscrimination rule,” and they cite statements to the effect that the section would outlaw discriminatory measures. *Id.*, at 64. This argument is implausible.

First, while §1 of the Fourteenth Amendment contains “an antidiscrimination rule,” namely, the Equal Protection Clause, municipal respondents can hardly mean that §1 does no more than prohibit discrimination. If that were so, then the First Amendment, as applied to the States, would not prohibit nondiscriminatory abridgments of the rights to freedom of speech or freedom

of religion; the Fourth Amendment, as applied to the States, would not prohibit all unreasonable searches and seizures but only discriminatory searches and seizures—and so on. We assume that this is not municipal respondents' view, so what they must mean is that the Second Amendment should be singled out for special—and specially unfavorable—treatment. We reject that suggestion.

Second, municipal respondents' argument ignores the clear terms of the Freedmen's Bureau Act of 1866, which acknowledged the existence of the right to bear arms. If that law had used language such as "the equal benefit of laws concerning the bearing of arms," it would be possible to interpret it as simply a prohibition of racial discrimination. But §14 speaks of and protects "the constitutional right to bear arms," an unmistakable reference to the right protected by the Second Amendment. And it protects the "full and equal benefit" of this right in the States. 14 Stat. 176–177. It would have been nonsensical for Congress to guarantee the full and equal benefit of a constitutional right that does not exist.

Third, if the 39th Congress had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers. In the years immediately following the Civil War, a law banning the possession of guns by all private citizens would have been nondiscriminatory only in the formal sense. Any such law—like the Chicago and Oak Park ordinances challenged here—presumably would have permitted the possession of guns by those acting under the authority of the State and would thus have left firearms in the hands of the militia and local peace officers. And as the Report of the Joint Committee on Reconstruction revealed, see *supra*, at 24–25, those groups were widely involved in harassing blacks in the South.

Fourth, municipal respondents' purely antidiscrimination theory of the Fourteenth Amendment disregards the plight of whites in the South who opposed the Black Codes. If the 39th Congress and the ratifying public had simply prohibited racial discrimination with respect to the bearing of arms, opponents of the Black Codes would have been left without the means of self-defense—as had abolitionists in Kansas in the 1850's.

Fifth, the 39th Congress' response to proposals to disband and disarm the Southern militias is instructive. Despite recognizing and deploring the abuses of these militias, the 39th Congress balked

at a proposal to disarm them. See 39th Cong. Globe 914; Halbrook, Freedmen, *supra*, 20–21. Disarmament, it was argued, would violate the members’ right to bear arms, and it was ultimately decided to disband the militias but not to disarm their members. See Act of Mar. 2, 1867, §6, 14 Stat. 485, 487; Halbrook, Freedmen 68–69; Cramer 858–861. It cannot be doubted that the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner.

IV

Municipal respondents’ remaining arguments are at war with our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.

Municipal respondents’ main argument is nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era. Municipal respondents submit that the Due Process Clause protects only those rights “‘recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice.’” Brief for Municipal Respondents 9 (quoting *Chicago, B. & Q. R. Co.*, 166 U. S., at 238). According to municipal respondents, if it is possible to imagine *any* civilized legal system that does not recognize a particular right, then the Due Process Clause does not make that right binding on the States. Brief for Municipal Respondents 9. Therefore, the municipal respondents continue, because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment. *Id.*, at 21–23.

This line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases. See *Duncan*, 391 U. S., at 149, and n. 14. And the present-day implications of municipal respondents’ argument are stunning. For example, many of the rights that our Bill of Rights provides for persons accused of criminal offenses are virtually unique to this country.²⁸ If *our* understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of

any civilized country, it would follow that the United States is the only civilized Nation in the world.

Municipal respondents attempt to salvage their position by suggesting that their argument applies only to substantive as opposed to procedural rights. Brief for Municipal Respondents 10, n. 3. But even in this trimmed form, municipal respondents' argument flies in the face of more than a half-century of precedent. For example, in *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 8 (1947), the Court held that the Fourteenth Amendment incorporates the Establishment Clause of the First Amendment. Yet several of the countries that municipal respondents recognize as civilized have established state churches.²⁹ If we were to adopt municipal respondents' theory, all of this Court's Establishment Clause precedents involving actions taken by state and local governments would go by the boards.

Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety. Brief for Municipal Respondents 11. And they note that there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries. *Id.*, at 11, 13–17.

The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (“The exclusionary rule generates ‘substantial social costs,’ *United States v. Leon*, 468 U.S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large”); *Barke v. Wingo*, 407 U.S. 514, 522 (1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means “a defendant who may be guilty of a serious crime will go free”); *Miranda v. Arizona*, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting); *id.*, at 542 (White, J., dissenting) (objecting that the Court's rule “[i]n some unknown number of cases . . . will return a killer, a rapist or other criminal to the streets . . . to repeat his crime”); *Mapp*, 367 U.S., at 659. Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.

We likewise reject municipal respondents' argument that we should

depart from our established incorporation methodology on the ground that making the Second Amendment binding on the States and their subdivisions is inconsistent with principles of federalism and will stifle experimentation. Municipal respondents point out—quite correctly—that conditions and problems differ from locality to locality and that citizens in different jurisdictions have divergent views on the issue of gun control. Municipal respondents therefore urge us to allow state and local governments to enact any gun control law that they deem to be reasonable, including a complete ban on the possession of handguns in the home for self-defense. Brief for Municipal Respondents 18–20, 23.

There is nothing new in the argument that, in order to respect federalism and allow useful state experimentation, a federal constitutional right should not be fully binding on the States. This argument was made repeatedly and eloquently by Members of this Court who rejected the concept of incorporation and urged retention of the two-track approach to incorporation. Throughout the era of “selective incorporation,” Justice Harlan in particular, invoking the values of federalism and state experimentation, fought a determined rearguard action to preserve the two-track approach. See, e.g., *Roth v. United States*, 354 U. S. 476, 500–503 (1957) (Harlan, J., concurring in result in part and dissenting in part); *Mapp*, *supra*, at 678–680 (Harlan, J., dissenting); *Gideon*, 372 U. S., at 352 (Harlan, J., concurring); *Malloy*, 378 U. S., at 14–33 (Harlan, J., dissenting); *Pointer*, 380 U. S., at 408–409 (Harlan, J., concurring in result); *Washington*, 388 U. S., at 23–24 (Harlan, J., concurring in result); *Duncan*, 391 U. S., at 171–193 (Harlan, J., dissenting); *Benton*, 395 U. S., at 808–809 (Harlan, J., dissenting); *Williams v. Florida*, 399 U. S. 78, 117 (1970) (Harlan, J., dissenting in part and concurring in result in part).

Time and again, however, those pleas failed. Unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, municipal respondents’ argument must be rejected. Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise,³⁰ that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second

Amendment.” Brief for State of Texas et al. as *Amici Curiae* 23.

Municipal respondents and their *amici* complain that incorporation of the Second Amendment right will lead to extensive and costly litigation, but this argument applies with even greater force to constitutional rights and remedies that have already been held to be binding on the States. Consider the exclusionary rule. Although the exclusionary rule “is not an individual right,” *Herring v. United States*, 555 U. S. (2009) (slip op., at 5), but a judicially created rule,” *id.*, at ____ (slip op., at 4), this Court made the rule applicable to the States. See *Mapp, supra*, at 660. The exclusionary rule is said to result in “tens of thousands of contested suppression motions each year.” Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 Harv. J. Law & Pub. Pol’y, 443, 444 (1997).

Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to “interest-balancing” and have sustained a variety of restrictions. Brief for Municipal Respondents 23–31. In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing, 554 U. S., at – (slip op., at 62–63), and this Court decades ago abandoned “the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,” *Malloy, supra*, at 10–11 (internal quotation marks omitted).

As evidence that the Fourteenth Amendment has not historically been understood to restrict the authority of the States to regulate firearms, municipal respondents and supporting *amici* cite a variety of state and local firearms laws that courts have upheld. But what is most striking about their research is the paucity of precedent sustaining bans comparable to those at issue here and in *Heller*. Municipal respondents cite precisely one case (from the late 20th century) in which such a ban was sustained. See Brief for Municipal Respondents 26–27 (citing *Kalodimos v. Morton Grove*, 103 Ill. 2d 483, 470 N. E. 2d 266 (1984)); see also Reply Brief for Respondents NRA et al. 23, n. 7 (asserting that no other court has ever upheld a complete ban on the possession of handguns). It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” 554 U. S., at – (slip op., at 54). We made it clear in *Heller* that

our holding did not cast doubt on such longstanding regulatory measures as “prohibitions on the possession of firearms by felons and the mentally ill,” “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.” *Id.*, at ___ (slip op., at 54–55). We repeat those assurances here. Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.

Municipal respondents argue, finally, that the right to keep and bear arms is unique among the rights set out in the first eight Amendments “because the reason for codifying the Second Amendment (to protect the militia) differs from the purpose (primarily, to use firearms to engage in self-defense) that is claimed to make the right implicit in the concept of ordered liberty.” Brief for Municipal Respondents 36–37. Municipal respondents suggest that the Second Amendment right differs from the rights heretofore incorporated because the latter were “valued for [their] own sake.” *Id.*, at 33. But we have never previously suggested that incorporation of a right turns on whether it has intrinsic as opposed to instrumental value, and quite a few of the rights previously held to be incorporated—for example the right to counsel and the right to confront and subpoena witnesses—are clearly instrumental by any measure. Moreover, this contention repackages one of the chief arguments that we rejected in *Heller*, *i.e.*, that the scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights. In *Heller*, we recognized that the codification of this right was prompted by fear that the Federal Government would disarm and thus disable the militias, but we rejected the suggestion that the right was valued only as a means of preserving the militias. 554 U. S., at (slip op., at 26). On the contrary, we stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was “the *central component* of the right itself.” *Ibid.*

V

A

We turn, finally, to the two dissenting opinions. JUSTICE STEVENS’ eloquent opinion covers ground already addressed, and therefore little need be added in response. JUSTICE STEVENS would “‘ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments.’”

Post, at 8 (quoting *Malloy*, 378 U. S., at 24 (Harlan, J., dissenting)). The question presented in this case, in his view, “is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom.” *Post*, at 27. He would hold that “[t]he rights protected against state infringement by the Fourteenth Amendment’s Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights.” *Post*, at 9.

As we have explained, the Court, for the past half-century, has moved away from the two-track approach. If we were now to accept JUSTICE STEVENS’ theory across the board, decades of decisions would be undermined. We assume that this is not what is proposed. What is urged instead, it appears, is that this theory be revived solely for the individual right that *Heller* recognized, over vigorous dissents.

The relationship between the Bill of Rights’ guarantees and the States must be governed by a single, neutral principle. It is far too late to exhume what Justice Brennan, writing for the Court 46 years ago, derided as “the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.” *Malloy*, *supra*, at 10–11 (internal quotation marks omitted).

B

JUSTICE BREYER’s dissent makes several points to which we briefly respond. To begin, while there is certainly room for disagreement about *Heller*’s analysis of the history of the right to keep and bear arms, nothing written since *Heller* persuades us to reopen the question there decided. Few other questions of original meaning have been as thoroughly explored.

JUSTICE BREYER’s conclusion that the Fourteenth Amendment does not incorporate the right to keep and bear arms appears to rest primarily on four factors: First, “there is no popular consensus” that the right is fundamental, *post*, at 9; second, the right does not protect minorities or persons neglected by those holding political power, *post*, at 10; third, incorporation of the Second Amendment right would “amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government” and preventing local variations, *post*, at 11; and fourth, determining the scope of the Second Amendment right in cases involving state and

local laws will force judges to answer difficult empirical questions regarding matters that are outside their area of expertise, *post*, at 11–16. Even if we believed that these factors were relevant to the incorporation inquiry, none of these factors undermines the case for incorporation of the right to keep and bear arms for self-defense.

First, we have never held that a provision of the Bill of Rights applies to the States only if there is a “popular consensus” that the right is fundamental, and we see no basis for such a rule. But in this case, as it turns out, there is evidence of such a consensus. An *amicus* brief submitted by 58 Members of the Senate and 251 Members of the House of Representatives urges us to hold that the right to keep and bear arms is fundamental. See Brief for Senator Kay Bailey Hutchison et al. as *Amici Curiae* 4. Another brief submitted by 38 States takes the same position. Brief for State of Texas et al. as *Amici Curiae* 6.

Second, petitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout. The plight of Chicagoans living in high-crime areas was recently highlighted when two Illinois legislators representing Chicago districts called on the Governor to deploy the Illinois National Guard to patrol the City’s streets.³¹ The legislators noted that the number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black.³² *Amici* supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime.³³ If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of hand-guns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

Third, JUSTICE BREYER is correct that incorporation of the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights. “[T]he enshrinement of constitutional rights necessarily

takes certain policy choices off the table.” *Heller*, 554 U. S., at (slip op., at 64). This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution.

Finally, JUSTICE BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. See *supra*, at 38–39. “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.” *Heller*, *supra*, at (slip op., at 62–63).

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In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan*, 391 U. S., at 149, and n. 14. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Endnotes

¹ See Brief for Heartland Institute as *Amicus Curiae* 6–7 (noting that handgun murder rate was 9.65 in 1983 and 13.88 in 2008).

² Brief for Buckeye Firearms Foundation, Inc., et al. as *Amici Curiae* 8–9 (“In 2002 and again in 2008, Chicago had more murders than any other city in the U. S., including the much larger Los Angeles and New York” (internal quotation marks omitted)); see also Brief for International Law Enforcement Educators and Trainers Association et al. as *Amici Curiae* 17–21, and App. A (providing comparisons of Chicago’s rates of assault, murder, and robbery to average crime rates in 24 other large cities).

³ Brief for Women State Legislators et al. as *Amici Curiae* 2.

⁴ The Illinois State Rifle Association and the Second Amendment Foundation, Inc.

⁵ The first sentence of the Fourteenth Amendment makes “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof . . . citizens of the United States *and of the State wherein they reside.*” (Emphasis added.) The Privileges and Immunities Clause of Article IV provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of *Citizens in the several States.*” (Emphasis added.)

⁶ See C. Lane, *The Day Freedom Died* 265–266 (2008); see also Brief for NAACP Legal Defense & Education Fund, Inc., as *Amicus Curiae* 3, and n. 2.

⁷ See Lane, *supra*, at 106.

⁸ *United States v. Cruikshank*, 92 U. S. 542, 544–545 (statement of the case), 548, 553 (opinion of the Court) (1875); Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 *Tulane L. Rev.* 2113, 2153 (1993).

⁹ Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of “the personal rights guaranteed and secured by the first eight amendments of the Constitution.” *Cong. Globe*, 39th Cong., 1st Sess., 2765 (1866) (hereinafter *39th Cong. Globe*). Representative John Bingham, the principal author of the text of §1, said that the Amendment would “arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today.” *Id.*, at 1088; see also *id.*, at 1089–1090; A. Amar, *The Bill of Rights: Creation and Reconstruction* 183 (1998) (hereinafter *Amar, Bill of Rights*). After ratification of the Amendment, Bingham maintained the view that the rights guaranteed by §1 of the Fourteenth Amendment “are chiefly defined in the first eight amendments to the Constitution of the United States.” *Cong. Globe*, 42d Cong., 1st Sess., App. 84 (1871). Finally, Representative Thaddeus Stevens, the political leader of the House and acting chairman of the Joint Committee on Reconstruction, stated during the debates on the Amendment that “the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States.” *39th Cong. Globe* 2459; see also M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 112 (1986) (counting at least 30 statements during the debates in Congress interpreting §1 to incorporate the Bill of Rights); Brief for Constitutional Law Professors as *Amici Curiae* 20 (collecting authorities and stating that “[n]ot a single senator or repre-

sentative disputed [the incorporationist] understanding” of the Fourteenth Amendment).

¹⁰ The municipal respondents and some of their *amici* dispute the significance of these statements. They contend that the phrase “privileges or immunities” is not naturally read to mean the rights set out in the first eight Amendments, see Brief for Historians et al. as *Amici Curiae* 13–16, and that “there is ‘support in the legislative history for no fewer than four interpretations of the . . . Privileges or Immunities Clause.’” Brief for Municipal Respondents 69 (quoting Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 406 (2008); brackets omitted). They question whether there is sound evidence of “‘any strong public awareness of nationalizing the *entire* Bill of Rights.’” Brief for Municipal Respondents 69 (quoting Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 Ohio St. L. J. 1509, 1600 (2007)). Scholars have also disputed the total incorporation theory. See, e.g., Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5 (1949); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 Ohio St. L. J. 435 (1981). Proponents of the view that §1 of the Fourteenth Amendment makes all of the provisions of the Bill of Rights applicable to the States respond that the terms privileges, immunities, and rights were used interchangeably at the time, see, e.g., Curtis, *supra*, at 64–65, and that the position taken by the leading congressional proponents of the Amendment was widely publicized and understood, see, e.g., Wildenthal, *supra*, at 1564–1565, 1590; Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 Whittier L. Rev. 695 (2009). A number of scholars have found support for the total incorporation of the Bill of Rights. See Curtis, *supra*, at 57–130; Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L. J. 57, 61 (1993); see also Amar, *Bill of Rights* 181–230. We take no position with respect to this academic debate.

¹¹ By contrast, the Court has never retreated from the proposition that the Privileges or Immunities Clause and the Due Process Clause present different questions. And in recent cases addressing unenumerated rights, we have required that a right also be “implicit in the concept of ordered liberty.” See, e.g., *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997) (internal quotation marks omitted).

¹² With respect to the First Amendment, see *Everson v. Board of Ed. of Ewing*, 330 U. S. 1 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U. S. 296 (1940) (Free Exercise Clause); *De Jonge v. Oregon*, 299 U. S. 353 (1937) (freedom of assembly); *Gitlow v. New York*, 268 U. S. 652 (1925)

(free speech); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931) (freedom of the press).

With respect to the Fourth Amendment, see *Aguilar v. Texas*, 378 U. S. 108 (1964) (warrant requirement); *Mapp v. Ohio*, 367 U. S. 643 (1961) (exclusionary rule); *Wolf v. Colorado*, 338 U. S. 25 (1949) (freedom from unreasonable searches and seizures).

With respect to the Fifth Amendment, see *Benton v. Maryland*, 395 U. S. 784 (1969) (Double Jeopardy Clause); *Malloy v. Hogan*, 378 U. S. 1 (1964) (privilege against self-incrimination); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897) (Just Compensation Clause).

With respect to the Sixth Amendment, see *Duncan v. Louisiana*, 391 U. S. 145 (1968) (trial by jury in criminal cases); *Washington v. Texas*, 388 U. S. 14 (1967) (compulsory process); *Klopfer v. North Carolina*, 386 U. S. 213 (1967) (speedy trial); *Pointer v. Texas*, 380 U. S. 400 (1965) (right to confront adverse witness); *Gideon v. Wainwright*, 372 U. S. 335 (1963) (assistance of counsel); *In re Oliver*, 333 U. S. 257 (1948) (right to a public trial).

With respect to the Eighth Amendment, see *Robinson v. California*, 370 U. S. 660 (1962) (cruel and unusual punishment); *Schilb v. Kuebel*, 404 U. S. 357 (1971) (prohibition against excessive bail).

¹³ In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict, see n. 14, *infra*), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines. We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause. See *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257, 276, n. 22 (1989) (declining to decide whether the excessive-fines protection applies to the States); see also *Engblom v. Carey*, 677 F.2d 957, 961 (CA2 1982) (holding as a matter of first impression that the "Third Amendment is incorporated into the Fourteenth Amendment for application to the states"). Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation.

¹⁴ There is one exception to this general rule. The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials. See *Apodaca v. Oregon*, 406 U. S. 404 (1972); see also *Johnson v. Louisiana*, 406 U. S. 356 (1972) (holding that the Due

Process Clause does not require unanimous jury verdicts in state criminal trials). But that ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation. In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. See *Johnson, supra*, at 395 (Brennan, J., dissenting). Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, *Apodaca*, 406 U.S., at 406 (plurality opinion), and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials, *id.*, at 414–415 (Stewart, J., dissenting); *Johnson, supra*, at 381–382 (Douglas, J., dissenting). Justice Powell’s concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government. See *Johnson, supra*, at 395–396 (Brennan, J., dissenting) (footnote omitted) (“In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment’s jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments”).

¹⁵ Citing Jewish, Greek, and Roman law, Blackstone wrote that if a person killed an attacker, “the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame.” 4 W. Blackstone, *Commentaries on the Laws of England* 182 (reprint 1992).

¹⁶ For example, an article in the *Boston Evening Post* stated: “For it is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip’d with arms, &c. are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs.” *Boston Evening Post*, Feb. 6, 1769, in *Boston Under Military Rule 1768–1769*, p. 61 (1936) (emphasis deleted).

¹⁷ Abolitionists and Republicans were not alone in believing that the right to keep and bear arms was a fundamental right. The 1864 Democratic Party Platform complained that the confiscation of firearms by Union troops occupying parts of the South constituted “the interference with and denial of the right of the people to bear arms in their defense.” *National Party Platforms 1840–1972*, at 34.

¹⁸ In South Carolina, prominent black citizens held a convention to address the State's black code. They drafted a memorial to Congress, in which they included a plea for protection of their constitutional right to keep and bear arms: "We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed . . . that the late efforts of the Legislature of this State to pass an act to deprive us [of] arms be forbidden, as a plain violation of the Constitution." S. Halbrook, *Freedmen, The Fourteenth Amendment, and The Right to Bear Arms, 1866–1876*, p. 9 (1998) (hereinafter Halbrook, *Freedmen*) (quoting 2 *Proceedings of the Black State Conventions, 1840–1865*, p. 302 (P. Foner & G. Walker eds. 1980)). Senator Charles Sumner relayed the memorial to the Senate and described the memorial as a request that black citizens "have the constitutional protection in keeping arms." 39th Cong. Globe 337.

¹⁹ See B. Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* 265–266 (1914); *Adamson v. California*, 332 U. S. 46, 108–109 (1947) (appendix to dissenting opinion of Black, J.).

²⁰ Disarmament by bands of former Confederate soldiers eventually gave way to attacks by the Ku Klux Klan. In debates over the later enacted Enforcement Act of 1870, Senator John Pool observed that the Klan would "order the colored men to give up their arms; saying that everybody would be Kukluxed in whose house fire-arms were found." Cong. Globe, 41st Cong., 2d Sess., 2719 (1870); see also H. R. Exec. Doc. No. 268, 42d Cong., 2d Sess., 2 (1872).

²¹ For example, the occupying Union commander in South Carolina issued an order stating that "[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed." General Order No. 1, Department of South Carolina, January 1, 1866, in 1 *Documentary History of Reconstruction* 208 (W. Fleming ed. 1950). Union officials in Georgia issued a similar order, declaring that "[a]ll men, without the distinction of color, have the right to keep arms to defend their homes, families or themselves." Cramer, "This Right is Not Allowed by Governments That Are Afraid of The People": The Public Meaning of the Second Amendment When the Fourteenth Amendment was Ratified, 17 *Geo. Mason L. Rev.* 823, 854 (2010) (hereinafter Cramer) (quoting *Right to Bear Arms*, *Christian Recorder*, Feb. 24, 1866, pp. 1–2). In addition, when made aware of attempts by armed parties to disarm blacks, the head of the Freedmen's Bureau in Alabama "made public [his] determination to maintain the right of the negro to keep and to bear arms, and [his] disposition to send an armed force into any neighborhood in which that right should be systematically interfered with." Joint Committee on Reconstruc-

tion, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 3, p. 140 (1866).

22 The Freedmen's Bureau bill was amended to include an express reference to the right to keep and bear arms, see 39th Cong. Globe 654 (Rep. Thomas Eliot), even though at least some Members believed that the unamended version alone would have protected the right, see *id.*, at 743 (Sen. Lyman Trumbull).

23 There can be no doubt that the principal proponents of the Civil Rights Act of 1866 meant to end the disarmament of African Americans in the South. In introducing the bill, Senator Trumbull described its purpose as securing to blacks the "privileges which are essential to freemen." *Id.*, at 474. He then pointed to the previously described Mississippi law that "prohibit[ed] any negro or mulatto from having fire-arms" and explained that the bill would "destroy" such laws. *Ibid.* Similarly, Representative Sidney Clarke cited disarmament of freed-men in Alabama and Mississippi as a reason to support the Civil Rights Act and to continue to deny Alabama and Mississippi representation in Congress: "I regret, sir, that justice compels me to say, to the disgrace of the Federal Government, that the 'reconstructed' State authorities of Mississippi were allowed to rob and disarm our veteran soldiers and arm the rebels fresh from the field of treasonable strife. Sir, the disarmed loyalists of Alabama, Mississippi, and Louisiana are powerless to-day, and oppressed by the pardoned and encouraged rebels of those States. They appeal to the American Congress for protection. In response to this appeal I shall vote for every just measure of protection, for I do not intend to be among the treacherous violators of the solemn pledge of the nation." *Id.*, at 1838–1839.

24 For example, at least one southern court had held the Civil Rights Act to be unconstitutional. That court did so, moreover, in the course of upholding the conviction of an African-American man for violating Mississippi's law against firearm possession by freedmen. See Decision of Chief Justice Handy, Declaring the Civil Rights Bill Unconstitutional, N. Y. Times, Oct. 26, 1866, p. 2, col. 3.

25 Other Members of the 39th Congress stressed the importance of the right to keep and bear arms in discussing other measures. In speaking generally on reconstruction, Representative Roswell Hart listed the "right of the people to keep and bear arms" as among those rights necessary to a "republican form of government." 39th Cong. Globe 1629. Similarly, in objecting to a bill designed to disarm southern militias, Senator Willard Saulsbury argued that such a measure would violate the Second Amendment. *Id.*, at 914–915. Indeed, the bill "ultimately passed in a form that disbanded militias but maintained the right of individuals to their private firearms." Cramer 858.

²⁶ More generally worded provisions in the constitutions of seven other States may also have encompassed a right to bear arms. See Calabresi & Agudo, 87 *Texas L. Rev.*, at 52.

²⁷ These state constitutional protections often reflected a lack of law enforcement in many sections of the country. In the frontier towns that did not have an effective police force, law enforcement often could not pursue criminals beyond the town borders. See Brief for Rocky Mountain Gun Owners et al. as *Amici Curiae* 15. Settlers in the West and elsewhere, therefore, were left to “repe[] force by force when the intervention of society . . . [was] too late to prevent an injury.” *District of Columbia v. Heller*, 554 U. S., (2008) (slip op., at 21) (internal quotation marks omitted). The settlers’ dependence on game for food and economic livelihood, moreover, undoubtedly undergirded these state constitutional guarantees. See *id.*, at , (slip. op, at 26, ————— 36, 42).

²⁸ For example, the United States affords criminal jury trials far more broadly than other countries. See, e.g., Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 *Notre Dame L. Rev.* 403 (1992); Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 *Ohio St. J. Crim. L.* 629, 630 (2008); Henderson, *The Wrongs of Victim’s Rights*, 37 *Stan. L. Rev.* 937, 1003, n. 296 (1985); see also *Roper v. Simmons*, 543 U. S. 551, 624 (2005) (SCALIA, J., dissenting) (“In many significant respects the laws of most other countries differ from our law—including . . . such explicit provisions of our Constitution as the right to jury trial”). Similarly, our rules governing pretrial interrogation differ from those in countries sharing a similar legal heritage. See Dept. of Justice, Office of Legal Policy, Report to the Attorney General on the Law of Pretrial Interrogation: Truth in Criminal Justice Report No. 1 (Feb. 12, 1986), reprinted in 22 *U. Mich. J. L. Ref.* 437, 534–542 (1989) (comparing the system envisioned by *Miranda v. Arizona*, 384 U. S. 436 (1966), with rights afforded by England, Scotland, Canada, India, France, and Germany). And the “Court-pronounced exclusionary rule . . . is distinctively American.” *Roper*, *supra*, at 624 (SCALIA, J., dissenting) (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 415 (1971) (Burger, C. J., dissenting) (noting that exclusionary rule was “unique to American jurisprudence” (internal quotation marks omitted))); see also Sklansky, *Anti-Inquisitorialism*, 122 *Harv. L. Rev.* 1634, 1648–1656, 1689–1693 (2009) (discussing the differences between American and European confrontation rules).

²⁹ England and Denmark have state churches. See Torke, *The English Religious Establishment*, 12 *J. of Law & Religion* 399, 417–427 (1995–1996) (describing legal status of Church of England); Constitutional Act of Denmark, pt. I, §4 (1953) (“The Evangelical Lutheran Church shall be

the Established Church of Denmark”). The Evangelical Lutheran Church of Finland has attributes of a state church. See Christensen, *Is the Lutheran Church Still the State Church? An Analysis of Church-State Relations in Finland*, 1995 B. Y. U. L. Rev. 585, 596–600 (describing status of church under Finnish law). The Web site of the Evangelical Lutheran Church of Finland states that the church may be usefully described as both a “state church” and a “folk church.” See J. Seppo, *The Current Condition of Church-State Relations in Finland*, online at http://evl.fi/EVLen.nsf/Documents/838DDBEF_4A28712AC225730F001F7C67?OpenDocument&lang=EN (all Internet materials as visited June 23, 2010, and available in Clerk of Court’s case file).

³⁰ As noted above, see n. 13, *supra*, cases that predate the era of selective incorporation held that the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment’s civil jury requirement do not apply to the States. See *Hurtado v. California*, 110 U. S. 516 (1884) (indictment); *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U. S. 211 (1916) (civil jury). As a result of *Hurtado*, most States do not require a grand jury indictment in all felony cases, and many have no grand juries. See Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *State Court Organization 2004*, pp. 213, 215–217 (2006) (Table 38), online at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>. As a result of *Bombolis*, cases that would otherwise fall within the Seventh Amendment are now tried without a jury in state small claims courts. See, e.g., *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 124 P. 3d 550 (2005) (no right to jury trial in small claims court under Nevada Constitution).

³¹ See Mack & Burnette, *2 Lawmakers to Quinn: Send the Guard to Chicago*, *Chicago Tribune*, Apr. 26, 2010, p. 6.

³² Janssen & Knowles, *Send in Troops? Chicago Sun-Times*, Apr. 26, 2010, p. 2; see also Brief for NAACP Legal Defense & Education Fund, Inc., as *Amicus Curiae* 5, n. 4 (stating that in 2008, almost three out of every four homicide victims in Chicago were African Americans); *id.*, at 5–6 (noting that “each year [in Chicago], many times more African Americans are murdered by assailants wielding guns than were killed during the Colfax massacre” (footnote omitted)).

³³ See Brief for Women State Legislators et al. as *Amici Curiae* 9–10, 14–15; Brief for Jews for the Preservation of Firearms Ownership as *Amicus Curiae* 3–4; see also Brief for Pink Pistols et al. as *Amici Curiae* in *District of Columbia v. Heller*, O. T. 2007, No. 07–290, pp. 5–11.

**In The
Supreme Court of the United States**

◆
OTIS MCDONALD, et al.,
Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.
Respondent.

◆
**Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

◆
June 28, 2010

◆

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment “fully applicable to the States.” *Ante*, at 1. I write separately because I believe there is a more straightforward path to this conclusion, one that is more faithful to the Fourteenth Amendment’s text and history.

Applying what is now a well-settled test, the plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment’s Due Process Clause because it is “fundamental” to the American “scheme of ordered liberty,” *ante*, at 19 (citing *Duncan v. Louisiana*, 391 U. S. 145, 149 (1968)), and “‘deeply rooted in this Nation’s history and tradition,’ ” *ante*, at 19 (quoting *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997)). I agree with that description of the right. But I cannot agree that it is enforceable against the States through a clause that speaks only to “process.” Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the

Fourteenth Amendment's Privileges or Immunities Clause.

I

In *District of Columbia v. Heller*, 554 U. S. (2008), this Court held that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense, striking down a District of Columbia ordinance that banned the possession of handguns in the home. *Id.*, at (slip op., at 64). The question in this case is whether the Constitution protects that right against abridgment by the States.

As the Court explains, if this case were litigated before the Fourteenth Amendment's adoption in 1868, the answer to that question would be simple. In *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833), this Court held that the Bill of Rights applied only to the Federal Government. Writing for the Court, Chief Justice Marshall recalled that the founding generation added the first eight Amendments to the Constitution in response to Antifederalist concerns regarding the extent of federal—not state—power, and held that if “the framers of these amendments [had] intended them to be limitations on the powers of the state governments,” “they would have declared this purpose in plain and intelligible language.” *Id.*, at 250. Finding no such language in the Bill, Chief Justice Marshall held that it did not in any way restrict state authority. *Id.*, at 248–250; see *Lessee of Livingston v. Moore*, 7 Pet. 469, 551–552 (1833) (reaffirming *Barron's* holding); *Permoli v. Municipality No. 1 of New Orleans*, 3 How. 589, 609–610 (1845) (same).

Nearly three decades after *Barron*, the Nation was splintered by a civil war fought principally over the question of slavery. As was evident to many throughout our Nation's early history, slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure. See, e.g., 3 Records of the Federal Convention of 1787, p. 212 (M. Farrand ed. 1911) (remarks of Luther Martin) (“[S]lavery is inconsistent with the genius of republicanism, and has a tendency to destroy those principles on which it is supported, as it lessens the sense of the equal rights of mankind” (emphasis deleted)); A. Lincoln, Speech at Peoria, Ill. (Oct. 16, 1854), reprinted in 2 The Collected Works of Abraham Lincoln 266 (R. Basler ed. 1953) (“[N]o man is good enough to govern another man, *without that other's consent*. I say this is the leading principle—the sheet anchor of American republicanism. . . . Now the relation of

masters and slaves is, *pro tanto*, a total violation of this principle”).

After the war, a series of constitutional amendments were adopted to repair the Nation from the damage slavery had caused. The provision at issue here, §1 of the Fourteenth Amendment, significantly altered our system of government. The first sentence of that section provides that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” This unambiguously overruled this Court’s contrary holding in *Dred Scott v. Sandford*, 19 How. 393 (1857), that the Constitution did not recognize black Americans as citizens of the United States or their own State. *Id.*, at 405–406.

The meaning of §1’s next sentence has divided this Court for many years. That sentence begins with the command that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” On its face, this appears to grant the persons just made United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status.

This Court’s precedents accept that point, but define the relevant collection of rights quite narrowly. In the *Slaughter-House Cases*, 16 Wall. 36 (1873), decided just five years after the Fourteenth Amendment’s adoption, the Court interpreted this text, now known as the Privileges or Immunities Clause, for the first time. In a closely divided decision, the Court drew a sharp distinction between the privileges and immunities of state citizenship and those of federal citizenship, and held that the Privileges or Immunities Clause protected only the latter category of rights from state abridgment. *Id.*, at 78. The Court defined that category to include only those rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.” *Id.*, at 79. This arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship. See *ibid.* (listing “[t]he right to peaceably assemble” and “the privilege of the writ of *habeas corpus*” as rights potentially protected by the Privileges or Immunities Clause). But the Court soon rejected that proposition, interpreting the Privileges or Immunities Clause even more narrowly in its later cases.

Chief among those cases is *United States v. Cruikshank*, 92 U. S. 542 (1876). There, the Court held that members of a white militia

who had brutally murdered as many as 165 black Louisianians congregating outside a courthouse had not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms. *Ibid.*; see L. Keith, *The Colfax Massacre* 109 (2008). According to the Court, the right to peaceably assemble codified in the First Amendment was not a privilege of United States citizenship because “[t]he right . . . existed long *before* the adoption of the Constitution.” 92 U. S., at 551 (emphasis added). Similarly, the Court held that the right to keep and bear arms was not a privilege of United States citizenship because it was not “in any manner dependent upon that instrument for its existence.” *Id.*, at 553. In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution’s adoption—was the very reason citizens could not enforce it against States through the Fourteenth.

That circular reasoning effectively has been the Court’s last word on the Privileges or Immunities Clause.¹ In the intervening years, the Court has held that the Clause prevents state abridgment of only a handful of rights, such as the right to travel, see *Saenz v. Roe*, 526 U. S. 489, 503 (1999), that are not readily described as essential to liberty.

As a consequence of this Court’s marginalization of the Clause, litigants seeking federal protection of fundamental rights turned to the remainder of §1 in search of an alternative fount of such rights. They found one in a most curious place—that section’s command that every State guarantee “due process” to any person before depriving him of “life, liberty, or property.” At first, litigants argued that this Due Process Clause “incorporated” certain procedural rights codified in the Bill of Rights against the States. The Court generally rejected those claims, however, on the theory that the rights in question were not sufficiently “fundamental” to warrant such treatment. See, e.g., *Hurtado v. California*, 110 U. S. 516 (1884) (grand jury indictment requirement); *Maxwell v. Dow*, 176 U. S. 581 (1900) (12-person jury requirement); *Twining v. New Jersey*, 211 U. S. 78 (1908) (privilege against self-incrimination).

That changed with time. The Court came to conclude that certain Bill of Rights guarantees *were* sufficiently fundamental to fall within §1’s guarantee of “due process.” These included not only procedural protections listed in the first eight Amendments, see, e.g., *Benton v. Maryland*, 395 U. S. 784 (1969) (protection against double jeopardy), but substantive rights as well, see, e.g., *Gillow v.*

New York, 268 U. S. 652, 666 (1925) (right to free speech); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 707 (1931) (same). In the process of incorporating these rights against the States, the Court often applied them differently against the States than against the Federal Government on the theory that only those “fundamental” aspects of the right required Due Process Clause protection. See, e.g., *Betts v. Brady*, 316 U. S. 455, 473 (1942) (holding that the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, but that the Due Process Clause required appointment of counsel in state criminal cases only where “want of counsel . . . result[ed] in a conviction lacking in . . . fundamental fairness”). In more recent years, this Court has “abandoned the notion” that the guarantees in the Bill of Rights apply differently when incorporated against the States than they do when applied to the Federal Government. *Ante*, at 17–18 (opinion of the Court) (internal quotation marks omitted). But our cases continue to adhere to the view that a right is incorporated through the Due Process Clause only if it is sufficiently “fundamental,” *ante*, at 37, 42–44 (plurality opinion)—a term the Court has long struggled to define.

While this Court has at times concluded that a right gains “fundamental” status only if it is essential to the American “scheme of ordered liberty” or “‘deeply rooted in this Nation’s history and tradition,’ ” *ante*, at 19 (plurality opinion) (quoting *Glucksberg*, 521 U. S., at 721), the Court has just as often held that a right warrants Due Process Clause protection if it satisfies a far less measurable range of criteria, see *Lawrence v. Texas*, 539 U. S. 558, 562 (2003) (concluding that the Due Process Clause protects “liberty of the person both in its spatial and in its more transcendent dimensions”). Using the latter approach, the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights. See, e.g., *Lochner v. New York*, 198 U. S. 45 (1905); *Roe v. Wade*, 410 U. S. 113 (1973); *Lawrence*, *supra*.

All of this is a legal fiction. The notion that a constitutional provision that guarantees only “process” before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that

links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish "fundamental" rights that warrant protection from nonfundamental rights that do not. Today's decision illustrates the point. Replaying a debate that has endured from the inception of the Court's substantive due process jurisprudence, the dissents laud the "flexibility" in this Court's substantive due process doctrine, *post*, at 14 (STEVENS, J., dissenting); see *post*, at 6–8 (BREYER, J., dissenting), while the plurality makes yet another effort to impose principled restraints on its exercise, see *ante*, at 33–41. But neither side argues that the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification.

To be sure, the plurality's effort to cabin the exercise of judicial discretion under the Due Process Clause by focusing its inquiry on those rights deeply rooted in American history and tradition invites less opportunity for abuse than the alternatives. See *post*, at 7 (BREYER, J., dissenting) (arguing that rights should be incorporated against the States through the Due Process Clause if they are "well-suited to the carrying out of . . . constitutional promises"); *post*, at 22 (STEVENS, J., dissenting) (warning that there is no "all-purpose, top-down, totalizing theory of 'liberty' " protected by the Due Process Clause). But any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does.

I cannot accept a theory of constitutional interpretation that rests on such tenuous footing. This Court's substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle. I believe the original meaning of the Fourteenth Amendment offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.

I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an "adjunct" of our duty as judges to decide by our best lights what the Constitution means. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S.

833, 963 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part). It is not “an inexorable command.” *Lawrence, supra*, at 577. Moreover, as judges, we interpret the Constitution one case or controversy at a time. The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here. With the inquiry appropriately narrowed, I believe this case presents an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it.

II

“It cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison*, 1 Cranch 137, 174 (1803) (Marshall, C. J.). Because the Court’s Privileges or Immunities Clause precedents have presumed just that, I set them aside for the moment and begin with the text.

The Privileges or Immunities Clause of the Fourteenth Amendment declares that “[n]o State . . . shall abridge the privileges or immunities of citizens of the United States.” In interpreting this language, it is important to recall that constitutional provisions are “‘written to be understood by the voters.’” *Heller*, 554 U. S., at (slip op., at 3) (quoting *United States v. Sprague*, 282 U. S. 716, 731 (1931)). Thus, the objective of this inquiry is to discern what “ordinary citizens” at the time of ratification would have understood the Privileges or Immunities Clause to mean. 554 U. S., at (slip op., at 3).

A 1

At the time of Reconstruction, the terms “privileges” and “immunities” had an established meaning as synonyms for “rights.” The two words, standing alone or paired together, were used interchangeably with the words “rights,” “liberties,” and “freedoms,” and had been since the time of Blackstone. See 1 W. Blackstone, *Commentaries* *129 (describing the “rights and liberties” of Englishmen as “private immunities” and “civil privileges”). A number of antebellum judicial decisions used the terms in this manner. See, e.g., *Magill v. Brown*, 16 F. Cas. 408, 428 (No. 8,952) (CC ED Pa. 1833) (Baldwin, J.) (“The words ‘privileges and immunities’ relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular

persons or places”). In addition, dictionary definitions confirm that the public shared this understanding. See, *e.g.*, N. Webster, *An American Dictionary of the English Language* 1039 (C. Goodrich & N. Porter rev. 1865) (defining “privilege” as “a right or immunity not enjoyed by others or by all” and listing among its synonyms the words “immunity,” “franchise,” “right,” and “liberty”); *id.*, at 661 (defining “immunity” as “[f]reedom from an obligation” or “particular privilege”); *id.*, at 1140 (defining “right” as “[p]rivilege or immunity granted by authority”).²

The fact that a particular interest was designated as a “privilege” or “immunity,” rather than a “right,” “liberty,” or “freedom,” revealed little about its substance. Blackstone, for example, used the terms “privileges” and “immunities” to describe both the inalienable rights of individuals and the positive-law rights of corporations. See 1 Commentaries, at *129 (describing “private immunities” as a “*residuum* of natural liberty,” and “civil privileges” as those “which society has engaged to provide, in lieu of the natural liberties so given up by individuals” (footnote omitted)); *id.*, at *468 (stating that a corporate charter enables a corporation to “establish rules and orders” that serve as “the privileges and immunities . . . of the corporation”). Writers in this country at the time of Reconstruction followed a similar practice. See, *e.g.*, *Racine & Mississippi R. Co. v. Farmers’ Loan & Trust Co.*, 49 Ill. 331, 334 (1868) (describing agreement between two railroad companies in which they agreed “to fully merge and consolidate the[ir] capital stock, powers, privileges, immunities and franchises”); *Hathorn v. Caley*, 53 Me. 471, 483–484 (1866) (concluding that a statute did not “modify any power, privileges, or immunity, pertaining to the franchise of any corporation”). The nature of a privilege or immunity thus varied depending on the person, group, or entity to whom those rights were assigned. See Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 Geo. L. J. 1241, 1256–1257 (2010) (surveying antebellum usages of these terms).

2

The group of rights-bearers to whom the Privileges or Immunities Clause applies is, of course, “citizens.” By the time of Reconstruction, it had long been established that both the States and the Federal Government existed to preserve their citizens’ inalienable rights, and that these rights were considered “privileges” or “immunities” of citizenship.

This tradition begins with our country's English roots. Parliament declared the basic liberties of English citizens in a series of documents ranging from the Magna Carta to the Petition of Right and the English Bill of Rights. See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 8–16, 19–21, 41–46 (1971) (hereinafter Schwartz). These fundamental rights, according to the English tradition, belonged to all people but became legally enforceable only when recognized in legal texts, including acts of Parliament and the decisions of common-law judges. See B. Bailyn, *The Ideological Origins of the American Revolution* 77–79 (1967). These rights included many that later would be set forth in our Federal Bill of Rights, such as the right to petition for redress of grievances, the right to a jury trial, and the right of “Protestants” to “have arms for their defence.” English Bill of Rights (1689), reprinted in 1 Schwartz 41, 43.

As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen. They consistently claimed the rights of English citizenship in their founding documents, repeatedly referring to these rights as “privileges” and “immunities.” For example, a Maryland law provided that “[A]ll the Inhabitants of this Province being Christians (Slaves excepted) Shall have and enjoy all such *rights liberties immunities priviledges and free customs* within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England” Md. Act for the Liberties of the People (1639), in *id.*, at 68 (emphasis added).³

As tensions between England and the Colonies increased, the colonists adopted protest resolutions reasserting their claim to the inalienable rights of Englishmen. Again, they used the terms “privileges” and “immunities” to describe these rights. As the Massachusetts Resolves declared:

“*Resolved*, That there are certain essential Rights of the *British* Constitution of Government, which are founded in the Law of God and Nature, and are the common Rights of Mankind—Therefore. . . .

“*Resolved*, That no Man can justly take the Property of another without his Consent: And that upon this *original* Principle the Right of Representation . . . is evidently founded. . . . *Resolved*, That this *inherent* Right, together with all other, essential *Rights, Liberties, Privileges and Immunities* of the People of *Great Britain*, have been fully confirmed to them by *Magna Charta*.” The Massachusetts Resolves

(Oct. 29, 1765), reprinted in *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764–1766*, p. 56 (E. Morgan ed. 1959) (some emphasis added).⁴

In keeping with this practice, the First Continental Congress declared in 1774 that the King had wrongfully denied the colonists “the rights, liberties, and immunities of free and natural-born subjects . . . within the realm of England.” 1 *Journals of the Continental Congress 1774–1789*, p. 68 (1904). In an address delivered to the inhabitants of Quebec that same year, the Congress described those rights as including the “great” “right[s]” of “trial by jury,” “Habeas Corpus,” and “freedom of the press.” *Address of the Continental Congress to the Inhabitants of Quebec (1774)*, reprinted in 1 Schwartz 221–223.

After declaring their independence, the newly formed States replaced their colonial charters with constitutions and state bills of rights, almost all of which guaranteed the same fundamental rights that the former colonists previously had claimed by virtue of their English heritage. See, e.g., *Pa. Declaration of Rights (1776)*, reprinted in 5 Thorpe 3081–3084 (declaring that “all men are born equally free and independent, and have certain natural, inherent and inalienable rights,” including the “right to worship Almighty God according to the dictates of their own consciences” and the “right to bear arms for the defence of themselves and the state”).⁵

Several years later, the Founders amended the Constitution to expressly protect many of the same fundamental rights against interference by the Federal Government. Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution’s text. See, e.g., 1 *Annals of Cong.* 431–432, 436–437, 440–442 (1834) (statement of Rep. Madison) (proposing Bill of Rights in the first Congress); *The Federalist No. 84*, pp. 531–533 (B. Wright ed. 1961) (A. Hamilton); see also *Heller*, 554 U. S., at (slip op., at 19) (“[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right”). The Court’s subsequent decision in *Barron*, however, made plain that the codification of these rights in the Bill made them legally enforceable only against the Federal Government, not the States. See 7 *Pet.*, at 247.

Even though the Bill of Rights did not apply to the States, other provisions of the Constitution did limit state interference with individual rights. Article IV, §2, cl. 1 provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” The text of this provision resembles the Privileges or Immunities Clause, and it can be assumed that the public’s understanding of the latter was informed by its understanding of the former.

Article IV, §2 was derived from a similar clause in the Articles of Confederation, and reflects the dual citizenship the Constitution provided to all Americans after replacing that “league” of separate sovereign States. *Gibbons v. Ogden*, 9 Wheat. 1, 187 (1824); see 3 J. Story, Commentaries on the Constitution of the United States §1800, p. 675 (1833). By virtue of a person’s citizenship in a particular State, he was guaranteed whatever rights and liberties that State’s constitution and laws made available. Article IV, §2 vested citizens of each State with an additional right: the assurance that they would be afforded the “privileges and immunities” of citizenship in any of the several States in the Union to which they might travel.

What were the “Privileges and Immunities of Citizens in the several States”? That question was answered perhaps most famously by Justice Bushrod Washington sitting as Circuit Justice in *Corfield v. Coryell*, 6 F. Cas. 546, 551–552 (No. 3,230) (CC ED Pa. 1825). In that case, a Pennsylvania citizen claimed that a New Jersey law prohibiting nonresidents from harvesting oysters from the State’s waters violated Article IV, §2 because it deprived him, as an out-of-state citizen, of a right New Jersey availed to its own citizens. *Id.*, at 550. Justice Washington rejected that argument, refusing to “accede to the proposition” that Article IV, §2 entitled “citizens of the several states . . . to participate in *all* the rights which belong exclusively to the citizens of any other particular state.” *Id.*, at 552 (emphasis added). In his view, Article IV, §2 did not guarantee equal access to all public benefits a State might choose to make available to its citizens. See *id.*, at 552. Instead, it applied only to those rights “which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments.” *Id.*, at 551 (emphasis added). Other courts generally agreed with this principle. See, e.g., *Abbott v. Bayley*, 23 Mass. 89, 92–93 (1827) (noting that the “privileges and immunities” of citizens in the several States protected by Article IV, §2 are “qualified and not absolute” because they do not grant a

traveling citizen the right of “suffrage or of eligibility to office” in the State to which he travels).

When describing those “fundamental” rights, Justice Washington thought it “would perhaps be more tedious than difficult to enumerate” them all, but suggested that they could “be all comprehended under” a broad list of “general heads,” such as “[p]rotection by the government,” “the enjoyment of life and liberty, with the right to acquire and possess property of every kind,” “the benefit of the writ of habeas corpus,” and the right of access to “the courts of the state,” among others.⁶ *Corfield, supra*, at 551–552.

Notably, Justice Washington did not indicate whether Article IV, §2 required States to recognize these fundamental rights in their own citizens and thus in sojourning citizens alike, or whether the Clause simply prohibited the States from discriminating against sojourning citizens with respect to whatever fundamental rights state law happened to recognize. On this question, the weight of legal authorities at the time of Reconstruction indicated that Article IV, §2 prohibited States from discriminating against sojourning citizens when recognizing fundamental rights, but did not require States to recognize those rights and did not prescribe their content. The highest courts of several States adopted this view, see, e.g., *Livingston v. Van Ingen*, 9 Johns. 507, 561 (N. Y. Sup. Ct. 1812) (Yates, J.); *id.*, at 577 (Kent, J.); *Campbell v. Morris*, 3 H. & McH. 535, 553–554 (Md. Gen. Ct. 1797) (Chase, J.), as did several influential treatise-writers, see T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union* 15–16, and n. 3 (1868) (reprint 1972) (describing Article IV, §2 as designed “to prevent discrimination by the several States against the citizens and public proceedings of other States”); 2 J. Kent, *Commentaries on American Law* 35 (11th ed. 1867) (stating that Article IV, §2 entitles sojourning citizens “to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other”). This Court adopted the same conclusion in a unanimous opinion just one year after the Fourteenth Amendment was ratified. See *Paul v. Virginia*, 8 Wall. 168, 180 (1869).

* * *

The text examined so far demonstrates three points about the meaning of the Privileges or Immunities Clause in §1. First, “privileges” and “immunities” were synonyms for “rights.”

Second, both the States and the Federal Government had long recognized the inalienable rights of their citizens. Third, Article IV, §2 of the Constitution protected traveling citizens against state discrimination with respect to the fundamental rights of state citizenship. Two questions still remain, both provoked by the textual similarity between §1's Privileges or Immunities Clause and Article IV, §2. The first involves the nature of the rights at stake: Are the privileges or immunities of "citizens of the United States" recognized by §1 the same as the privileges and immunities of "citizens in the several States" to which Article IV, §2 refers? The second involves the restriction imposed on the States: Does §1, like Article IV, §2, prohibit only discrimination with respect to certain rights *if* the State chooses to recognize them, or does it require States to recognize those rights? I address each question in turn.

B

I start with the nature of the rights that §1's Privileges or Immunities Clause protects. Section 1 overruled *Dred Scott's* holding that blacks were not citizens of either the United States or their own State and, thus, did not enjoy "the privileges and immunities of citizens" embodied in the Constitution. 19 How., at 417. The Court in *Dred Scott* did not distinguish between privileges and immunities of citizens of the United States and citizens in the several States, instead referring to the rights of citizens generally. It did, however, give examples of what the rights of citizens were—the constitutionally enumerated rights of "the full liberty of speech" and the right "to keep and carry arms." *Ibid.*

Section 1 protects the rights of citizens "of the United States" specifically. The evidence overwhelmingly demonstrates that the privileges and immunities of such citizens included individual rights enumerated in the Constitution, including the right to keep and bear arms.

1

Nineteenth-century treaties through which the United States acquired territory from other sovereigns routinely promised inhabitants of the newly acquired territories that they would enjoy all of the "rights," "privileges," and "immunities" of United States citizens. See, e.g., Treaty of Amity, Settlement, and Limits, Art. 6, Feb. 22, 1819, 8 Stat. 256–258, T. S. No. 327 (entered into force Feb. 19, 1821) (cession of Florida) ("The inhabitants of the territories which his Catholic Majesty cedes to the United States, by this Treaty, shall

be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of *all the privileges, rights, and immunities, of the citizens of the United States*” (emphasis added).⁷ Commentators of the time explained that the rights and immunities of “citizens of the United States” recognized in these treaties “undoubtedly mean[t] those privileges that are common to all citizens of this republic.” Marcus, *An Examination of the Expediency and Constitutionality of Prohibiting Slavery in the State of Missouri* 17 (1819). It is therefore altogether unsurprising that several of these treaties identify liberties enumerated in the Constitution as privileges and immunities common to all United States citizens.

For example, the Louisiana Cession Act of 1803, which codified a treaty between the United States and France culminating in the Louisiana Purchase, provided that “The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyments of *all the rights, advantages and immunities of citizens of the United States*; and in the mean time they shall be maintained and protected in *the free enjoyment of their liberty, property and the religion which they profess.*” *Treaty Between the United States of America and the French Republic*, Art. III, Apr. 30, 1803, 8 Stat. 202, T. S. No. 86 (emphasis added).⁸

The Louisiana Cession Act reveals even more about the privileges and immunities of United States citizenship because it provoked an extensive public debate on the meaning of that term. In 1820, when the Missouri Territory (which the United States acquired through the Cession Act) sought to enter the Union as a new State, a debate ensued over whether to prohibit slavery within Missouri as a condition of its admission. Some congressmen argued that prohibiting slavery in Missouri would deprive its inhabitants of the “privileges and immunities” they had been promised by the Cession Act. See, e.g., 35 *Annals of Cong.* 1083 (1855) (remarks of Kentucky Rep. Hardin). But those who opposed slavery in Missouri argued that the right to hold slaves was merely a matter of state property law, not one of the privileges and immunities of United States citizenship guaranteed by the Act.⁹

Daniel Webster was among the leading proponents of the antislavery position. In his “Memorial to Congress,” Webster argued that “[t]he rights, advantages and immunities here spoken of [in the Cession Act] must . . . be such as are recognized or communicated by

the Constitution of the United States,” not the “rights, advantages and immunities, derived exclusively from the *State* governments. . . .” D. Webster, A Memorial to the Congress of the United States on the Subject of Restraining the Increase of Slavery in New States to be Admitted into the Union 15 (Dec. 15, 1819) (emphasis added). “The obvious meaning” of the Act, in Webster’s view, was that “*the rights derived under the federal Constitution shall be enjoyed by the inhabitants of [the territory].*” *Id.*, at 15–16 (emphasis added). In other words, Webster articulated a distinction between the rights of United States citizenship and the rights of state citizenship, and argued that the former included those rights “recognized or communicated by the Constitution.” Since the right to hold slaves was not mentioned in the Constitution, it was not a right of federal citizenship.

Webster and his allies ultimately lost the debate over slavery in Missouri and the territory was admitted as a slave State as part of the now-famous Missouri Compromise. Missouri Enabling Act of March 6, 1820, ch. 22, §8,

3 Stat. 548. But their arguments continued to inform public understanding of the privileges and immunities of United States citizenship. In 1854, Webster’s Memorial was republished in a pamphlet discussing the Nation’s next major debate on slavery—the proposed repeal of the Missouri Compromise through the Kansas-Nebraska Act, see *The Nebraska Question: Comprising Speeches in the United States Senate: Together with the History of the Missouri Compromise* 9–12 (1854). It was published again in 1857 in a collection of famous American speeches. See *The Political Text-Book, or Encyclopedia: Containing Everything Necessary for the Reference of the Politicians and Statesmen of the United States* 601–604 (M. Cluskey ed. 1857); see also Lash, 98 Geo. L. J., at 1294–1296 (describing Webster’s arguments and their influence).

2

Evidence from the political branches in the years leading to the Fourteenth Amendment’s adoption demonstrates broad public understanding that the privileges and immunities of United States citizenship included rights set forth in the Constitution, just as Webster and his allies had argued. In 1868, President Andrew Johnson issued a proclamation granting amnesty to former Confederates, guaranteeing “to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason . . . with restoration of *all rights*,

privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof.” 15 Stat. 712.

Records from the 39th Congress further support this understanding.

a

After the Civil War, Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union. See Cong. Globe, 39th Cong., 1st Sess., 6, 30 (1865) (hereinafter 39th Cong. Globe); M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 57 (1986) (hereinafter Curtis). That Committee would ultimately recommend the adoption of the Fourteenth Amendment, justifying its recommendation by submitting a report to Congress that extensively catalogued the abuses of civil rights in the former slave States and argued that “adequate security for future peace and safety . . . can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic.” See Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., p. 15 (1866); H. R. Rep. No. 30, 39th Cong., 1st Sess., p. XXI (1866).

As the Court notes, the Committee’s Report “was widely reprinted in the press and distributed by members of the 39th Congress to their constituents.” *Ante*, at 24; B. Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* 264–265 (1914) (noting that 150,000 copies of the Report were printed and that it was widely distributed as a campaign document in the election of 1866). In addition, newspaper coverage suggests that the wider public was aware of the Committee’s work even before the Report was issued. For example, the Fort Wayne Daily Democrat (which appears to have been unsupportive of the Committee’s work) paraphrased a motion instructing the Committee to “enquire into [the] expediency of amending the Constitution of the United States so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation all the guarantees contained in *that instrument*.” *The Nigger Congress!*, Fort Wayne Daily Democrat, Feb. 1, 1866, p. 4 (emphasis added).

b

Statements made by Members of Congress leading up to, and during, the debates on the Fourteenth Amendment point in the same

direction. The record of these debates has been combed before. See *Adamson v. California*, 332 U. S. 46, 92–110 (1947) (Appendix to dissenting opinion of Black, J.) (concluding that the debates support the conclusion that §1 was understood to incorporate the Bill of Rights against the States); *ante*, at 14, n. 9, 26–27, n. 23, (opinion of the Court) (counting the debates among other evidence that §1 applies the Second Amendment against the States). Before considering that record here, it is important to clarify its relevance. When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted. Statements by legislators can assist in this process to the extent they demonstrate the manner in which the public used or understood a particular word or phrase. They can further assist to the extent there is evidence that these statements were disseminated to the public. In other words, this evidence is useful not because it demonstrates what the draftsmen of the text may have been thinking, but only insofar as it illuminates what the public understood the words chosen by the draftsmen to mean.

(1)

Three speeches stand out as particularly significant. Representative John Bingham, the principal draftsman of §1, delivered a speech on the floor of the House in February 1866 introducing his first draft of the provision. Bingham began by discussing *Barron* and its holding that the Bill of Rights did not apply to the States. He then argued that a constitutional amendment was necessary to provide “an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, secur-ing to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person.” 39th Cong. Globe 1089–1090 (1866). Bingham emphasized that §1 was designed “to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It ‘hath that extent—no more.” *Id.*, at 1088.

Bingham’s speech was printed in pamphlet form and broadly distributed in 1866 under the title, “One Country, One Constitution, and One People,” and the subtitle, “In Support of the Proposed Amendment to Enforce the Bill of Rights.”¹⁰ Newspapers also reported his proposal, with the *New York Times* providing particularly extensive coverage, including a full reproduction of Bingham’s first

draft of §1 and his remarks that a constitutional amendment to “enforc[e]” the “immortal bill of rights” was “absolutely essential to American nationality.” N. Y. Times, Feb. 27, 1866, p. 8.

Bingham’s first draft of §1 was different from the version ultimately adopted. Of particular importance, the first draft granted Congress the “power to make all laws . . . necessary and proper to secure” the “citizens of each State all privileges and immunities of citizens in the several States,” rather than restricting state power to “abridge” the privileges or immunities of citizens of the United States.¹¹ 39th Cong. Globe 1088.

That draft was met with objections, which the Times covered extensively. A front-page article hailed the “Clear and Forcible Speech” by Representative Robert Hale against the draft, explaining—and endorsing—Hale’s view that Bingham’s proposal would “confer upon Congress all the rights and power of legislation now reserved to the States” and would “in effect utterly obliterate State rights and State authority over their own internal affairs.”¹² N. Y. Times, Feb. 28, 1866, p. 1.

Critically, Hale did *not* object to the draft insofar as it purported to protect constitutional liberties against state interference. Indeed, Hale stated that he believed (incorrectly in light of *Barron*) that individual rights enumerated in the Constitution were already enforceable against the States. See 39th Cong. Globe 1064 (“I have, somehow or other, gone along with the impression that there is that sort of protection thrown over us in some way, whether with or without the sanction of a judicial decision that we are so protected”); see N. Y. Times, Feb. 28, 1866, at 1. Hale’s misperception was not uncommon among members of the Reconstruction generation. See *infra*, at 38–40. But that is secondary to the point that the Times’ coverage of this debate over §1’s meaning suggests public awareness of its main contours—*i.e.*, that §1 would, at a minimum, enforce constitutionally enumerated rights of United States citizens against the States.

Bingham’s draft was tabled for several months. In the interim, he delivered a second well-publicized speech, again arguing that a constitutional amendment was required to give Congress the power to enforce the Bill of Rights against the States. That speech was printed in pamphlet form, see Speech of Hon. John A. Bingham, of Ohio, on the Civil Rights Bill, Mar. 9, 1866 (Cong. Globe); see 39th Cong. Globe 1837 (remarks of Rep. Lawrence) (noting that the speech was “extensively published”), and the New

York Times covered the speech on its front page. Thirty-Ninth Congress, N. Y. Times, Mar. 10, 1866, p. 1.

By the time the debates on the Fourteenth Amendment resumed, Bingham had amended his draft of §1 to include the text of the Privileges or Immunities Clause that was ultimately adopted. Senator Jacob Howard introduced the new draft on the floor of the Senate in the third speech relevant here. Howard explained that the Constitution recognized “a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution,” and that “there is no power given in the Constitution to enforce and to carry out any of these guarantees” against the States. 39th Cong. Globe 2765. Howard then stated that “the great object” of §1 was to “restrain the power of the States and compel them at all times to respect these great fundamental guarantees.” *Id.*, at 2766. Section 1, he indicated, imposed “a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States.” *Id.*, at 2765.

In describing these rights, Howard explained that they included “the privileges and immunities spoken of” in Article IV, §2. *Id.*, at 2765. Although he did not catalogue the precise “nature” or “extent” of those rights, he thought “*Corfield v. Coryell*” provided a useful description. Howard then submitted that “[t]o these privileges and immunities, whatever they may be— . . . should be added *the personal rights guarantied and secured by the first eight amendments of the Constitution*; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, [and] . . . *the right to keep and to bear arms.*” *Ibid.* (emphasis added).

News of Howard’s speech was carried in major newspapers across the country, including the New York Herald, see N. Y. Herald, May 24, 1866, p. 1, which was the bestselling paper in the Nation at that time, see A. Amar, *The Bill of Rights: Creation and Reconstruction* 187 (1998) (hereinafter Amar).¹³ The New York Times carried the speech as well, reprinting a lengthy excerpt of Howard’s remarks, including the statements quoted above. N. Y. Times, May 24, 1866, p. 1. The following day’s Times editorialized on Howard’s speech, predicting that “[t]o this, the first section of the amendment, the Union party throughout the country will yield a ready acquiescence, and the South could offer no justifiable

resistance,” suggesting that Bingham’s narrower second draft had not been met with the same objections that Hale had raised against the first. *N. Y. Times*, May 25, 1866, p. 4.

As a whole, these well-circulated speeches indicate that §1 was understood to enforce constitutionally declared rights against the States, and they provide no suggestion that any language in the section other than the Privileges or Immunities Clause would accomplish that task.

(2)

When read against this backdrop, the civil rights legislation adopted by the 39th Congress in 1866 further supports this view. Between passing the Thirteenth Amendment—which outlawed slavery alone—and the Fourteenth Amendment, Congress passed two significant pieces of legislation. The first was the Civil Rights Act of 1866, which provided that “all persons born in the United States” were “citizens of the United States” and that “such citizens, of every race and color, . . . shall have the same right” to, among other things, “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.” Ch. 31, §1, 14 Stat. 27.

Both proponents and opponents of this Act described it as providing the “privileges” of citizenship to freedmen, and defined those privileges to include constitutional rights, such as the right to keep and bear arms. See 39th Cong. Globe 474 (remarks of Sen. Trumbull) (stating that the “the late slaveholding States” had enacted laws “depriving persons of African descent of privileges which are essential to freemen,” including “prohibit[ing] any negro or mulatto from having fire-arms” and stating that “[t]he purpose of the bill under consideration is to destroy all these discriminations”); *id.*, at 1266–1267 (remarks of Rep. Raymond) (opposing the Act, but recognizing that to “[m]ake a colored man a citizen of the United States” would guarantee to him, *inter alia*, “a defined *status* . . . a right to defend himself and his wife and children; a right to bear arms”).

Three months later, Congress passed the Freedmen’s Bureau Act, which also entitled all citizens to the “full and equal benefit of all laws and proceedings concerning personal liberty” and “personal security.” Act of July 16, 1866, ch. 200, §14, 14 Stat. 176. The Act stated expressly that the rights of personal liberty and security protected by the Act “includ[ed] the constitutional right to bear arms.” *Ibid.*

(3)

There is much else in the legislative record. Many statements by Members of Congress corroborate the view that the Privileges or Immunities Clause enforced constitutionally enumerated rights against the States. See Curtis 112 (collecting examples). I am not aware of any statement that directly refutes that proposition. That said, the record of the debates—like most legislative history—is less than crystal clear. In particular, much ambiguity derives from the fact that at least several Members described §1 as protecting the privileges and immunities of citizens “in the several States,” harkening back to Article IV, §2. See *supra*, at 28–29 (describing Sen. Howard’s speech). These statements can be read to support the view that the Privileges or Immunities Clause protects some or all the fundamental rights of “citizens” described in *Corfield*. They can also be read to support the view that the Privileges or Immunities Clause, like Article IV, §2, prohibits only state discrimination with respect to those rights it covers, but does not deprive States of the power to deny those rights to all citizens equally.

I examine the rest of the historical record with this understanding. But for purposes of discerning what the public most likely thought the Privileges or Immunities Clause to mean, it is significant that the most widely publicized statements by the legislators who voted on §1—Bingham, Howard, and even Hale—point unambiguously toward the conclusion that the Privileges or Immunities Clause enforces at least those fundamental rights enumerated in the Constitution against the States, including the Second Amendment right to keep and bear arms.

3

Interpretations of the Fourteenth Amendment in the period immediately following its ratification help to establish the public understanding of the text at the time of its adoption.

Some of these interpretations come from Members of Congress. During an 1871 debate on a bill to enforce the Fourteenth Amendment, Representative Henry Dawes listed the Constitution’s first eight Amendments, including “the right to keep and bear arms,” before explaining that after the Civil War, the country “gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens” who formerly were slaves. Cong. Globe, 42d Cong., 1st Sess., 475–476 (1871). “It is all these,” Dawes explained,

“which are comprehended in the words ‘American citizen.’” *Ibid.*; see also *id.*, at 334 (remarks of Rep. Hoar) (stating that the Privileges or Immunities Clause referred to those rights “declared to belong to the citizen by the Constitution itself”). Even opponents of Fourteenth Amendment enforcement legislation acknowledged that the Privileges or Immunities Clause protected constitutionally enumerated individual rights. See 2 Cong. Rec. 384–385 (1874) (remarks of Rep. Mills) (opposing enforcement law, but acknowledging, in referring to the Bill of Rights, that “[t]hese first amendments and some provisions of the Constitution of like import embrace the ‘privileges and immunities’ of citizenship as set forth in article 4, section 2 of the Constitution *and in the fourteenth amendment*” (emphasis added)); see Curtis 166–170 (collecting examples).

Legislation passed in furtherance of the Fourteenth Amendment demonstrates even more clearly this understanding. For example, Congress enacted the Civil Rights Act of 1871, 17 Stat. 13, which was titled in pertinent part “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States,” and which is codified in the still-existing 42 U. S. C. §1983. That statute prohibits state officials from depriving citizens of “any rights, privileges, or immunities *secured by the Constitution.*” Rev. Stat. 1979, 42 U. S. C. §1983 (emphasis added). Although the Judiciary ignored this provision for decades after its enactment, this Court has come to interpret the statute, unremarkably in light of its text, as protecting constitutionally enumerated rights. *Monroe v. Pape*, 365 U. S. 167, 171 (1961).

A Federal Court of Appeals decision written by a future Justice of this Court adopted the same understanding of the Privileges or Immunities Clause. See, e.g., *United States v. Hall*, 26 F. Cas. 79, 82 (No. 15,282) (CC SD Ala. 1871) (Woods, J.) (“We think, therefore, that the . . . rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States”). In addition, two of the era’s major constitutional treatises reflected the understanding that §1 would protect constitutionally enumerated rights from state abridgment.¹⁴ A third such treatise unambiguously indicates that the Privileges or Immunities Clause accomplished this task. G. Paschal, *The Constitution of the United States* 290 (1868) (explaining that the rights listed in §1 had “already been guaranteed” by Article IV and the Bill of Rights, but that “[t]he new feature declared” by §1

was that these rights, “which had been construed to apply only to the national government, are thus imposed upon the States”).

Another example of public understanding comes from United States Attorney Daniel Corbin’s statement in an 1871 Ku Klux Klan prosecution. Corbin cited *Barron* and declared:

“[T]he fourteenth amendment changes all that theory, and lays the same restriction upon the States that before lay upon the Congress of the United States—that, as Congress heretofore could not interfere with the right of the citizen to keep and bear arms, now, after the adoption of the fourteenth amendment, the State cannot interfere with the right of the citizen to keep and bear arms. The right to keep and bear arms is included in the fourteenth amendment, under ‘privileges and immunities.’” Proceedings in the Ku Klux Trials at Columbia, S. C., in the United States Circuit Court, November Term, 1871, p. 147 (1872).

This evidence plainly shows that the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms. As the Court demonstrates, there can be no doubt that §1 was understood to enforce the Second Amendment against the States. See *ante*, at 22—

33. In my view, this is because the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause.

C

The next question is whether the Privileges or Immunities Clause merely prohibits States from discriminating among citizens if they recognize the Second Amendment’s right to keep and bear arms, or whether the Clause requires States to recognize the right. The municipal respondents, Chicago and Oak Park, argue for the former interpretation. They contend that the Second Amendment, as applied to the States through the Fourteenth, authorizes a State to impose an outright ban on handgun possession such as the ones at issue here so long as a State applies it to all citizens equally.¹⁵ The Court explains why this antidiscrimination-only reading of §1 as a whole is “implausible.” *Ante*, at 31 (citing Brief for Municipal Respondents 64). I agree, but because I think it is the Privileges or Immunities Clause that applies this right to the States, I must explain why this Clause in particular protects against more than just

state discrimination, and in fact establishes a minimum baseline of rights for all American citizens.

1

I begin, again, with the text. The Privileges or Immunities Clause opens with the command that “*No State shall*” abridge the privileges or immunities of citizens of the United States. Amdt. 14, §1 (emphasis added). The very same phrase opens Article I, §10 of the Constitution, which prohibits the States from “pass[ing] any Bill of Attainder” or “ex post facto Law,” among other things. Article I, §10 is one of the few constitutional provisions that limits state authority. In *Barron*, when Chief Justice Marshall interpreted the Bill of Rights as lacking “plain and intelligible language” restricting state power to infringe upon individual liberties, he pointed to Article I, §10 as an example of text that would have accomplished that task. 7 Pet., at 250. Indeed, Chief Justice Marshall would later describe Article I, §10 as “a bill of rights for the people of each state.” *Fletcher v. Peck*, 6 Cranch 87, 138 (1810). Thus, the fact that the Privileges or Immunities Clause uses the command “[n]o State shall”—which Article IV, §2 does not—strongly suggests that the former imposes a greater restriction on state power than the latter.

This interpretation is strengthened when one considers that the Privileges or Immunities Clause uses the verb “abridge,” rather than “discriminate,” to describe the limit it imposes on state authority. The Webster’s dictionary in use at the time of Reconstruction defines the word “abridge” to mean “[t]o deprive; to cut off; . . . as, to *abridge* one of his rights.” Webster, *An American Dictionary of the English Language*, at 6. The Clause is thus best understood to impose a limitation on state power to infringe upon pre-existing substantive rights. It raises no indication that the Framers of the Clause used the word “abridge” to prohibit only discrimination.

This most natural textual reading is underscored by a well-publicized revision to the Fourteenth Amendment that the Reconstruction Congress rejected. After several Southern States refused to ratify the Amendment, President Johnson met with their Governors to draft a compromise. *N. Y. Times*, Feb. 5, 1867, p. 5. Their proposal eliminated Congress’ power to enforce the Amendment (granted in §5), and replaced the Privileges or Immunities Clause in §1 with the following:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,

and of the States in which they reside, and the Citizens of each State shall be entitled to all *the privileges and immunities of citizens in the several States.*” Draft reprinted in 1 Documentary History of Reconstruction 240 (W. Fleming ed. 1950) (hereinafter Fleming).

Significantly, this proposal removed the “[n]o State shall” directive and the verb “abridge” from §1, and also changed the class of rights to be protected from those belonging to “citizens of the United States” to those of the “citizens in the several States.” This phrasing is materially indistinguishable from Article IV, §2, which generally was understood as an antidiscrimination provision alone. See *supra*, at 15–18. The proposal thus strongly indicates that at least the President of the United States and several southern Governors thought that the Privileges or Immunities Clause, which they unsuccessfully tried to revise, prohibited more than just state-sponsored discrimination.

2

The argument that the Privileges or Immunities Clause prohibits no more than discrimination often is followed by a claim that public discussion of the Clause, and of §1 generally, was not extensive. Because of this, the argument goes, §1 must not have been understood to accomplish such a significant task as subjecting States to federal enforcement of a minimum baseline of rights. That argument overlooks critical aspects of the Nation’s history that underscored the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States, including the right to keep and bear arms.

a

I turn first to public debate at the time of ratification. It is true that the congressional debates over §1 were relatively brief. It is also true that there is little evidence of extensive debate in the States. Many state legislatures did not keep records of their debates, and the few records that do exist reveal only modest discussion. See Curtis¹⁴⁵. These facts are not surprising.

First, however consequential we consider the question today, the nationalization of constitutional rights was not the most controversial aspect of the Fourteenth Amendment at the time of its ratification. The Nation had just endured a tumultuous civil war, and §§2, 3, and 4—which reduced the representation of States that denied voting rights to blacks, deprived most former Confederate officers of the power to hold elective office, and required States

to disavow Confederate war debts—were far more polarizing and consumed far more political attention. See Wildenthal 1600; Hardy, Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868, 30 Whittier L. Rev. 695, 699 (2009).

Second, the congressional debates on the Fourteenth Amendment reveal that many representatives, and probably many citizens, believed that the Thirteenth Amendment, the 1866 Civil Rights legislation, or some combination of the two, had already enforced constitutional rights against the States. Justice Black's dissent in *Adamson* chronicles this point in detail. 332 U. S., at 107–108 (Appendix to dissenting opinion). Regardless of whether that understanding was accurate as a matter of constitutional law, it helps to explain why Congressmen had little to say during the debates about §1. See *ibid.*

Third, while *Barron* made plain that the Bill of Rights was not legally enforceable against the States, see *supra*, at 2, the significance of that holding should not be overstated. Like the Framers, see *supra*, at 14–15, many 19th-century Americans understood the Bill of Rights to declare inalienable rights that pre-existed all government. Thus, even though the Bill of Rights technically applied only to the Federal Government, many believed that it declared rights that no legitimate government could abridge.

Chief Justice Henry Lumpkin's decision for the Georgia Supreme Court in *Numm v. State*, 1 Ga. 243 (1846), illustrates this view. In assessing state power to regulate firearm possession, Lumpkin wrote that he was “aware that it has been decided, that [the Second Amendment], like other amendments adopted at the same time, is a restriction upon the government of the United States, and does not extend to the individual States.” *Id.*, at 250. But he still considered the right to keep and bear arms as “an unalienable right, which lies at the bottom of every free government,” and thus found the States bound to honor it. *Ibid.* Other state courts adopted similar positions with respect to the right to keep and bear arms and other enumerated rights.¹⁶ Some courts even suggested that the protections in the Bill of Rights were legally enforceable against the States, *Barron* notwithstanding.¹⁷ A prominent treatise of the era took the same position. W. Rawle, *A View of the Constitution of the United States of America* 124–125 (2d ed. 1829) (reprint 2009) (arguing that certain of the first eight Amendments “appl[y] to the state legislatures” because those Amendments “form parts of the

declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them”); *id.*, at 125–126 (describing the Second Amendment “right of the people to keep and bear arms” as “a restraint on both” Congress and the States); see also *Heller*, 554 U. S., at (slip op., at 34) (describing Rawle’s treatise as “influential”). Certain abolitionist leaders adhered to this view as well. Lysander Spooner championed the popular abolitionist argument that slavery was inconsistent with constitutional principles, citing as evidence the fact that it deprived black Americans of the “natural right of all men ‘to keep and bear arms’ for their personal defence,” which he believed the Constitution “prohibit[ed] both Congress and the State governments from infringing.” L. Spooner, *The Unconstitutionality of Slavery* 98 (1860).

In sum, some appear to have believed that the Bill of Rights *did* apply to the States, even though this Court had squarely rejected that theory. See, e.g., *supra*, at 27–28 (recounting Rep. Hale’s argument to this effect). Many others believed that the liberties codified in the Bill of Rights were ones that no State *should* abridge, even though they understood that the Bill technically did not apply to States. These beliefs, combined with the fact that most state constitutions recognized many, if not all, of the individual rights enumerated in the Bill of Rights, made the need for federal enforcement of constitutional liberties against the States an afterthought. See *ante*, at 29 (opinion of the Court) (noting that, “[i]n 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms”). That changed with the national conflict over slavery.

b

In the contentious years leading up to the Civil War, those who sought to retain the institution of slavery found that to do so, it was necessary to eliminate more and more of the basic liberties of slaves, free blacks, and white abolitionists. Congressman Tobias Plants explained that slaveholders “could not hold [slaves] safely where dissent was permitted,” so they decided that “all dissent must be suppressed by the strong hand of power.” 39th Cong. Globe 1013. The measures they used were ruthless, repressed virtually every right recognized in the Constitution, and demonstrated that preventing only discriminatory state firearms restrictions would have been a hollow assurance for liberty. Public reaction indicates that the American people understood this point.

The overarching goal of pro-slavery forces was to repress

the spread of abolitionist thought and the concomitant risk of a slave rebellion. Indeed, it is difficult to overstate the extent to which fear of a slave uprising gripped slaveholders and dictated the acts of Southern legislatures. Slaves and free blacks represented a substantial percentage of the population and posed a severe threat to Southern order if they were not kept in their place. According to the 1860 Census, slaves represented one quarter or more of the population in 11 of the 15 slave States, nearly half the population in Alabama, Florida, Georgia, and Louisiana, and *more* than 50% of the population in Mississippi and South Carolina. Statistics of the United States (Including Mortality, Property, &c.) in 1860, The Eighth Census 336–350 (1866).

The Southern fear of slave rebellion was not unfounded. Although there were others, two particularly notable slave uprisings heavily influenced slaveholders in the South. In 1822, a group of free blacks and slaves led by Denmark Vesey planned a rebellion in which they would slay their masters and flee to Haiti. H. Aptheker, *American Negro Slave Revolts* 268–270 (1983). The plan was foiled, leading to the swift arrest of 130 blacks, and the execution of 37, including Vesey. *Id.*, at 271. Still, slaveowners took notice—it was reportedly feared that as many as 6,600 to 9,000 slaves and free blacks were involved in the plot. *Id.*, at 272. A few years later, the fear of rebellion was realized. An uprising led by Nat Turner took the lives of at least 57 whites before it was suppressed. *Id.*, at 300–302.

The fear generated by these and other rebellions led Southern legislatures to take particularly vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense. Teaching slaves to read (even the Bible) was a criminal offense punished severely in some States. See K. Stamp, *The Peculiar Institution: Slavery in the Ante-bellum South* 208, 211 (1956). Virginia made it a crime for a member of an “abolition” society to enter the State and argue “that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery.” 1835–1836 Va. Acts ch. 66, p. 44. Other States prohibited the circulation of literature denying a master’s right to property in his slaves and passed laws requiring postmasters to inspect the mails in search of such material. C. Eaton, *The Freedom-of-Thought Struggle in the Old South* 118–143, 199–200 (1964).

Many legislatures amended their laws prohibiting slaves from carrying firearms¹⁸ to apply the prohibition to free blacks as well.

See, *e.g.*, Act of Dec. 23, 1833, §7, 1833 Ga. Acts pp. 226, 228 (declaring that “it shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatever”); H. Aptheker, *Nat Turner’s Slave Rebellion* 74–76, 83–94 (1966) (discussing similar Maryland and Virginia statutes); see also Act of Mar. 15, 1852, ch. 206, 1852 Miss. Laws p. 328 (repealing laws allowing free blacks to obtain firearms licenses); Act of Jan. 31, 1831, 1831 Fla. Acts p. 30 (same). Florida made it the “duty” of white citizen “patrol[s] to search negro houses or other suspected places, for fire arms.” Act of Feb. 17, 1833, ch. 671, 1833 Fla. Acts pp. 26, 30. If they found any firearms, the patrols were to take the offending slave or free black “to the nearest justice of the peace,” whereupon he would be “severely punished” by “whipping on the bare back, not exceeding thirty-nine lashes,” unless he could give a “plain and satisfactory” explanation of how he came to possess the gun. *Ibid.*

Southern blacks were not alone in facing threats to their personal liberty and security during the antebellum era. Mob violence in many Northern cities presented dangers as well. Cottrol & Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Geo. L. J.* 309, 340 (1991) (hereinafter Cottrol) (recounting a July 1834 mob attack against “churches, homes, and businesses of white abolitionists and blacks” in New York that involved “upwards of twenty thousand people and required the intervention of the militia to suppress”); *ibid.* (noting an uprising in Boston nine years later in which a confrontation between a group of white sailors and four blacks led “a mob of several hundred whites” to “attac[k] and severely beat every black they could find”).

c

After the Civil War, Southern anxiety about an uprising among the newly freed slaves peaked. As Representative Thaddeus Stevens is reported to have said, “[w]hen it was first proposed to free the slaves, and arm the blacks, did not half the nation tremble? The prim conservatives, the snobs, and the male waiting-maids in Congress, were in hysterics.” K. Stamp, *The Era of Reconstruction, 1865–1877*, p. 104 (1965) (hereinafter *Era of Reconstruction*).

As the Court explains, this fear led to “systematic efforts” in the “old Confederacy” to disarm the more than 180,000 freedmen who had served in the Union Army, as well as other free blacks. See *ante*, at 23. Some States formally prohibited blacks from possessing firearms. *Ante*, at 23–24 (quoting 1865 Miss. Laws

p. 165, §1, reprinted in 1 Fleming 289). Others enacted legislation prohibiting blacks from carrying firearms without a license, a restriction not imposed on whites. See, *e.g.*, La. Statute of 1865, reprinted in *id.*, at 280. Additionally, “[t]hroughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves.” *Ante*, at 24.

As the Court makes crystal clear, if the Fourteenth Amendment “had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African-Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers.” *Ante*, at 32. In the years following the Civil War, a law banning firearm possession outright “would have been nondiscriminatory only in the formal sense,” for it would have “left firearms in the hands of the militia and local peace officers.” *Ibid.*

Evidence suggests that the public understood this at the time the Fourteenth Amendment was ratified. The publicly circulated Report of the Joint Committee on Reconstruction extensively detailed these abuses, see *ante*, at 23–24 (collecting examples), and statements by citizens indicate that they looked to the Committee to provide a federal solution to this problem, see, *e.g.*, 39th Cong. Globe 337 (remarks of Rep. Sumner) (introducing “a memorial from the colored citizens of the State of South Carolina” asking for, *inter alia*, “constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press”).

One way in which the Federal Government responded was to issue military orders countermanding Southern arms legislation. See, *e.g.*, Jan. 17, 1866, order from Major General D. E. Sickles, reprinted in E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 37 (1871) (“The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed”). The significance of these steps was not lost on those they were designed to protect. After one such order was issued, *The Christian Recorder*, published by the African Methodist Episcopal Church, published the following editorial:

“We have several times alluded to the fact that the Constitution of the United States, guaranties to every citizen the right to keep and bear arms. . . . All men, without the distinction of color, have the right to keep arms to defend their homes, families, or themselves.”

“We are glad to learn that [the] Commissioner for this State . . . has given freedmen to understand that they have as good a right to keep fire arms as any other citizens. The Constitution of the United States is the supreme law of the land, and we will be governed by that at present.” *Right to Bear Arms*, *Christian Recorder* (Phila.), Feb. 24, 1866, pp. 29–30.

The same month, *The Loyal Georgian* carried a letter to the editor asking “Have colored persons a right to own and carry fire arms?—A Colored Citizen.” The editors responded as follows:

“Almost every day, we are asked questions similar to the above. We answer *certainly* you have the *same* right to own and carry fire arms that *other* citizens have. You are not only free but citizens of the United States and, as such, entitled to the same privileges granted to other citizens by the Constitution of the United States.

“ . . . Article II, of the amendments to the Constitution of the United States, gives the people the right to bear arms and states that this right shall not be infringed.

. . . All men, without distinction of color, have the right to keep arms to defend their homes, families or themselves.” Letter to the Editor, *Loyal Georgian* (Augusta), Feb. 3, 1866, p. 3.

These statements are consistent with the arguments of abolitionists during the antebellum era that slavery, and the slave States’ efforts to retain it, violated the constitutional rights of individuals—rights the abolitionists described as among the privileges and immunities of citizenship. See, e.g., J. Tiffany, *Treatise on the Unconstitutionality of American Slavery* 56 (1849) (reprint 1969) (“pledg[ing] . . . to see that all the rights, privileges, and immunities, granted by the constitution of the United States, are extended to all”); *id.*, at 99 (describing the “right to keep and bear arms” as one of those rights secured by “the constitution of the United States”). The problem abolitionists sought to remedy was that, under *Dred Scott*, blacks were not entitled to the privileges and immunities of citizens under the Federal Constitution and that, in many States, whatever inalienable rights state law recognized did not apply to blacks. See, e.g., *Cooper v. Savannah*, 4 Ga. 68, 72 (1848) (deciding, just two years after Chief Justice Lumpkin’s opinion in *Nunn* recognizing the right to keep and bear arms, see *supra*, at 39, that “[f]ree persons of color have never been recognized here as

citizens; they are not entitled to bear arms”).

Section 1 guaranteed the rights of citizenship in the United States and in the several States without regard to race. But it was understood that liberty would be assured little protection if §1 left each State to decide which privileges or immunities of United States citizenship it would protect. As Frederick Douglass explained before §1’s adoption, “the Legislatures of the South can take from him the right to keep and bear arms, as they can—they would not allow a negro to walk with a cane where I came from, they would not allow five of them to assemble together.” In *What New Skin Will the Old Snake Come Forth? An Address Delivered in New York, New York, May 10, 1865*, reprinted in 4 *The Frederick Douglass Papers* 79, 83–84 (J. Blassingame & J. McKivigan eds., 1991) (footnote omitted). “Notwithstanding the provision in the Constitution of the United States, that the right to keep and bear arms shall not be abridged,” Douglass explained that “the black man has never had the right either to keep or bear arms.” *Id.*, at 84. Absent a constitutional amendment to enforce that right against the States, he insisted that “the work of the Abolitionists [wa]s not finished.” *Ibid.*

This history confirms what the text of the Privileges or Immunities Clause most naturally suggests: Consistent with its command that “[n]o State shall . . . abridge” the rights of United States citizens, the Clause establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them.¹⁹

III

My conclusion is contrary to this Court’s precedents, which hold that the Second Amendment right to keep and bear arms is not a privilege of United States citizenship.

See *Cruikshank*, 92 U. S., at 548–549, 551–553. I must, therefore, consider whether *stare decisis* requires retention of those precedents. As mentioned at the outset, my inquiry is limited to the right at issue here. Thus, I do not endeavor to decide in this case whether, or to what extent, the Privileges or Immunities Clause applies any other rights enumerated in the Constitution against the States.²⁰ Nor do I suggest that the *stare decisis* considerations surrounding the application of the right to keep and bear arms against the States would be the same as those surrounding another right protected by the Privileges or Immunities Clause. I consider *stare decisis* only as it applies to the question presented here.

A

This inquiry begins with the *Slaughter-House Cases*. There, this Court upheld a Louisiana statute granting a monopoly on livestock butchering in and around the city of New Orleans to a newly incorporated company. 16 Wall.

36. Butchers excluded by the monopoly sued, claiming that the statute violated the Privileges or Immunities Clause because it interfered with their right to pursue and “exercise their trade.” *Id.*, at 60. This Court rejected the butchers’ claim, holding that their asserted right was not a privilege or immunity of American citizenship, but one governed by the States alone. The Court held that the Privileges or Immunities Clause protected only rights of *federal* citizenship—those “which owe their existence to the Federal government, its National character, its Constitution, or its laws,” *id.*, at 79—and did not protect *any* of the rights of state citizenship, *id.*, at 74. In other words, the Court defined the two sets of rights as mutually exclusive.

After separating these two sets of rights, the Court defined the rights of state citizenship as “embrac[ing] nearly every civil right for the establishment and protection of which organized government is instituted”—that is, all those rights listed in *Corfield*. 16 Wall., at 76 (referring to “those rights” that “Judge Washington” described). That left very few rights of federal citizenship for the Privileges or Immunities Clause to protect. The Court suggested a handful of possibilities, such as the “right of free access to [federal] seaports,” protection of the Federal Government while traveling “on the high seas,” and even two rights listed in the Constitution. *Id.*, at 79 (noting “[t]he right to peaceably assemble” and “the privilege of the writ of *habeas corpus*”); see *supra*, at 4. But its decision to interpret the rights of state and federal citizenship as mutually exclusive led the Court in future cases to conclude that constitutionally enumerated rights were excluded from the Privileges or Immunities Clause’s scope. See *Cruikshank*, *supra*.

I reject that understanding. There was no reason to interpret the Privileges or Immunities Clause as putting the Court to the extreme choice of interpreting the “privileges and immunities” of federal citizenship to mean either all those rights listed in *Corfield*, or almost no rights at all. 16 Wall., at 76. The record is scant that the public understood the Clause to make the Federal Government “a perpetual censor upon all legislation of the States” as the *Slaughter-House* majority feared. *Id.*, at 78. For one thing, *Corfield* listed the “elective

franchise” as one of the privileges and immunities of “citizens of the several states,” 6 F. Cas., at 552, yet Congress and the States still found it necessary to adopt the Fifteenth Amendment—which protects “[t]he right of citizens of the United States to vote”—two years after the Fourteenth Amendment’s passage. If the Privileges or Immunities Clause were understood to protect every conceivable civil right from state abridgment, the Fifteenth Amendment would have been redundant.

The better view, in light of the States and Federal Government’s shared history of recognizing certain inalienable rights in their citizens, is that the privileges and immunities of state and federal citizenship overlap. This is not to say that the privileges and immunities of state and federal citizenship are the same. At the time of the Fourteenth Amendment’s ratification, States performed many more functions than the Federal Government, and it is unlikely that, simply by referring to “privileges or immunities,” the Framers of §1 meant to transfer every right mentioned in *Corfield* to congressional oversight. As discussed, “privileges” and “immunities” were understood only as synonyms for “rights.” See *supra*, at 9–11. It was their attachment to a particular group that gave them content, and the text and history recounted here indicate that the rights of United States citizens were not perfectly identical to the rights of citizens “in the several States.” Justice Swayne, one of the dissenters in *Slaughter-House*, made the point clear:

“The citizen of a State has the *same* fundamental rights as a citizen of the United States, *and also certain others*, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection.” 16 Wall., at 126 (emphasis added).

Because the privileges and immunities of American citizenship include rights enumerated in the Constitution, they overlap to at least some extent with the privileges and immunities traditionally recognized in citizens in the several States.

A separate question is whether the privileges and immunities of American citizenship include any rights besides those enumerated in the Constitution. The four dissenting Justices in *Slaughter-House* would have held that the Privileges or Immunities Clause protected

the unenumerated right that the butchers in that case asserted. See *id.*, at 83 (Field, J., dissenting); *id.*, at 111 (Bradley, J., dissenting); *id.*, at 124 (Swayne, J., dissenting). Because this case does not involve an unenumerated right, it is not necessary to resolve the question whether the Clause protects such rights, or whether the Court’s judgment in *Slaughter-House* was correct.

Still, it is argued that the mere possibility that the Privileges or Immunities Clause may enforce unenumerated rights against the States creates “‘special hazards’” that should prevent this Court from returning to the original meaning of the Clause.²¹ *Post*, at 3 (STEVENS, J., dissenting). Ironically, the same objection applies to the Court’s substantive due process jurisprudence, which illustrates the risks of granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts. But I see no reason to assume that such hazards apply to the Privileges or Immunities Clause. The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress’ power or is otherwise prohibited. See, e.g., Art. I, §8, cl. 18 (Necessary and Proper Clause); Amdt. 8 (Cruel and Unusual Punishments Clause). When the inquiry focuses on what the ratifying era understood the Privileges or Immunities Clause to mean, interpreting it should be no more “hazardous” than interpreting these other constitutional provisions by using the same approach. To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer. I believe those questions are more worthy of this Court’s attention—and far more likely to yield discernable answers—than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support.

Finding these impediments to returning to the original meaning overstated, I reject *Slaughter-House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship. I next proceed to the *stare decisis* considerations surrounding the precedent that expressly controls the question presented here.

B

Three years after *Slaughter-House*, the Court in *Cruikshank* squarely held that the right to keep and bear arms was not a privilege

of American citizenship, thereby over-turning the convictions of militia members responsible for the brutal Colfax Massacre. See *supra*, at 4–5. *Cruikshank* is not a precedent entitled to any respect. The flaws in its interpretation of the Privileges or Immunities Clause are made evident by the preceding evidence of its original meaning, and I would reject the holding on that basis alone. But, the consequences of *Cruikshank* warrant mention as well.

Cruikshank's holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery. Without federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were tragically successful in waging a campaign of terror against the very people the Fourteenth Amendment had just made citizens. Take, for example, the Hamburg Massacre of 1876.

There, a white citizen militia sought out and murdered a troop of black militiamen for no other reason than that they had dared to conduct a celebratory Fourth of July parade through their mostly black town. The white militia commander, "Pitchfork" Ben Tillman, later described this massacre with pride: "[T]he leading white men of Edgefield" had decided "to seize the first opportunity that the negroes might offer them to provoke a riot and teach the negroes a lesson by having the whites demonstrate their superiority by killing as many of them as was justifiable." S. Kantrowitz, *Ben Tillman & the Reconstruction of White Supremacy* 67 (2000) (ellipsis, brackets, and internal quotation marks omitted). None of the perpetrators of the Hamburg murders was ever brought to justice.²²

Organized terrorism like that perpetuated by Tillman and his cohorts proliferated in the absence of federal enforcement of constitutional rights. Militias such as the Ku Klux Klan, the Knights of the White Camellia, the White Brotherhood, the Pale Faces, and the '76 Association spread terror among blacks and white Republicans by breaking up Republican meetings, threatening political leaders, and whipping black militiamen. *Era of Reconstruction, 199–200*; Curtis 156. These groups raped, murdered, lynched, and robbed as a means of intimidating, and instilling pervasive fear in, those whom they despised. A. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* 28–46 (1995).

Although Congress enacted legislation to suppress these activities,²³ Klan tactics remained a constant presence in the lives of Southern blacks for decades. Between 1882 and 1968, there were at least 3,446 reported lynchings of blacks in the South. Cottrol 351–352. They were tortured and killed for a wide array of alleged crimes, without even the slightest hint of due process. Emmitt Till, for example, was killed in 1955 for allegedly whistling at a white woman. S. Whitfield, *A Death in the Delta: The Story of Emmett Till* 15–31 (1988). The fates of other targets of mob violence were equally depraved. See, e.g., *Lynched Negro and Wife Were First Mutilated*, *Vicksburg (Miss.) Evening Post*, Feb. 8, 1904, reprinted in R. Ginzburg, *100 Years of Lynchings* 63 (1988); *Negro Shot Dead for Kissing His White Girlfriend*, *Chi. Defender*, Feb. 31, 1915, in *id.*, at 95 (reporting incident in Florida); *La. Negro Is Burned Alive Screaming “I Didn’t Do It,”* *Cleveland Gazette*, Dec. 13, 1914, in *id.*, at 93 (reporting incident in Louisiana).

The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence. As Eli Cooper, one target of such violence, is said to have explained, “[t]he Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.” *Church Burnings Follow Negro Agitator’s Lynching*, *Chicago Defender*, Sept. 6, 1919, in *id.*, at 124. Sometimes, as in Cooper’s case, self-defense did not succeed. He was dragged from his home by a mob and killed as his wife looked on. *Ibid.* But at other times, the use of firearms allowed targets of mob violence to survive. One man recalled the night during his childhood when his father stood armed at a jail until morning to ward off lynchers. See Cottrol, 354. The experience left him with a sense, “not ‘of powerlessness, but of the ‘possibilities of salvation’” that came from standing up to intimidation. *Ibid.*

In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery. There is nothing about *Cruikshank’s* contrary holding that warrants its retention.

* *

*

I agree with the Court that the Second Amendment is fully applicable to the States. I do so because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship.

ENDNOTES

¹ In the two decades after *United States v. Cruikshank*, 92 U. S. 542 (1876), was decided, this Court twice reaffirmed its holding that the Privileges or Immunities Clause does not apply the Second Amendment to the States. *Presser v. Illinois*, 116 U. S. 252, 266–267 (1886); *Mille v. Texas*, 153 U. S. 535 (1894).

² See also 2 C. Richardson, *A New Dictionary of the English Language* 1512 (1839) (defining “privilege” as “an appropriate or peculiar law or rule or right; a peculiar immunity, liberty, or franchise”); 1 *id.*, at 1056 (defining “immunity” as “[f]reedom or exemption, (from duties,) liberty, privilege”); *The Philadelphia School Dictionary; or Expositor of the English Language* 152 (3d ed. 1812) (defining “privilege” as a “peculiar advantage”); *id.*, at 105 (defining “immunity” as “privilege, exemption”); *Royal Standard English Dictionary* 411 (1788) (defining “privilege” as “public right; peculiar advantage”).

³ See also, *e.g.*, *Charter of Va. (1606)*, reprinted in 7 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3783, 3788 (F. Thorpe ed. 1909) (hereinafter Thorpe) (“DECLAR[ING]” that “all and every the Persons being our Subjects, . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realm of *England*” (emphasis in original)); *Charter of New England (1620)*, in 3 *id.*, at 1827, 1839 (“[A]ll and every the Persons, being our Subjects, . . . shall have and enjoy all Liberties, and franchises, and Immunities of free Denizens and naturall subjects. . . as if they had been abiding and born within this our Kingdome of England”); *Charter of Mass. Bay (1629)*, in *id.* at 1846, 1856–1857 (guaranteeing that “all and every the Subjects of Us, . . . shall have and enjoy all liberties and Immunities of free and naturall Subjects . . . as yf they and everie of them were borne within the Realme of England”); *Grant of the Province of Me. (1639)*, in *id.*, at 1625, 1635 (guaranteeing “Liberties Franchises and Immunities of or belonging to any the naturall borne subjects of this our Kingdome of England”); *Charter of Carolina (1663)*, in

5 *id.*, at 2743, 2747 (guaranteeing to all subjects “all liberties franchises and privileges of this our kingdom of England”); Charter of R. I. and Providence Plantations (1663), in 6 *id.*, at 3211, 3220 (“[A]ll and every the subjects of us . . . shall have and enjoy all libertyes and immunities of ffree and naturall subjects within any the dominions of us, our heires, or successours, . . . as if they, and every of them, were borne within the realme of England”); Charter of Ga. (1732), in 2 *id.*, at 765, 773 (“[A]ll and every the persons which shall happen to be born within the said province . . . shall have and enjoy all liberties, franchises and immunities of free denizens and natural born subjects, within any of our dominions, to all intents and purposes, as if abiding and born within this our kingdom of Great-Britain”).

4 See also, *e.g.*, A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 174 (1968) (quoting 1774 Georgia resolution declaring that the colony’s inhabitants were entitled to “ ‘the same rights, privileges, and immunities with their fellow-subjects in *Great Britain*’ ” (emphasis in original)); *The Virginia Resolves, The Resolutions as Printed in the Journal of the House of Burgesses*, reprinted in *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764–1766*, at 46, 48 (“[T]he Colonists aforesaid are declared entitled to all Liberties, Privileges, and Immunities of Denizens and natural Subjects, to all Intents and Purposes, as if they had been abiding and born within the Realm of *England*’ ” (emphasis in original)).

⁵See also Va. Declaration of Rights (1776), reprinted in 1 Schwartz 234–236; Pa. Declaration of Rights (1776), in *id.*, at 263–275; Del. Declaration of Rights (1776), in *id.*, at 276–278; Md. Declaration of Rights (1776), in *id.*, at 280–285; N. C. Declaration of Rights (1776), in *id.*, 286–288.

⁶Justice Washington’s complete list was as follows:

“Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise,

as regulated and established by the laws or constitution of the state in which it is to be exercised.” 6 Fed. Cas., at 551–552.

⁷ See also Treaty Between the United States of America and the Ottawa Indians of Blanchard’s Fork and Roche De Boeuf, June 24, 1862, 12 Stat. 1237 (“The Ottawa Indians of the United Bands of Blanchard’s Fork and of Roche de Boeuf, having become sufficiently advanced in civilization, and being desirous of becoming citizens of the United States . . . [after five years from the ratification of this treaty] shall be deemed and declared to be citizens of the United States, to all intents and purposes, and shall be entitled to all the *rights, privileges, and immunities of such citizens*” (emphasis added)); Treaty Between the United States of America and Different Tribes of Sioux Indians, Art. VI, April 29, 1868, 15 Stat. 637 (“[A]ny Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the *privileges and immunities of such citizens*” (emphasis added)).

⁸ Subsequent treaties contained similar guarantees that the inhabitants of the newly acquired territories would enjoy the freedom to exercise certain constitutional rights. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Art. IX, Feb. 2, 1848, 9 Stat. 930, T. S. No. 207 (cession of Texas) (declaring that inhabitants of the Territory were entitled “to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction”); Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russians to the United States of America, Art. III, Mar. 30, 1867, 15 Stat. 542, T. S. No. 301 (June 20, 1867) (cession of Alaska) (“The inhabitants of the ceded territory, . . . if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion”).

⁹ See, e.g., Speech of Mr. Joseph Hemphill (Pa.) on the Missouri Question in the House of the Representatives 16 (1820), as published in pamphlet form and reprinted in 22 Moore Pamphlets, p. 16 (“If the right to hold slaves is a federal right and attached merely to citizenship of the United States, [then slavery] could maintain itself against state authority, and on this principle the owner might take his slaves into any state he pleased, in defiance of the state laws, but this would be contrary to the

constitution”); see also Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 *Geo. L. J.* 1241, 1288–1290 (2010) (collecting other examples).

¹⁰ One Country, One Constitution, and One People: Speech of Hon. John A. Bingham, of Ohio, In the House of Representatives, February 28, 1866, In Support of the Proposed Amendment to Enforce the Bill of Rights (Cong. Globe). The pamphlet was published by the official reporter of congressional debates, and was distributed presumably pursuant to the congressional franking privilege. See B. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 *Ohio St. L. J.* 1509, 1558, n. 167 (2007) (hereinafter Wildenthal).

¹¹ The full text of Bingham’s first draft of §1 provided as follows:

“The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.” 39th Cong. Globe 1088.

¹² In a separate front-page article on the same day, the paper expounded upon Hale’s arguments in even further detail, while omitting Bingham’s chief rebuttals. *N. Y. Times*, Feb. 28, 1866, p. 1. The unbalanced nature of *The New York Times’* coverage is unsurprising. As scholars have noted, “[m]ost papers” during the time of Reconstruction “had a frank partisan slant . . . and the *Times* was no exception.” Wildenthal 1559. In 1866, the paper “was still defending” President Johnson’s resistance to Republican reform measures, as exemplified by the fact that it “supported Johnson’s veto of the Civil Rights Act of 1866.” *Ibid.*

¹³ Other papers that covered Howard’s speech include the following: *Baltimore Gazette*, May 24, 1866, p. 4; *Boston Daily Journal*, May 24, 1866, p. 4; *Boston Daily Advertiser*, May 24, 1866, p. 1; *Daily National Intelligencer*, May 24, 1866, p. 3. *Springfield Daily Republican*, May 24, 1866, p. 3; *Charleston Daily Courier*, May 28, 1866, p. 4; *Charleston Daily Courier*, May 29, 1866, p. 1; *Chicago Tribune*, May 29, 1866, p. 2; *Philadelphia Inquirer*, May 24, 1866, p. 8.

¹⁴ See J. Pomeroy, *An Introduction to the Constitutional Law of the United States* 155–156 (E. Bennett ed. 1886) (describing §1, which the country was then still considering, as a “needed” “remedy” for *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833), which held that the Bill of Rights was not enforceable against the States); T. Farrar, *Manual of the Constitution of the United States of America* 58–59, 145–146,

395–397 (1867) (reprint 1993); *id.*, at 546 (3d ed. 1872)

(describing the Fourteenth Amendment as having “swept away” the “decisions of many courts” that “the popular rights guaranteed by the Constitution are secured only against [the federal] government”).

15 The municipal respondents and JUSTICE BREYER’s dissent raise a most unusual argument that §1 prohibits discriminatory laws affecting only the right to keep and bear arms, but offers substantive protection to other rights enumerated in the Constitution, such as the freedom of speech. See *post*, at 24. Others, however, have made the more comprehensive—and internally consistent—argument that §1 bars discrimination alone and does not afford protection to any substantive rights. See, e.g., R. Berger, *Government By Judiciary: The Transformation of the Fourteenth Amendment* (1997). I address the coverage of the Privileges or Immunities Clause only as it applies to the Second Amendment right presented here, but I do so with the understanding that my conclusion may have implications for the broader argument.

16 See, e.g., *Raleigh & Gaston R. Co. v. Davis*, 19 N. C. 451, 458–462 (1837) (right to just compensation for government taking of property); *Roban v. Swain*, 59 Mass. 281, 285 (1850) (right to be secure from unreasonable government searches and seizures); *State v. Buzzard*, 4 Ark. 18, 28 (1842) (right to keep and bear arms); *State v. Jumel*, 13 La. Ann. 399, 400 (1858) (same); *Cockrum v. State*, 24 Tex. 394, 401–404 (1859) (same).

17 See, e.g., *People v. Goodwin*, 18 Johns. Cas. 187, 201 (N. Y. Sup. Ct. 1820); *Rhinehart v. Schulyer*, 7 Ill. 473, 522 (1845).

18 See, e.g., Black Code, ch. 33, §19, 1806 La. Acts pp. 160, 162 (prohibiting slaves from using firearms unless they were authorized by their master to hunt within the boundaries of his plantation); Act of Dec. 18, 1819, 1819 S. C. Acts pp. 29, 31 (same); An Act Concerning Slaves, §6, 1840 Tex. Laws pp. 42–43 (making it unlawful for “any slave to own firearms of any description”).

19 I conclude that the right to keep and bear arms applies to the States through the Privileges or Immunities Clause, which recognizes the rights of United States “citizens.” The plurality concludes that the right applies to the States through the Due Process Clause, which covers all “person[s].” Because this case does not involve a claim brought by a noncitizen, I express no view on the difference, if any, between my conclusion and the plurality’s with respect to the extent to which the States may regulate firearm possession by noncitizens.

20 I note, however, that I see no reason to assume that the constitutionally enumerated rights protected by the Privileges or Immunities Clause should consist of all the rights recognized in the Bill of Rights and no others. Constitutional provisions outside the Bill of Rights protect individual rights, see, e.g., Art. I, §9, cl. 2 (granting the “Privilege of the Writ of Habeas Corpus”), and there is no obvious evidence that the Framers of the Privileges or Immunities Clause meant to exclude them. In addition, certain Bill of Rights provisions prevent federal interference in state affairs and are not readily construed as protecting rights that belong to individuals. The Ninth and Tenth Amendments are obvious examples, as is the First Amendment’s Establishment Clause, which “does not purport to protect individual rights.” *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 50 (2004) (THOMAS, J., concurring in judgment); see Amar 179–180.

21 To the extent JUSTICE STEVENS is concerned that reliance on the Privileges or Immunities Clause may invite judges to “write their personal views of appropriate public policy into the Constitution,” post, at 3 (internal quotation marks omitted), his celebration of the alternative—the “flexibility,” “transcend[ence],” and “dynamism” of substantive due process—speaks for itself, post, at 14–15, 20.

22 Tillman went on to a long career as South Carolina’s Governor and, later, United States Senator. Tillman’s contributions to campaign finance law have been discussed in our recent cases on that subject. See *Citizens United v. Federal Election Comm’n*, 558 U. S. , (2010) (STEVENS, J., dissenting) (slip. op., at 2, 42, 56, 87) (discussing at length the Tillman Act of 1907, 34 Stat. 864). His contributions to the culture of terrorism that grew in the wake of Cruikshank had an even more dramatic and tragic effect.

23 In an effort to enforce the Fourteenth Amendment and halt this violence, Congress enacted a series of civil rights statutes, including the Force Acts, see Act of May 31, 1870, 16 Stat. 140; Act of Feb. 28, 1871, 16 Stat. 433, and the Ku Klux Klan Act, see Act of Apr. 20, 1871, 17 Stat. 13.

In the
United States Court of Appeals
For the Seventh Circuit

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Nos. 12-1269, 12-1788

MICHAEL MOORE, *et al.*, and
MARY E. SHEPARD, *et al.*,
Plaintiffs-Appellants,

v.

LISA MADIGAN, ATTORNEY GENERAL
OF ILLINOIS, *et al.*,
Defendants-Appellees.

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Appeals from the United States District Courts for the Central
District of Illinois and the Southern District of Illinois. Nos.
3:11-cv-3134-SEM-BGC and 3:11-cv-405-WDS-PMF— Sue E.
Myerscough and William D. Stiehl, Judges.

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ARGUED JUNE 8, 2012—DECIDED DECEMBER 11, 2012

Before POSNER, FLAUM, and WILLIAMS, *Circuit Judges.*

POSNER, *Circuit Judge.* These two appeals, consolidated for oral argument, challenge denials of declaratory and injunctive relief sought in materially identical suits under the Second Amendment. An Illinois law forbids a person, with exceptions mainly for police and other security personnel, hunters, and members of target shooting clubs, 720 ILCS 5/24-2, to carry a gun ready to use (loaded, immediately accessible—that is, easy to reach—and uncased). There are exceptions for a person on his own property (owned or rented), or in his home (but if it's an apartment, only there and not in the apartment building's common areas), or in his fixed place of business, or on the property of someone who has permitted him to be there with a ready-to-use gun. 720 ILCS 5/24-1(a)(4), (10), -1.6(a); see *People v. Diggins*, 919 N.E.2d 327, 332 (Ill. 2009); *People v. Laub-scher*, 701 N.E.2d 489, 490–92 (Ill. 1998); *People v. Smith*, 374 N.E.2d 472, 475 (Ill. 1978); *People v. Pulley*, 803 N.E.2d 953, 957–58, 961 (Ill.

App. 2004). Even carrying an unloaded gun in public, if it's uncased and immediately accessible, is prohibited, other than to police and other excepted persons, unless carried openly outside a vehicle in an unincorporated area and ammunition for the gun is not immediately accessible. 720 ILCS 5/24-1(a)(4)(iii), (10)(iii), -1.6(a)(3)(B).

The appellants contend that the Illinois law violates the Second Amendment as interpreted in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and held applicable to the states in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). *Heller* held that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” 554 U.S. at 635. But the Supreme Court has not yet addressed the question whether the Second Amendment creates a right of self-defense outside the home. The district courts ruled that it does not, and so dismissed the two suits for failure to state a claim.

The parties and the amici curiae have treated us to hundreds of pages of argument, in nine briefs. The main focus of these submissions is history. The supporters of the Illinois law present historical evidence that there was no generally recognized private right to carry arms in public in 1791, the year the Second Amendment was ratified—the critical year for determining the amendment’s historical meaning, according to *McDonald v. City of Chicago*, *supra*, 130 S. Ct. at 3035 and n. 14. Similar evidence against the existence of an eighteenth-century right to have weapons in the home for purposes of self-defense rather than just militia duty had of course been presented to the Supreme Court in the *Heller* case. See, e.g., Saul Cornell, *A Well-Regulated Militia* 2–4, 58–65 (2006); Lois G. Schworer, “To Hold and Bear Arms: The English Perspective,” 76 *Chi.-Kent L. Rev.* 27, 34–38 (2000); Don Higginbotham, “The Second Amendment in Historical Context,” 16 *Constitutional Commentary* 263, 265 (1999). The District of Columbia had argued that “the original understanding of the Second Amendment was neither an individual right of self-defense nor a collective right of the states, but rather a civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia.” Cornell, *supra*, at 2; see also Paul Finkelman, “A Well Regulated Militia’: The Second Amendment in Historical Perspective,” 76 *Chi.-Kent L. Rev.* 195, 213–14 (2000); Don Higginbotham, “The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship,” 55 *William & Mary Q.* 39, 47–50 (1998); Roy G. Weatherup, “Standing Armies and Armed Citi-

zens: An Historical Analysis of the Second Amendment,” 2 *Hastings Constitutional L.Q.* 961, 994–95 (1975).

The Supreme Court rejected the argument. The appellees ask us to repudiate the Court’s historical analysis. That we can’t do. Nor can we ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one’s home. The first sentence of the *McDonald* opinion states that “two years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense,” *McDonald v. City of Chicago*, *supra*, 130 S. Ct. at 3026, and later in the opinion we read that “*Heller* explored the right’s origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, 554 U.S. at 593, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was ‘one of the fundamental rights of Englishmen,’ *id.* at 594.” 130 S. Ct. at 3037. And immediately the Court adds that “Blackstone’s assessment was shared by the American colonists.” *Id.*

Both *Heller* and *McDonald* do say that “the need for defense of self, family, and property is *most acute*” in the home, *id.* at 3036 (emphasis added); 554 U.S. at 628, but that doesn’t mean it is not acute outside the home.

Heller repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home, as when it says that the amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” 554 U.S. at 592. Confrontations are not limited to the home.

The Second Amendment states in its entirety that “a well regulated Militia, being necessary to the security of a free State, the right of the people to keep *and bear* Arms, shall not be infringed” (emphasis added). The right to “bear” as distinct from the right to “keep” arms is unlikely to refer to the home. To speak of “bearing” arms within one’s home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.

And one doesn’t have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home. Suppose one lived in what was then the wild west—the Ohio Valley for example (for until the Louisiana Purchase the Mississippi River was the western boundary of the United States), where there were hos-

tile Indians. One would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed.

The situation in England was different—there was no wilderness and there were no hostile Indians and the right to hunt was largely limited to landowners, Schwoerer, *supra*, at 34–35, who were few. Defenders of the Illinois law reach back to the fourteenth-century Statute of Northampton, which provided that unless on King's business no man could “go nor ride armed by night nor by day, in Fairs, markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere.” 2 Edw. III, c. 3 (1328). Chief Justice Coke interpreted the statute to allow a person to possess weapons inside the home but not to “assemble force, though he be extremely threatened, to go with him to church, or market, or any other place.” Edward Coke, *Institutes of the Laws of England* 162 (1797). But the statute enumerated the locations at which going armed was thought dangerous to public safety (such as in fairs or in the presence of judges), and Coke's reference to “assemble force” suggests that the statutory limitation of the right of self-defense was based on a concern with armed gangs, thieves, and assassins rather than with indoors versus outdoors as such.

In similar vein *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686), interpreted the statute as punishing “people who go armed to terrify the King's subjects.” Some weapons do not terrify the public (such as well-concealed weapons), and so if the statute was (as it may have been) intended to protect the public from being frightened or intimidated by the brandishing of weapons, it could not have applied to all weapons or all carriage of weapons. Blackstone's summary of the statute is similar: “the offence of riding or going armed, with *dangerous or unusual* weapons, is a crime against the public peace, by terrifying the good people of the land.” 4 *Commentaries on the Law of England* 148–49 (1769) (emphasis added). *Heller* treated Blackstone's reference to “dangerous or unusual weapons” as evidence that the ownership of some types of firearms is not protected by the Second Amendment, 554 U.S. at 627, but the Court cannot have thought *all* guns are “dangerous or unusual” and can be banned, as otherwise there would be no right to keep a handgun in one's home for self-defense. And while another English source, Robert Gardiner, *The Compleat Constable* 18–19 (3d ed. 1707), says that constables “may seize and take away” loaded guns worn or carried by persons not

doing the King's business, it does not specify the circumstances that would make the exercise of such authority proper, let alone would warrant a prosecution.

Blackstone described the right of armed self-preservation as a fundamental natural right of Englishmen, on a par with seeking redress in the courts or petitioning the government. 1 Blackstone, *supra*, at 136, 139–40. The Court in *Heller* inferred from this that eighteenth-century English law recognized a right to possess guns for resistance, self-preservation, selfdefense, and protection against both public and private violence. 554 U.S. at 594. The Court said that American law was the same. *Id.* at 594–95. And in contrast to the situation in England, in less peaceable America a distinction between keeping arms for selfdefense in the home and carrying them outside the home would, as we said, have been irrational. All this is debatable of course, but we are bound by the Supreme Court's historical analysis because it was central to the Court's holding in *Heller*.

Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by *McDonald* to honor the latter. That creates an arbitrary difference. To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*. It is not a property right—a right to kill a houseguest who in a fit of aesthetic fury tries to slash your copy of Norman Rockwell's painting *Santa with Elves*. That is not self-defense, and this case like *Heller* and *McDonald* is just about self-defense.

A gun is a potential danger to more people if carried in public than just kept in the home. But the other side of this coin is that knowing that many law-abiding citizens are walking the streets armed may make criminals timid. Given that in Chicago, at least, most murders occur outside the home, Chicago Police Dep't, *Crime at a Glance: District 1* 13 (Jan.–June 2010), the net effect on crime rates in general and murder rates in particular of allowing the carriage of guns in public is uncertain both as a matter of theory and em-

pirically. “Based on findings from national law assessments, cross-national comparisons, and index studies, evidence is insufficient to determine whether the degree or intensity of firearms regulation is associated with decreased (or increased) violence.” Robert A. Hahn et al., “Firearms Laws and the Reduction of Violence: A Systematic Review,” 28 *Am. J. Preventive Med.* 40, 59 (2005); cf. John J. Donohue, “The Impact of Concealed-Carry Laws,” in *Evaluating Gun Policy Effects on Crime and Violence* 287, 314–21 (2003). “Whether the net effect of relaxing concealed-carry laws is to increase or reduce the burden of crime, there is good reason to believe that the net is not large.... [T]he change in gun carrying appears to be concentrated in rural and suburban areas where crime rates are already relatively low, among people who are at relatively low risk of victimization—white, middle-aged, middle-class males. The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders. Based on available empirical data, therefore, we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand.” Philip J. Cook, Jens Ludwig & Adam M. Samaha, “Gun Control After *Heller*: Threats and Sideshows from a Social Welfare Perspective,” 56 *UCLA L. Rev.* 1041, 1082 (2009); see also H. Sterling Burnett, “Texas Concealed Handgun Carriers; Law-Abiding Public Benefactors,” www.ncpa.org/pdfs/ba324.pdf (visited Oct. 29, 2012). But we note with disapproval that the opening brief for the plaintiffs in appeal no. 12-1788, in quoting the last sentence above from the article by Cook and his colleagues, deleted without ellipses the last clause—“assuming that some sort of permit system for public carry is allowed to stand.”

If guns cannot be carried outside the home, an officer who has reasonable suspicion to stop and frisk a person and finds a concealed gun on him can arrest him, as in *United States v. Mayo*, 361 F.3d 802, 80408 (4th Cir. 2004), and thus take the gun off the street before a shooting occurs; and this is argued to support the ban on carrying guns outside the home. But it is a weak argument. Often the officer will have no suspicion (the gun is concealed, after all). And a state may be able to require “open carry”—that is, require persons who carry a gun in public to carry it in plain view rather than concealed. See *District of Columbia v. Heller*, *supra*, 554 U.S. at 626; James Bishop, Note, “Hidden or on the Hip: The Right(s) to Carry After *Heller*,” 97 *Cornell L. Rev.* 907, 920–21 (2012). Many criminals would continue to conceal the guns they carried, in order to preserve the element

of surprise and avoid the price of a gun permit; so the police would have the same opportunities (limited as they are, if the concealment is effective and the concealer does not behave suspiciously) that they do today to take concealed guns off the street.

Some studies have found that an increase in gun *ownership* causes an increase in homicide rates. Mark Duggan's study, reported in his article "More Guns, More Crime," 109 *J. Pol. Econ.* 1086, 1112 (2001), is exemplary; and see also Philip J. Cook & Jens Ludwig, "The Social Costs of Gun Ownership," 90 *J. Pub. Econ.* 379, 387 (2006). But the issue in this case isn't ownership; it's carrying guns in public. Duggan's study finds that even the concealed carrying of guns, which many states allow, doesn't lead to an increase in gun ownership. 109 *J. Pol. Econ.* at 1106–07. Moreover, violent crime in the United States has been falling for many years and so has gun ownership, Patrick Egan, "The Declining Culture of Guns and Violence in the United States," www.themonkeycage.org/blog/2012/07/21/the-declining-culture-of-guns-and-violence-in-the-united-states (visited Oct. 29, 2012); see also Tom W. Smith, "Public Attitudes Towards the Regulation of Firearms" 10 (University of Chicago Nat'l Opinion Research Center, Mar. 2007), <http://icpgv.org/pdf/NORCPoll.pdf> (visited Oct. 29, 2012)—in the same period in which gun laws have become more permissive.

A few studies find that states that allow concealed carriage of guns outside the home and impose minimal restrictions on obtaining a gun permit have experienced increases in assault rates, though not in homicide rates. See Ian Ayres & John J. Donohue III, "More Guns, Less Crime Fails Again: The Latest Evidence From 1977–2006," 6 *Econ. J. Watch* 218, 224 (2009). But it has not been shown that those increases persist.

Of another, similar paper by Ayres and Donohue, "Shooting Down the 'More Guns, Less Crime' Hypothesis," 55 *Stan. L. Rev.* 1193, 1270–85 (2003), it has been said that if they "had extended their analysis by one more year, they would have concluded that these laws [laws allowing concealed handguns to be carried in public] reduce crime." Carlisle E. Moody & Thomas B. Marvell, "The Debate on Shall-Issue Laws," 5 *Econ. J. Watch* 269, 291 (2008). Ayres and Donohue disagree that such laws reduce crime, but they admit that data and modeling problems prevent a strong claim that they *increase* crime. 55 *Stan. L. Rev.* at 1281–82, 1286–87; 6 *Econ. J. Watch* at 230–31.

Concealed carriage of guns might increase the death rate from assaults rather than increase the number of assaults. But the studies don't find that laws that allow concealed carriage increase the death rate from shootings, and this in turn casts doubt on the finding of an increased crime rate when concealed carriage is allowed; for if there were more confrontations with an armed criminal, one would expect more shootings. Moreover, there is no reason to expect Illinois to impose *minimal* permit restrictions on carriage of guns outside the home, for obviously this is not a state that has a strong pro-gun culture, unlike the states that began allowing concealed carriage before *Heller* and *MacDonald* enlarged the scope of Second Amendment rights.

Charles C. Branas et al., "Investigating the Link Between Gun Possession and Gun Assault," 99 *Am. J. of Pub. Health* 2034, 2037 (2009), finds that assault victims are more likely to be armed than the rest of the population is, which might be thought evidence that going armed is not effective self-defense. But that finding does not illuminate the deterrent effect of knowing that potential victims may be armed. David Hemenway & Deborah Azrael, "The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey," 15 *Violence & Victims* 257, 271 (2000), finds that a person carrying a gun is more likely to use it to commit a crime than to defend himself from criminals. But that is like saying that soldiers are more likely to be armed than civilians. And because fewer than 3 percent of gun-related deaths are from accidents, Hahn et al., *supra*, at 40, and because Illinois allows the use of guns in hunting and target shooting, the law cannot plausibly be defended on the ground that it reduces the accidental death rate, unless it could be shown that allowing guns to be carried in public causes gun ownership to increase, and we have seen that there is no evidence of that.

In sum, the empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law. Bishop, *supra*, at 922–23; Mark V. Tushnet, *Out of Range: Why the Constitution Can't End the Battle over Guns* 110–11 (2007). Anyway the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts. 554 U.S. at 636. If the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way, for that possibility was as great in the District of Columbia as it is in Illinois.

And a ban as broad as Illinois's can't be upheld merely on the ground that it's not irrational. *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011); *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) (per curiam); see also *Heller v. District of Columbia*, *supra*, 554 U.S. at 628 n. 27; *United States v. Chester*, 628 F.3d 673, 679–80 (4th Cir. 2010). Otherwise this court wouldn't have needed, in *United States v. Skoien*, 614 F.3d 638, 643–44 (7th Cir. 2010) (en banc), to marshal extensive empirical evidence to justify the less restrictive federal law that forbids a person “who has been convicted in any court of a misdemeanor crime of domestic violence” to possess a firearm in or affecting interstate commerce. 18 U.S.C. § 922(g)(9). In *Skoien* we said that the government had to make a “strong showing” that a gun ban was vital to public safety—it was not enough that the ban was “rational.” 614 F.3d at 641. Illinois has not made that strong showing—and it would have to make a stronger showing in this case than the government did in *Skoien*, because the curtailment of gun rights was much narrower: there the gun rights of persons convicted of domestic violence, here the gun rights of the entire lawabiding adult population of Illinois.

A blanket prohibition on carrying gun in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would. In contrast, when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need. Similarly, the state can prevail with less evidence when, as in *Skoien*, guns are forbidden to a class of persons who present a higher than average risk of misusing a gun. See also *Ezell v. City of Chicago*, *supra*, 651 F.3d at 708. And empirical evidence of a public safety concern can be dispensed with altogether when the ban is limited to obviously dangerous persons such as felons and the mentally ill. *Heller v. District of Columbia*, *supra*, 554 U.S. at 626. Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public.

Remarkably, Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home, though many states used to ban carrying concealed guns outside the home, Bishop, *supra*, at 910; David B. Kopel, “The Second Amendment in the Nineteenth

Century,” 1998 *BYU L. Rev.* 1359, 1432–33 (1998)—a more limited prohibition than Illinois’s, however. Not even Massachusetts has so flat a ban as Illinois, though the District of Columbia does, see D.C. Code §§ 22-4504 to -4504.02, and a few states did during the nineteenth century, *Kachalsky v. County of Westchester*, Nos. 11-3642,-3962, 2012 WL 5907502, at *6 (2d Cir. Nov. 27, 2012)—but no longer.

It is not that all states but Illinois are indifferent to the dangers that widespread public carrying of guns may pose. Some may be. But others have decided that a proper balance between the interest in self-defense and the dangers created by carrying guns in public is to limit the right to carry a gun to responsible persons rather than to ban public carriage altogether, as Illinois with its meager exceptions comes close to doing. Even jurisdictions like New York State, where officials have broad discretion to deny applications for gun permits, recognize that the interest in self-defense extends outside the home. There is no suggestion that some unique characteristic of criminal activity in Illinois justifies the state’s taking a different approach from the other 49 states. If the Illinois approach were demonstrably superior, one would expect at least one or two other states to have emulated it.

Apart from the usual prohibitions of gun ownership by children, felons, illegal aliens, lunatics, and in sensitive places such as public schools, the propriety of which was not questioned in *Heller* (“nothing in this opinion should be taken to cast doubt on long-standing 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,” 554 U.S. at 626), some states sensibly require that an applicant for a handgun permit establish his competence in handling firearms. A person who carries a gun in public but is not well trained in the use of firearms is a menace to himself and others. See Massad Ayoob, “The Subtleties of Safe Firearms Handling,” *Backwoods Home Magazine*, Jan./Feb. 2007, p. 30; Debra L. Karch, Linda L. Dahlberg & Nimesh Patel, “Surveillance for Violent Deaths—National Violent Death Reporting System, 16 States, 2007,” *Morbidity and Mortality Weekly Report*, p. 11, www.cdc.gov/mmwr/pdf/ss/ss5904.pdf (visited Oct. 29, 2012). States also permit private businesses and other private institutions (such as churches) to ban guns from their premises. If enough private institutions decided to do that, the right to carry a gun in public would have much less value and might rarely be exercised—in

which event the invalidation of the Illinois law might have little effect, which opponents of gun rights would welcome.

Recently the Second Circuit upheld a New York state law that requires an applicant for a permit to carry a concealed handgun in public to demonstrate “proper cause” to obtain a license. *Kachalsky v. County of Westchester, supra*. This is the inverse of laws that forbid dangerous persons to have handguns; New York places the burden on the applicant to show that he needs a handgun to ward off dangerous persons. As the court explained, 2012 WL 5907502, at *13, New York “decided not to ban handgun possession, but to limit it to those individuals who have an actual reason (‘proper cause’) to carry the weapon. In this vein, licensing is oriented to the Second Amendment’s protections [I]nstead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere.”

The New York gun law upheld in *Kachalsky*, although one of the nation’s most restrictive such laws (under the law’s “proper cause” standard, an applicant for a gun permit must demonstrate a need for self-defense greater than that of the general public, such as being the target of personal threats, *id.* at *3, *8), is less restrictive than Illinois’s law. Our principal reservation about the Second Circuit’s analysis (apart from disagreement, unnecessary to bore the reader with, with some of the historical analysis in the opinion—we regard the historical issues as settled by *Heller*) is its suggestion that the Second Amendment should have much greater scope inside the home than outside simply because other provisions of the Constitution have been held to make that distinction. For example, the opinion states that “in *Lawrence v. Texas*, the [Supreme] Court emphasized that the state’s efforts to regulate private sexual conduct between consenting adults is especially suspect when it intrudes into the home.” 2012 WL 5907502, at *9. Well of course—the interest in having sex inside one’s home is much greater than the interest in having sex on the sidewalk in front of one’s home. But the interest in self-protection is as great outside as inside the home. In any event the court in *Kachalsky* used the distinction between self-protection inside and outside the home mainly to suggest that a standard less demanding than “strict scrutiny” should govern the constitutionality of laws limiting the carrying of guns outside the home; our analysis

is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states.

Judge Wilkinson expressed concern in *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), that “there may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation. The notion that ‘self-defense has to take place wherever [a] person happens to be,’ appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities.... The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree” (citation omitted). Fair enough; but that “vast *terra incognita*” has been opened to judicial exploration by *Heller* and *McDonald*. There is no turning back by the lower federal courts, though we need not speculate on the limits that Illinois may in the interest of public safety constitutionally impose on the carrying of guns in public; it is enough that the limits it has imposed go too far.

The usual consequence of reversing the dismissal of a suit (here a pair of suits) is to remand the case for evidentiary proceedings preparatory to the filing of motions for summary judgment and if those motions fail to an eventual trial. But there are no evidentiary issues in these two cases. The constitutionality of the challenged statutory provisions does not present factual questions for determination in a trial. The evidence marshaled in the *Skoien* case was evidence of “legislative facts,” which is to say facts that bear on the justification for legislation, as distinct from facts concerning the conduct of parties in a particular case (“adjudicative facts”). See Fed. R. Evid. 201(a); Advisory Committee Note to Subdivision (a) of 1972 Proposed Rule [of Evidence] 201. Only adjudicative facts are determined in trials, and only legislative facts are relevant to the constitutionality of the Illinois gun law. The key legislative facts in this case are the effects of the Illinois law; the state has failed to show that those effects are positive.

We are disinclined to engage in another round of historical analysis to determine whether eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home. The Supreme Court has decided that the amendment confers

a right to bear arms for self-defense, which is as important outside the home as inside. The theoretical and empirical evidence (which overall is inconclusive) is consistent with concluding that a right to carry firearms in public may promote self-defense. Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden. The Supreme Court's interpretation of the Second Amendment therefore compels us to reverse the decisions in the two cases before us and remand them to their respective district courts for the entry of declarations of unconstitutionality and permanent injunctions. Nevertheless we order our mandate stayed for 180 days to allow the Illinois legislature to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public.

REVERSED AND REMANDED, WITH DIRECTIONS;
BUT MANDATE STAYED FOR 180 DAYS.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

TOM G. PALMER, GEORGE LYON, EDWARD RAY
MOND, AMY MCVEY,
and SECOND AMENDMENT FOUNDATION,
INC.,
Plaintiffs,

v. 1:09-CV-1482

(FJS)

DISTRICT OF COLUMBIA and CATHY LANIER,
Defendants.

SCULLIN, Senior Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Currently before the Court are Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment.

II. BACKGROUND

In their complaint, Plaintiffs assert two claims for relief. In their first claim, Plaintiffs allege that, “[b]y requiring a permit to carry a handgun in public, yet refusing to issue such permits and refusing to allow the possession of any handgun that would be carried in public, Defendants maintain a complete ban on the carrying of handguns in public by almost all individuals.” *See* Dkt. No. 1, Complaint at 39. Plaintiffs also contend that “Defendants’ laws, customs, practices and policies generally banning the carrying of handguns in public violate the Second Amendment to the United States Constitution, facially and as applied against the individual plaintiffs in this action, damaging plaintiffs in violation of 42 U.S.C. § 1983.” *See id.* at 40.

In their second claim for relief, Plaintiffs allege that “Defendants’ laws, customs, practices and policies generally refusing the registration of firearms by individuals who live outside the District of Columbia violate the rights to travel and equal protection secured by the Due Process Clause of the Fifth Amendment to the United States Constitution, facially and as applied against the individual

plaintiffs in this action, damaging plaintiffs in violation of 42 U.S.C. § 1983.” *See id.* at 42.

Plaintiffs seek relief in the form of an Order permanently enjoining Defendants, “their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing D.C. Code § 7-2502.02(a)(4) to ban registration of handguns to be carried for self-defense by law-abiding citizens[.]” *See id.* at WHEREFORE Clause. Furthermore, Plaintiffs seek an Order permanently enjoining

Defendants, “their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing D.C. Code § 22-4504(a), OR, in the alternative, ordering [D]efendants to issue licenses to carry handguns to all individuals who desire such licenses and who have satisfied the existing requirements, aside from residence requirements, for the registration of a handgun[.]” *See id.* Finally, Plaintiffs seek an Order permanently enjoining Defendants, “their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from denying firearm registration and handgun carry permit applications made by otherwise qualified individuals on account of lack of residence within the District of Columbia[.]” *See id.* ¹

The parties do not dispute the basic facts that underlie this action. D.C. Code § 72502.01(a) provides that “no persons or organization in the District shall possess or control any firearm, unless the persons or organization holds a valid registration certificate for the firearm.” D.C. Code § 7-2502.02(a)(4) provides that individuals who are not retired police officers may only register a handgun “for use in self-defense within that person’s home.” Pursuant to this statutory limitation, Defendants distribute handgun registration application forms requiring applicants to “give a brief statement of your intended use of the firearm and where the firearm will be kept.”

Defendants maintain a custom, practice and policy of refusing to entertain gun registration applications by individuals who do not reside in the District of Columbia.

Defendants require gun registration applicants to submit “[p]roof of residency in the District of Columbia (e.g., a valid DC operator’s permit, DC vehicle registration card, lease agreement for a residence in the District, the deed to your home or other legal document

showing DC residency.” A first violation of the District of Columbia’s ban on the ownership or possession of unregistered handguns is punishable as a misdemeanor by a fine of up to \$1,000, imprisonment of up to five years, or both. *See* D. C. Code § 7-2507.06.

D.C. Code § 22-4504(a) provides that “[n]o person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed.” The first violation of this section by a non-felon is punishable by a fine up to \$5,000 and imprisonment of up to five years.

Former D.C. Code § 22-4506 empowered the District of Columbia’s police chief to issue licenses to carry handguns to individuals, including to individuals not residing in the District of Columbia. However, it was Defendant District of Columbia’s policy for many years not to issue such licenses. On December 16, 2008, the District of Columbia’s City Council and Mayor repealed the Police Chief’s authority to issue handgun carry licenses. Accordingly, the District of Columbia lacks any mechanism to issue handgun carry licenses to individuals.

Plaintiff Palmer, a resident of the District, would carry a functional handgun in public for self-defense but refrains from doing so because he fears arrest, prosecution, fine, and imprisonment as he does not possess a license to carry a handgun. Plaintiff Palmer sought to register a handgun in the District of Columbia so that he might carry it for self-defense. On or about May 12, 2009, Defendant Lanier denied Plaintiff Palmer’s application to register a handgun for the following reason:

The intended use of the firearm as stated on your firearms registration application, “I intend to carry this firearm, loaded, in public, for self-defense, when not kept in my home” is unacceptable per the “Firearms Registration Emergency Amendment Act of 2008,” which states that pistols may only be registered by D.C. residents for protection within the home.

Defendant Lanier subsequently approved Plaintiff Palmer’s application to register the handgun for home self-defense.

Plaintiff George Lyon, a resident of the District, would carry a functional handgun in public for self-defense but refrains from doing so because he fears arrest, prosecution, fine, and imprisonment as he does not possess a license to carry a handgun in Washington,

D.C. Plaintiff Lyon is licensed to carry handguns in the states of Virginia, Utah, and Florida. He has approximately 240 hours of firearms training, of which approximately 140 hours relate specifically to handguns. Plaintiff Lyon sought to register a handgun in the District of Columbia so that he might carry it for self-defense. On or about April 8, 2009, Defendant Lanier denied Plaintiff Lyon's application to register a handgun for the following reason:

The intended storage and use of the firearm as stated on your firearms registration application, "carrying personal protection, keep at home or office" is unacceptable per the "Firearms Registration Emergency Amendment Act of 2008," which states that pistols may only be registered by D.C. residents for protection within the home.

Defendant Lanier subsequently approved Plaintiff Lyon's application to register the handgun for home self-defense.

At the time Plaintiffs filed this action, Plaintiff Raymond was not a resident of the District, was enrolled as a student in the Franklin Pierce Law Center in New Hampshire, was employed as a Patent Examiner and owned a home in Waldorf, Maryland. Plaintiff Raymond holds a Master of Business Administration degree as well as a Master of Science degree in Electrical Engineering. He has started various successful businesses and is an honorably discharged Navy veteran.

On April 6, 2007, District of Columbia Police stopped Plaintiff Raymond for allegedly speeding. At that time, Plaintiff Raymond held valid permits to carry a handgun issued by the states of Maryland and Florida and still holds those permits. Although Plaintiff Raymond was never charged with a traffic violation, he was charged with carrying a pistol without a license because his loaded handgun was located in his car's center console. Plaintiff Raymond subsequently pled guilty to misdemeanor possession of an unregistered firearm and unregistered ammunition. He successfully completed a sentence of probation.

Plaintiff Raymond would carry a functional handgun in public for self-defense while visiting and traveling through the District of Columbia but refrains from doing so because he fears another arrest and prosecution as well as fine and imprisonment as he does not possess a license to carry a handgun in the District of Columbia. On June 26, 2009, Plaintiff Raymond sought to register a handgun

in the District of Columbia, but he was refused an application form because of his lack of residence in the District.

Plaintiff Amy McVey, a resident of the District, would carry a functional handgun in public for self-defense but refrains from doing so because she fears arrest, prosecution, fine, and imprisonment as she does not possess a license to carry a handgun in the District of Columbia.

Plaintiff McVey is licensed by the state of Virginia to publicly carry a handgun.

Plaintiff McVey sought to register a handgun in the District of Columbia so that she could carry it for self-defense. On July 7, 2009, Defendant Lanier denied her application to register a handgun for the following reason:

The intended storage and use of the firearm as stated on your firearms registration application, “I intend to carry the loaded firearm in public for self-defense when not stored in my home” is unacceptable per the “Firearms Registration Emergency Amendment Act of 2008,” which states that pistols may only be registered by D.C. residents for protection within the home.

Plaintiff Second Amendment Foundation, Inc. (“SAF”) is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has more than 650,000 members and supporters nationwide, including in the District of Columbia. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms and the consequences of gun control. SAF expends its resources encouraging the exercise of the right to bear arms and advising and educating its members, supporters, and the general public about the law with respect to carrying handguns in the District of Columbia. The issues raised by, and consequences of, Defendants’ policies are of great interest to SAF’s constituency. Defendants’ policies regularly cause SAF to expend resources as people turn to it for advice and information. Defendants’ policies bar the members and supporters of SAF from obtaining permits to carry handguns.

III. DISCUSSION

The Supreme Court’s decisions in *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020

(2010), direct the Court's analysis of Plaintiffs' claims. In *Heller*, the plaintiffs mounted a Second Amendment challenge to a District of Columbia law that "totally ban[ned] handgun possession in the home" and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock[.]" *Heller*, 554 U.S. at 603, 628. The validity of the challenged measures depended, as a preliminary matter, on whether the Second Amendment codified an individual right or a collective right. *See id.* at 577. After consulting the text's original public meaning, the Court concluded that the Second Amendment codified a pre-existing, individual right to keep and bear arms and that the "central component of the right" was self-defense. *See id.* at 592, 599. Furthermore, the Court held that, because "the need for defense of self, family, and property is most acute in the home," the D.C. ban on the home use of handguns "the most preferred firearm in the nation" failed "constitutional muster" under any standard of heightened scrutiny. *Id.* at 628-29 & n.27. The same was true for the trigger-lock requirement. *See id.* at 635. The *Heller* Court concluded that it did not need to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment" to dispose of the case. *Id.* at 626. Nor did the Court have a reason to specify, for future cases, which burdens on the Second Amendment right triggered which standards of review, or whether a tiered-scrutiny approach was even appropriate in the first place. *See id.* at 628-29. By any measure, the Court found that the District of Columbia statute overreached.

Two years later, in *McDonald*, the Court evaluated a similar handgun ban that the City of Chicago had enacted. The question presented in *McDonald*, however, was not whether the ban infringed the Chicago's residents' Second Amendment rights, but, rather, whether a state government could even be subject to the strictures of the Second Amendment. The answer to that question depended on whether the right was "deeply rooted in this Nation's history and tradition" and "fundamental to our scheme of ordered liberty[.]" *McDonald*, 130 S. Ct. at 3036. The Court stated that its "decision in *Heller* point[ed] unmistakably to the answer." *Id.* The Court explained that self-defense, recognized since ancient times as a "basic right," was the "central component" of the Second Amendment guarantee. *Id.* Thus, the Court concluded that that right restricted not only the federal government but, under the Fourteenth Amendment, also the states. *See id.* at 3026. Having reached that conclusion, the Court remanded the case to the Seventh Circuit for an

analysis of whether, in light of *Heller*, the Chicago handgun ban infringed the Second Amendment right. See *id.* at 3050.

Neither *Heller* nor *McDonald* speaks explicitly or precisely to the scope of the Second Amendment right outside the home or to what it takes to “infringe” that right. However, both opinions, at the very least, “point[] in a general direction.” *Ezell v. City of Chicago*, 651 F.3d 684, 700 (7th Cir. 2011) (noting that *Heller* does not leave the court “without a framework for how to proceed”). As the Ninth Circuit recently noted in *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014)², which addressed statutes very similar to the ones at issue in this case,

[t]o resolve the challenge to the D.C. restrictions, the *Heller* majority described and applied a certain methodology: it addressed, first, whether having operable handguns in the home amounted to “keep[ing] and bear[ing] Arms” within the meaning of the Second Amendment and, next, whether the challenged laws, if they indeed did burden constitutionally protected conduct, “infringed” the right.

Id. at 1150.³

In analyzing the issues in this case, the Court must apply the two-step approach that the

District of Columbia Circuit set forth in *Heller v. Dist. of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011). The first question requires this Court to decide whether the restricted activity, in this case, a restriction on a responsible, law-abiding citizen’s ability to carry a gun outside the home for self-defense falls within the Second Amendment right to keep and bear arms for the purpose of self defense. See *Peruta*, 742 F.3d at 1150 (citing *Ezell*, 651 F.3d at 701; *Kachalsky v. City of Westchester*, 701 F.3d 81, 90 (2d Cir. 2012)). To determine the precise methods by which that right’s scope is discerned, the Supreme Court has directed, in both *Heller* and *McDonald*, that courts must consult “both text and history.” *Heller*, 554 U.S. at 595, *McDonald*, 130 S. Ct. at 3047).

As the Court noted in *Heller*, “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.” *Heller*, 554 U.S. at 634-35. To arrive at the original understanding of the right, “we are guided by the principle that [t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and

ordinary as distinguished from technical meaning” unless evidence suggests that the language was used idiomatically. *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731, 51 S. Ct. 220, 75 L. Ed. 640 (1931)) (other citation omitted). “Of course, the necessity of this historical analysis presupposes what *Heller* makes explicit: the Second Amendment right is ‘not unlimited.’” *Peruta*, 742 F.3d at 1151 (quoting [*Heller*, 554 U.S.] at 595, 128 S. Ct. 2783). Furthermore, “[i]t is ‘not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’” *Id.* (quoting [*Heller*, 554 U.S.] at 626, 128 S. Ct. 2783). “Rather, it is a right subject to ‘traditional restrictions,’ which themselves and this is a critical point tend ‘to show the scope of the right.’” *Id.* (quoting *McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring)) (citing *Kachalsky*, 701 F.3d at 96; Nat’l Rifle Ass’n of Am., 700 F.3d at 196 (“For now, we state that a longstanding presumptively lawful regulatory measure . . . would likely [burden conduct] outside the ambit of the Second Amendment.”); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (“That some categorical limits are proper is part of the original meaning.”)).

As the court noted in *Peruta*, “[t]he Second Amendment secures the right not only to ‘keep’ arms but also to ‘bear’ them[.]” *Peruta*, 742 F.3d at 1151; and, as the Supreme Court explained in *Heller*, “[a]t the time of the founding, as now, to ‘bear’ meant to ‘carry[.]’” *Heller*, 554 U.S. at 584. “Yet, not ‘carry’ in the ordinary sense of ‘convey[ing] or transport[ing]’ an object, as one might carry groceries to the check-out counter or garments to the laundromat, but ‘carry for a particular purpose confrontation.’” *Peruta*, 742 F.3d at 1151-52 (quoting [*Heller*, 554 U.S. at 584]). According to the *Heller* majority, the “natural meaning of ‘bear arms’” was the one that Justice Ginsburg provided in her dissent in *Muscarello v. United States*, 524 U.S. 125 (1998), that is “‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’” *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. at 143, 118 S. Ct. 1911) (Ginsburg, J., dissenting) (quoting Black’s Law Dictionary 214 (6th ed. 1998)).

Furthermore, “bearing a weapon inside the home’ does not exhaust this definition of ‘carry.’ For one thing, the very risk occasioning such carriage, ‘confrontation,’ is ‘not limited to the home.’” *Peruta*, 742 F.3d at 1152 (quoting *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012)). Moreover, it is beyond dispute that “the prospect

of conflict at least, the sort of conflict for which one would wish to be ‘armed and ready’ is just as menacing (and likely more so) beyond the front porch as it is in the living room.” *Id.* Thus, “[t]o speak of ‘bearing’ arms within one’s home would at all times have been an awkward usage.” *Id.* (quotation omitted). In addition, the *Heller* Court stated that the Second Amendment secures “the right to ‘protect[] [oneself] against both public and private violence,’ . . . thus extending the right in some form to wherever a person could become exposed to public or private violence.” *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (Niemeyer, J., specially concurring) (quoting [*Heller*, 128 S. Ct.] at 2798, 2799). Moreover, the *Heller* Court emphasized that the need for the right was “most acute” in the home, *Peruta*, 742 F.3d at 1153 (citing *Heller*, 554 U.S. at 628, 128 S. Ct. 2783), “thus implying that the right exists outside the home, though the need is not always as “acute.” *Id.* (citing *McDonald*, 130 S. Ct. at 3044 (2010) (“[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.”)). However, *Heller* also pointed out that “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” is presumptively lawful.

Heller, 554 U.S. at 626. Finally, “both *Heller* and *McDonald* identif[ied] the ‘core component’ of the right as self-defense, which necessarily ‘take[s] place wherever [a] person happens to be,’ whether in a back alley or on the back deck.” *Peruta*, 742 F.3d at 1153 (citing *Moore*, 702 F.3d at 937 (“To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.”)) (other citation omitted).

This Court agrees with the Ninth Circuit’s statement in *Peruta* that “[t]hese passages alone, though short of dispositive, strongly suggest that the Second Amendment secures a right to carry a firearm in some fashion outside the home.” *Peruta*, 742 F.3d at 1153. “Reading those lines in light of the plain meaning definition of ‘bear Arms’ elucidated above makes matters even clearer; the Second Amendment right ‘could not rationally have been limited to the home.’” *Id.* (quoting *Moore*, 702 F.3d at 936). Although “people may ‘keep Arms’ (or, per *Heller*’s definition, ‘have weapons,’ 554 U.S. at 582, 128 S. Ct. 2783), in the home for defense of self, family, and property, they are more sensibly said to ‘bear Arms’ (or, *Heller*’s gloss: ‘carry [weapons] . . . upon the person or in the clothing or in a pocket,’ *id.* at 584, 128 S. Ct. 2783) in *nondomestic* settings.” *Id.* (citing *Kachalsky*, 701 F.3d at 89 n.10 (“The plain text of the Second

Amendment does not limit the right to bear arms to the home.”); *Drake v. Filko*, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting) (“To speak of ‘bearing’ arms solely within one’s home not only would conflate ‘bearing’ with ‘keeping,’ in derogation of the Court’s holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court.”) (footnote omitted).

In addition to the textual analysis of the phrase “bear Arms,” the Court in *Heller* looked to the original public understanding of the Second Amendment right as evidence of its scope and meaning, relying on the “important founding-era legal scholars.” *Heller*, 554 U.S. at 600-03 (examining the public understanding of the Second Amendment in the period after its ratification because “[t]hat sort of inquiry is a critical tool of constitutional interpretation”). Based on its historical review, the Court found support for the proposition that the Second Amendment secures an individual right to carry in case of confrontation means nothing if not the general right to carry a common weapon outside the home for self-defense. Furthermore, as the court in *Peruta* correctly pointed out, “with *Heller* on the books, the Second Amendment’s original meaning is now settled in at least two relevant respects.” *Peruta*, 742 F.3d at 1155. “First, *Heller* clarifies that the keeping and bearing of arms is, and has always been, an individual right. *Id.* (citing [*Heller*], 554 U.S. at 616, 128 S. Ct. 2783). “Second, the right is, and has always been, oriented to the end of self-defense.” *Id.* (citation omitted). After an exhaustive summary of the text and history of the Second Amendment, the Ninth Circuit in *Peruta* concluded that “the carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes ‘bear[ing] Arms’ within the meaning of the Second Amendment.” *Peruta*, 742 F.3d at 1166. As the Ninth Circuit noted, this conclusion is not surprising in light of the fact that other circuits have reached the same result. *See id.* (citing *Moore*, 702 F.3d at 936 (“A right to bear arms thus implies a right to carry a loaded gun outside the home.”); *Drake*, 724 F.3d at 431 (recognizing that the Second Amendment right “may have some application beyond the home”); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (“We . . . assume that the *Heller* right exists outside the home. . . .”); *Kachalsky*, 701 F.3d at 89 (assuming that the Second Amendment “must have some application in the very different context of the public possession of firearms”)). This Court, joining with most of the other courts that have addressed this issue, reaches this same conclusion.

Finally, as the *Peruta* court pointed out, “[u]nderstanding the scope of the right is not just necessary, it is key to [the court’s] analysis [because,] if self-defense outside the home is part of the core right to ‘bear arms’ and the [District of Columbia’s] regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-end scrutiny can justify [the District of Columbia’s] policy.” *Id.* at 1167 (citing *Heller*, 554 U.S. at 634, 128 S. Ct. 2783 (“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.”))). Thus, having concluded that carrying a handgun outside the home for self-defense comes within the meaning of “bear[ing] Arms” under the Second Amendment, the Court must now ask whether the District of Columbia’s total ban on the carrying of handguns within the District “infringes” that right.

This question is not difficult to answer. As the Seventh Circuit stated in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), “[a] blanket prohibition on carrying gun[s] in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public might benefit on balance from such a curtailment, though there is no proof that it would.” *Id.* at 940. This does not mean that the government cannot place some reasonable restrictions on carrying of handguns; for example, “when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that’s a lesser burden, the state doesn’t need to prove so strong a need.” *Id.* The District of Columbia appears to be the only jurisdiction that still has such a complete ban on the carrying of ready-to-use handguns outside the home. That does not mean that other jurisdictions are indifferent to the dangers that the widespread public carrying of guns; rather, those jurisdictions “have decided that a proper balance between the interest in self-defense and the dangers created by carrying guns in public is to limit the right to carry a gun to responsible persons rather than to ban public carriage altogether[.]” *Id.* at 940. In addition, to “the usual prohibitions of gun ownership by children, felons, illegal aliens, lunatics, and in sensitive places such as public schools, the propriety of which was not questioned in *Heller* . . . some states sensibly require that an applicant for a handgun permit establish his competence in handling firearms.” *Id.* at 940-41 (internal paren-

thetical omitted). Some states “also permit private businesses and other private institutions (such as churches) to ban guns from their premises.” *Id.* at 941.

In light of *Heller*, *McDonald*, and their progeny, there is no longer any basis on which this Court can conclude that the District of Columbia’s total ban on the public carrying of ready-to-use handguns outside the home is constitutional under any level of scrutiny. Therefore, the Court finds that the District of Columbia’s complete ban on the carrying of handguns in public is unconstitutional. Accordingly, the Court grants Plaintiffs’ motion for summary judgment and enjoins Defendants from enforcing the home limitations of D.C. Code § 7-2502.02(a)(4) and enforcing D.C. Code § 22-4504(a) unless and until such time as the District of Columbia adopts a licensing mechanism consistent with constitutional standards enabling people to exercise their Second Amendment right to bear arms.⁴ Furthermore, this injunction prohibits the District from completely banning the carrying of handguns in public for self-defense by otherwise qualified non-residents based **solely** on the fact that they are not residents of the District.

C. Equal protection and right to travel challenges to residency requirements

Plaintiff Raymond, the only non-resident individual Plaintiff, and SAF, insofar as some of its members who are not residents of the District of Columbia who would like to carry a hand gun in the District when they are there, argue that Defendants’ practice of refusing to issue a permit to carry a gun in the District based solely on the fact that a person is not a resident violates their right to travel and the equal protection clause of the Fourteenth Amendment.

The Court has difficulty seeing how these challenges, under the circumstances of this case, are not co-extensive with Plaintiff Raymond’s Second Amendment challenges to the current District laws regarding the complete ban on carrying handguns in public. Furthermore, as things now stand, Plaintiff Raymond, and all others who are not residents of the District, are treated exactly the same as residents of the District insofar as the District has a complete ban on the carrying of handguns in public for self-defense. Thus, to the extent that Plaintiff Raymond’s right to travel and equal protection

claims are not co-extensive with his Second Amendment claims, the Court finds that these claims are not ripe.

IV. CONCLUSION

Having reviewed the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby **GRANTS** Plaintiffs' motion for summary judgment and **DENIES**

Defendants' cross-motion for summary judgment; and the Court further

ORDERS that Defendants, their officers, agents, servants, employees and all persons in active concert or participation with them who receive actual notice of this Memorandum Decision and Order, are permanently enjoined from enforcing D.C. Code § 7-2502.02(a)(4) to ban registration of handguns to be carried in public for self-defense by law-abiding citizens; and the Court further

ORDERS that Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of this Memorandum Decision and Order are permanently enjoined from enforcing D.C. Code § 22-4504(a); and the Court further

ORDERS that Defendants, their officers, agents, servants, employees, and all persons in active concert or participation from them who receive actual notice of this Memorandum Decision and Order from enforcing D.C. Code § 7-2502.02(a)(4) and D.C. Code § 22-4504(a) against individuals based solely on the fact that they are not residents of the District of Columbia.

IT IS SO ORDERED.

Dated: July 24, 2014
Syracuse, New York

Frederick J. Scullin, Jr.
Senior United States District Court Judge

¹ Plaintiffs also seek costs of the suit, including attorney fees and costs under 42 U.S.C. § 1988 and declaratory relief consistent with the injunction. *See* Complaint at WHEREFORE Clause

² The *Peruta* court addressed the issue of “whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense.” *Peruta*, 742 F.3d at 1147. As a preliminary matter, the court noted that “California generally prohibits the open or concealed carriage of a handgun, whether loaded or unloaded, in public locations.” *Id.* (citations and footnote omitted). However, an individual could apply for a license to carry a concealed weapon in the city or county in which he worked or resided. *See id.* at 1148 (citations omitted). To obtain such a license, however, an applicant had to meet several requirements, including a demonstration of good moral character, completion of a specified training course, and establishing good cause. *See id.* (citations omitted). The plaintiff challenged San Diego County’s procedures for obtaining a concealed-carry license, in particular its definition of the term “good cause.” *See id.*

³ As the *Peruta* court noted, several other circuit courts have also applied this two-step inquiry. *See Peruta*, 742 F.3d at 1150 (citing *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell*, 651 F.3d at 701-04; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

⁴ The Court notes that, in *Heller v. Dist. of Columbia*, 08-CV-1289, Dkt. No. 83, Judge Boasberg recently dismissed all of the plaintiffs’ challenges to the constitutionality of the District’s firearm laws with prejudice except for their challenge to the vision requirement for gun registration, which, because he decided that challenge based on jurisdictional grounds, he dismissed without prejudice. *See id.* at 62. The plaintiffs had challenged the registration requirements of the District’s gun laws. The issue of the complete ban on the carrying of handguns in the District for self-defense was not at issue nor was the residency requirement at issue in that case. What were at issue, however, were the regulations pertaining to the registration of firearms, specifically the basic registration requirements as they applied to long guns and the following registration requirements that applied to all guns: (1) to register a weapon, registrants must appear in person and in possession of the firearm to be registered and must submit to being photographed and fingerprinted, *see* D.C. Code § 7-2502.04; (2) to register a weapon, registrants must complete a firearms-training and safety class and pass a test demonstrating knowledge of the District’s firearms laws, *see*

D. C. Code § 7-2502.03(a)(10), (13); (3) registrants are limited to registering one pistol every thirty days, see D.C. Code § 72502.03(e); (4) firearm-registration certificates automatically expire three years after the date they are issued, unless the registrant renews them, see D. C. Code § 7-2502.07a(a), and registrants are eligible to renew their certificates so long as they continue to meet the District's initial registration requirements, see D.C. Code § 7-2502.03(a), and follow any procedures the Metropolitan Police Department ("MPD") Chief establishes by rule, see D.C. Code § 72502.07a(b). In addition, the plaintiffs challenged several provisions related to the administration and enforcement of the gun-registry scheme, including (1) the requirement that gun owners keep their registration certificates with them when they are in possession of their registered firearms and be able to exhibit the certificate upon the demand of law enforcement, see D. C. Code § 7-2502.08(c); (2) the requirement that gun owners notify MPD in writing if their registered weapons are lost, stolen, or destroyed, if they sell or transfer their weapons, or if they change their name or address, see D. C. Code § 7-2502.08(a); (3) the fees associated with the registration process, see D.C. Code § 7-2502.05(b); and (4) the penalties for violations of the registration scheme, see D.C. Code § 7-2507.06. The plaintiffs in *Heller* have filed a Notice of Appeal from Judge Boasburg's May 15, 2014 Memorandum-Opinion. See *Heller*, 08-CV-1289, at Dkt. No. 84.

⁵ As stated above, with respect to Plaintiff Raymond's Second Amendment claim, the District of Columbia may not completely bar him, or any other qualified individual, from carrying a handgun in public for self-defense simply because they are not residents of the District.

