







Journal on Firearms and Public Policy

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The Journal on Firearms and Public Policy is the official publication of the Center for the Study of Firearms and Public Policy of the Second Amendment Foundation.

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OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,
Petitioners,

v.

CITY OF CHICAGO,
Respondents





Note

On June 26, 2008, Alan Gura, the attorney for the prevailing party in *District of Columbia v. Heller*, filed a challenge to the Chicago city firearms ban representing Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Illinois State Rifle & Pistol Association (ISRA) and the Second Amendment Foundation (SAF). David Sigale was retained as local counsel. The litigation was funded by SAF.

The case, known as *McDonald v. Chicago,* was filed in the U.S. District Court for the Northern District of Illinois before the 7th Circuit of the U.S. Federal District Court. There were four major causes brought in this action: the handgun ban, the re-registration requirements, the pre-acquisition registration requirement and the unregisterable status penalty. The legal theory presented was that the Second Amendment is incorporated to the U.S. Constitution via the 14th Amendment.

The trial court found in favor of the City of Chicago on December 18, 2008. The decision was appealed to the 7th Circuit Court of Appeals where the Chicago firearms laws were found Constitutional.

The plaintiffs appealed to the U.S. Supreme Court filing for *certiorari. Certiorari* for McDonald was granted on September 30, 2009. Oral arguments took place on March 2, 2010.

On June 28, 2010, in a 5-4 decision, the U.S. Supreme Court ruled that the Second Amendment was incorporated under the Fourteenth Amendment and protected the right of individuals to keep and bear arms from onerous governmental regulations.

Just after the decision, *McDonald* attorney, Alan Gura, commented on the ruling:*

> The Second Amendment is a normal part of the Bill of Rights – that much is the essential rule of McDonald v. City of Chicago. In the glass-two-drops-full department, opponents of the right to arms find refuge in statements recalling that the Second Amendment 'does not imperil every law regulating firearms.' We can all breathe easier knowing that airport metal detectors are going nowhere.

Of course, the First Amendment, a Bill of Rights provision with which the courts are vastly more experienced, does not imperil the overwhelming majority of speech regulations. For example, the police may ask those of us reveling in the McDonald decision to keep the party within our neighborhoods' defined maximum noise levels. This much is just common-sense, confirmed by familiar time, place and manner standards. But just as the First Amendment will not tolerate the arbitrary licensing of political speech or punitive fees for expressive conduct, neither does the Second Amendment tolerate the gun prohibitionists' agenda of frustrating the right to arms with excessive regulation. Politicians can justify any law. With respect to laws reaching some topics – including arms – the Constitution requires much more than paeans to the public good.

The Second Amendment is itself a reasonable, common-sense gun law – it provides powerful security for a fundamental individual right. Governments contemplating gun regulations out of legitimate concern for public safety may occasionally be reminded of their limits by courts, but good faith actors should find today's decision no more troubling than any other precedent effectuating basic constitutional limitations. On the other hand, politicians approaching gun regulation as a means of continuing their disagreement with the Constitution's enumerated policy choice on the subject will discover that doing so carries a price taxpayers do not wish to spend – and ultimately achieves nothing.

Finally, the reasoning matters as much as the result, and on this score there is tremendous cause for celebration as well. Justice Alito's plurality opinion firmly rejects turning the clock back to the days when Due Process incorporation was divorced from our unique American experience. Chicago's contrary arguments would have opened the door to reversing the entire incorporation enterprise.

And critically, Justice Thomas's opinion provides an excellent platform for restoring the Fourteenth Amendment's original public meaning. That today's result has a strong historical basis may have increased the plurality's comfort level in utilizing substantive due process, but Justice Thomas

demonstrated that concern for the constitutional text's original public meaning was actually necessary to achieve the result. In 1868, the public meaning of the Fourteenth Amendment's Privileges or Immunities Clause commanded the support of a ratifying nation. After this ruling, no one should doubt that it will yet command a majority of the Supreme Court.

* Alan Gura's analysis first appeared on Scotusblog.com.





More Friends of the Second Amendment: A Walk through the Amicus Briefs in *McDonald v. City of Chicago*

By Ilya Shapiro

This Article summarizes each of the dozens of amicus brief filed in McDonald v. City of Chicago. *Ilya Shapiro is Senior Fellow in Constitutional Studies at the Cato Institute, and Editor-in-Chief of the* Cato Supreme Court Review. *The author would like to thank Matthew Aichele, Travis Cushman, Andrew Kasnevich, Katy Noeth, Eric Tellado, and Evan Turgeon for their assistance with this article.*

Keywords: Second Amendment, Fourteenth Amendment, Due Process, Privileges or Immunities, incorporation, Supreme Court, amicus brief, Chicago, handgun prohibition, self-defense

Two years ago in these pages I presented an article summarizing the record 68 amicus curiae briefs in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), the case establishing that the Second Amendment protected an individual right to keep and bear arms. Heller only applied that right as against federal government infringement, however—D.C. being under direct federal control—so, as expected, in the days and weeks following the decision, various lawsuits were filed challenging state and local restrictions.

In a consolidated appeal of two such suits, the U.S. Court of Appeals for the Seventh Circuit upheld a Chicago ordinance banning the possession of handguns—as well as other gun regulations affecting rifles and shotguns—citing Supreme Court precedent from before the time *any* rights had been applied against the states. The Supreme Court disaggregated the suits and granted cert on the question: "Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses."

That was the question presented in the cert petition filed by *Heller* victor Alan Gura in *McDonald v. Chicago*—the Court held *NRA*

v. Chicago in abeyance pending *McDonald*'s resolution—and showed that this case was just as much about the Fourteenth Amendment as it was the Second. That is, the Court since the 1920s has been "incorporating" various rights (including nearly the entire Bill of Rights) against the states under the Substantive Due Process doctrine. This methodology has become such a constitutional trope that a second-year law student, let alone a Supreme Court clerk or justice—could write an opinion applying the Second Amendment to the states in this manner. Such "selective incorporation" (a constitutional misnomer, really) arose only because the Privileges or Immunities Clause was strangled in its crib, however, by a Supreme Court that refused to reconcile itself to Reconstruction-era changes in constitutional structure: In a set of cases on the regulation of Louisiana abattoirs—appropriately known as the *Slaughterhouse Cases*, 83 U.S. 36 (1873)—the Court virtually erased that Clause, reducing its contents to a risible set of federal rights.

And so, in the wake of *Heller*, legal scholars and lay people alike widely anticipated the Court's rejection of Chicago's far-reaching prohibition on private gun ownership but did not know *how* the Court would go about doing so. Would it resurrect the Privileges or Immunities Clause or continue using a suspect doctrine—one that Justice Antonin Scalia has called "babble"—for protecting individual rights against state infringement?

That was perhaps the most interesting question at issue in *McDonald*, but there were others too, with activists, think tanks, politicians, and concerned citizens of all stripes filing 50 *amicus* briefs (fourth all-time). Many focused on the Due Process versus Privileges or Immunities issue, while others discussed the incorporation of rights generally—treating the debate over Fourteenth Amendment clauses as an academic technicality. (It's not, for reasons that are beyond this article's scope but that Josh Blackman and I detail in "Keeping Pandora's Box Sealed: Privileges or Immunities, *The Constitution in 2020*, and Properly Extending the Right to Keep and Bear Arms to the States," 8 Geo. J.L. & Pub. Pol'y 1 (2010).)

Disappointingly, many of the respondents' *amici* insisted on re-litigating *Heller*, arguing about the meaning of the historic right to keep and bear arms and its relationship to militia service. One or more of petitioners' *amici* might similarly be criticized for running a *Heller* victory lap, essentially saying that the individual Second Amendment right is *so* important that it just *has to* be incorporated. And, of course, several *amici* got into a duel, as it were, over the so-

cial science evidence regarding effectiveness of gun bans and related issues.

The *amici* (32 for the challengers to the handgun ban, 16 for Chicago, and two styled as not taking sides) not only echo the fundamental disagreement on the nature of the right to keep and bear arms and the role of the federal courts in protecting it, but extend it.

One notable *amicus* brief is signed by Senators Kay Bailey Hutchison (R-TX) and Jon Tester (D-MT), along with a majority of the members of both the House and the Senate. That brief details Congress's long history of protecting the right of the people to keep and bear arms, an interest it argues would be undermined if the Second Amendment were held not to apply to the states. Not surprisingly, a group of Democratic congressmen led by Carolyn McCarthy (D-NY) took it upon themselves to offer a contrary interpretation of congressional interests.

Among the *amicus* briefs are competing arguments from state prosecutors and legislators, contradictory interpretations of empirical evidence relating to gun violence, and the pros and cons of whether guns cause more violence against women, children, and racial and religious minorities. Philosophers battle criminologists, while public health officials feud with historians—who themselves are bitterly divided. There is no agreement on the correct interpretation of *Slaughterhouse* and the degree to which the Court needs to distinguish or overrule that precedent regardless of which way it ultimately rules. Many of the briefs repeat arguments spelled out more than adequately by the parties or fellow *amici*—and were likely filed so the particular organization could say to its prospective donors that it "took a stand" on this high-profile case. But a not insignificant number of the briefs—even if they didn't end up being cited—seemed to have genuinely helped the justices write their opinions.

Perhaps the most striking, and quite possibly influential, brief was provided by the "Constitutional Law Professors": anything that brings together conservative, progressive, and libertarian lions—*e.g.*, Steven Calabresi, Jack Balkin, and Randy Barnett, respectively—merits serious consideration. (Full disclosure: I was involved in discussions surrounding that and several other briefs regarding the original understanding of the Fourteenth Amendment and how the Constitution protects rights against state usurpation generally—and of course I signed the Cato Institute's brief, which was principally authored by Timothy Sandefur of the Pacific Legal Foundation.)

In any event, here is a compendium of *amicus* briefs in *McDonald v. Chicago*. For lack of a better organizing principle, I list them alphabetically, first the petitioners' *amici*, then the respondents', then two supporting neither side. Unlike in *Heller*, the U.S. Government did not weigh in here. In addition to a summary of the argument in each brief, I provide the interest of each *amicus* and any "items of note" (*i.e.*, interesting facts) about the brief. I hope that, when read in the light of the Court's opinions in the case, this Article can serve as a guide for counsel and parties in the litigation over how much states can regulate the right to keep and bear arms that has already been launched.

PETITIONERS' *AMICI*

1. ACADEMICS FOR THE SECOND AMENDMENT

Interest: Academics for the Second Amendment is a tax-exempt organization formed in 1992 by law school teachers. Its goal is to secure the right to keep and bear arms as a meaningful, individual right.

Argument: The antebellum years saw expansion and increasing individualism of the right to bear arms. The American right to arms has evolved in ways that make it ever more individualistic and personal. The persecution of abolitionists and the refusal of authorities to protect them greatly expanded the individual rights movement.

2. AMERICAN CENTER FOR LAW AND JUSTICE

Interest: The ACLJ is a public interest legal and educational organization committed to ensure the ongoing viability of constitutional freedoms in accordance with the principles of justice.

Argument: The Privileges or Immunities Clause is better suited to incorporating the individual protections of the Bill of Rights, including the Second Amendment. The understanding of Rep. John Bingham and of learned commentators during or shortly after ratification also supports incorporation by the Privileges or Immunities Clause. The *Slaughterhouse, Cruikshank* and *Miller* cases should not bar the Court from incorporating the Second Amendment.

Items of Note: Bingham stated that the goal of his amendment was "not to transfer the laws of one state to another state" but "to

secure to the citizens of each state all the privileges and immunities of citizens of the United States in the several states." Also, *Slaughterhouse* can be read to support the incorporation of the Second Amendment and Bill of Rights because the butchers in that case didn't base their claims on the Bill of Rights.

3. American Civil Rights Union, Let Freedom Ring, Committee for Justice, Family Research Council

Interest: *Amici* are groups that seek to ensure all constitutional rights are fully protected.

Argument: The right to keep and bear arms is a fundamental right applicable to the states through the Fourteenth Amendment. The right to bear arms can be incorporated through the Privileges or Immunities Clause without overruling the *Slaughterhouse Cases*. *Slaughterhouse* should not be overruled. *Slaughterhouse* did not involve any provision of the Bill of Rights and therefore was not an incorporation case. *Slaughter-House Cases* should not be overruled, as doing so would render the Privileges or Immunities Clause a *tabula rasa*, which the Court in the future could interpret to mean anything it chooses.

4. American Legislative Exchange Council

Interest: ALEC is the nation's largest non-partisan individual membership association of state legislators. It serves to advance Jeffersonian principles of free markets, limited government, federalism and individual liberty.

Argument: The Second Amendment is incorporated under the Due Process Clause because the right to keep and bear arms is "necessary to an Anglo-American regime of ordered liberty" and is a right "deeply rooted in our nation's history and tradition."

5. Appellants from the Ninth Circuit Incorporation Case of *Nordyke v. King*

Interest: Russell and Sallie Nordyke are gun show promoters, exhibitors, and vendors who operate at county fairgrounds throughout California, whose case involving similar questions was argued before the *en banc* Ninth Circuit and is now pending in that court.

Argument: The Court has fully already examined the historical analysis of the fundamental nature of the "right to keep and bear arms" and its significance to American jurisprudence. Purging the

legacy of *Slaughterhouse* is reason enough to reconsider the post-Civil War insurgency against the Fourteenth Amendment. Incorporation of the Bill of Rights is a form of constitutional preemption that insures a baseline uniformity of the rights, privileges and immunities of all persons entitled to the protections of our Constitution.

Items of Note: Most guns in the United States are possessed by law-abiding citizens. Chicago's gun ban is not interfering with criminals and their illegal use of illegal firearms. This is evidenced by the fact that it is the murder capital of the United States and 11,000+ firearms are recovered and traced each year .

6. Arms Keepers

Interest: Arms Keepers is a nonpartisan volunteer organization that supports the reasonable regulation of handguns and rifles, instead of prohibition.

Argument: Incorporating Second Amendment rights via Substantive Due Process would violate both original meaning and precedent. Process of elimination rules out implausible readings of the Privileges or Immunities Clause and supports an interpretation that selectively incorporates the right to keep and bear arms without overturning precedents like *Slaughterhouse*. If the Court incorporates the right to keep and bear arms via the Privileges or Immunities clause, then the Court should not use the avoidance doctrine to bypass Due Process Clause analysis.

7. Buckeye Firearms Foundation and United States Concealed Carry Association

Interest: Buckeye is a non-profit organization dedicated to defending and advancing human and civil rights secured by law, specifically including the rights of Ohio citizens to own and use firearms for all legal activities. U.S. Concealed Carry Association is the largest organization in the United States dedicated to protecting and advancing the unique interests of those persons within the United States who may carry concealed weapons for all lawful purposes.

Argument: Chicago suffers from a consistently high violent crime rate and Chicago's disarmed residents are forced to rely exclusively on the police for protection. Incorporating the Second Amendment will restore the right of self-defense to residents of

Chicago and non-resident visitors alike. Non-resident visitors to Chicago are currently treated as second-class citizens.

Items of Note: People traveling to Chicago are forced to shed their constitutional right to self defense at both the Illinois state line and the Chicago city limits, as Illinois does not issue Firearm Owner I.D. cards to non-residents and Chicago makes no provision for non-residents to keep an operable handgun at hand for self-defense.

8. Calguns Foundation

Interest: Calguns Foundation is a nonprofit organization that supports the California firearms community.

Argument: Charles Fairman's and Raoul Berger's work on Fourteenth Amendment incorporation of the Bill of Rights is deeply flawed, inaccurate and should not be relied upon by the Court. Fairman's and Berger's suggestion that the Fourteenth Amendment is equivalent to the Civil Rights Acts (and thus limited to prohibiting discrimination rather than enforcing rights) is contrary to the text and purpose of both. They use unreliable sources and have a now-repudiated historical perspective of hostility toward the Reconstruction and the Fourteenth Amendment.

Items of Note: Brief written by noted Supreme Court/appellate practitioner Erik S. Jaffe.

9. California District Attorneys, et al.

Interest: *Amici* are district attorneys from California and Nevada who represent populous, mid-sized and rural counties, as well as several police and firearms associations, plus Bloomfield Press, the nation's largest publisher and distributer of gun-law books.

Argument: Incorporation of the Second Amendment under the Due Process Clause is a matter of first impression. The Second Amendment right is fundamental and thus incorporated. The Supreme Court has recognized a fundamental right to armed self-defense. Firearms are essential to the right of self-defense and federalism does not bar incorporation of a fundamental right.

Items of Note: In light of *Heller,* incorporation reduces to a simple syllogism: 1) all fundamental rights of the people enumerated in the Bill of Rights are incorporated by, and apply to, the states through the Fourteenth Amendment, 2) *Heller* found the Second Amendment embodied a fundamental right of the people to keep and bear arms, and therefore 3) the Second Amendment is

incorporated by, and applies to, the states through the Fourteenth Amendment.

10. Cato Institute and Pacific Legal Foundation

Interest: Cato is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. PLF is the largest nonprofit legal foundation devoted to defending property rights and economic freedom.

Argument: *Slaughterhouse* ignored the doctrine of paramount national citizenship that the Fourteenth Amendment's authors intended to constitutionalize. In addition to ignoring the legislative history of the Fourteenth Amendment, the *Slaughterhouse* majority violated basic rules of constitutional interpretation. Overruling *Slaughterhouse* would not threaten the vitality of substantive due process. *Slaughterhouse*'s refusal to acknowledge that the Fourteenth Amendment constitutionalized the theory of paramount national citizenship led it to make the critical error of narrowly defining the realm of rights protected by the Amendment.

Items of Note: Opponents of slavery "argued that national citizenship was not dependent upon state citizenship, but was paramount to it." It is now widely recognized that the Fourteenth Amendment's authors intended to overturn *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and provide federal protection against state actions that deprived individuals of their natural and civil rights.

11. Claremont Institute Center for Constitutional Jurisprudence

Interest: The Center is dedicated to upholding the principles of the American Founding, including the proposition that governments are established to secure unalienable rights, including the right to keep and bear arms in self-defense and as a check against government tyranny.

Argument: The Fourteenth Amendment recognized and adopted the widely-held historical consensus that the terms "privileges" and "immunities" embraced well-understood, fundamental rights. The right to keep and bear arms, recognized in the Second Amendment, is among the Privileges and Immunities that the Fourteenth Amendment protects from state deprivation.

Items of Note: Former Attorney General Ed Meese is one of the brief's signatories.

12. Constitutional Law Professors

Interest: *Amici* teach constitutional law and have published books and articles on the Fourteenth Amendment and the Bill of Rights: Richard L. Aynes, Jack M. Balkin, Randy E. Barnett, Steven G. Calabresi, Michael Kent Curtis, Michael A. Lawrence, William Van Alstyne, Adam Winkler

Argument: The Privileges or Immunities Clause protects substantive fundamental rights against state infringement. The Clause included an individual right to bear arms. Precedent does not prevent the Court from recognizing that the Clause protects an individual right to bear arms against state infringement. Reviving the Clause and limiting *Slaughterhouse* would bring the Court's jurisprudence in line with constitutional text and a near-unanimous scholarly consensus on the history and meaning of the Clause.

Items of Note: The brief was signed by Doug Kendall, Elizabeth Wydra, and David Gans of the Constitutional Accountability Center, a progressive organization that brought together academics of all political persuasions to argue for this originalist position.

13. Eagle Forum Education & Legal Defense

Interest: Eagle Forum Education & Legal Defense is a nonprofit corporation devoted to principles of limited government, individual liberty, and moral virtue.

Argument: The Second Amendment requires uniform application nationwide, and the right of self-defense is analogous to rights that are incorporated. Federalism sometimes protects against local tyranny as well as national tyranny.

Items of Note: "Here, the factionalism of irrational gun control has taken hold of a small, notoriously corrupt political unit (the City of Chicago) when such gun control would not be adopted by a larger political unit (the State of Illinois)."

14. Foundation for Moral Law

Interest: The Foundation is a national public-interest organization that promotes a return in the judiciary to the historic and original interpretation of the Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems.

Argument: The Court should be guided by the original meaning of the constitutional texts at issue. The right to keep and bear arms

is a pre-existing right naturally derived from the inalienable right of self-defense given by God. The Second Amendment right to keep and bear arms is a fundamental and deeply-rooted American right that easily satisfies the Court's criteria for incorporation through the Due Process Clause. Compared to total incorporation, however, selective incorporation is subjective and unreliable. *Heller* acknowledged that the Second Amendment did not create the right to bear arms, it "codified a pre-existing right." The natural right predates not just the Constitution but America and even England. It is the only right with "teeth," and the one by which the people can defend and maintain all their other rights.

15. Goldwater Institute and Wyoming Liberty Group

Interest: The Goldwater Institute is a tax-exempt organization advancing the public policies of limited government, economic freedom and individual responsibility. The Wyoming Liberty Group's mission is to facilitate the practical exercise of liberty in Wyoming through public policy options that are faithful to protecting property rights, individual liberty, privacy, federalism, free markets, and decentralized decision-making.

Argument: *Stare decisis* does not compel adherence to *Slaughterhouse* or its progeny because its erroneous interpretation of the Privileges or Immunities Clause has proven unworkable. The normal and ordinary meaning of that Clause incorporates the right to keep and bear arms and other guarantees of rightful liberty. Shifting incorporation of the right to keep and bear arms to the Privileges or Immunities Clause is workable and consistent with federalism because dual sovereignty is meant to secure rightful liberty.

16. Gun Owners of America, et al.

Interest: Each of the eight *amici* nonprofit groups was established for educational purposes related to participation in the public policy process, which purposes include programs to educate the public on statutes related to the right of citizens to bear arms.

Argument: The Chicago handgun ban unconstitutionally abridges the right to keep and bear arms, a privilege or immunity of U.S. citizens protected by the Fourteenth Amendment. No wholesale change in the Court's Fourteenth Amendment jurisprudence is required to rule that the Chicago ordinance unconstitutionally abridges petitioners' right to keep and bear arms.

Items of Note: Petitioners are both U.S. citizens and citizens of Illinois. As duel citizens, petitioners have "two political capacities, one state and one federal, each protected from incursion by the other." As U.S. citizens, petitioners are entitled to possess handguns in the privacy of their homes for self-defense.

17. Institute for Justice

Interest: The Institute for Justice is a public interest law firm committed to individual liberty and appropriate constitutional limits on governmental power, including restoring the Privileges or Immunities Clause to its proper role in the constitutional structure.

Argument: Blacks and whites desperately needed judicial protection of their right to keep and bear arms during reconstruction, but they never got it. The Fourteenth Amendment does not "incorporate" the Second Amendment—it protects the *pre-existing* right to arms from state and local governments. The Privileges or Immunities Clause aimed to eliminate constructive servitude by protecting the rights most incompatible with it. Interpreting the Clause according to its original public meaning would clarify and improve the Court's individual rights jurisprudence

Items of Note: Congress received reams of evidence during the drafting of the Fourteenth Amendment that freedmen and white loyalists were being systematically disarmed in the South to make them more vulnerable to intimidation, terror, and reprisals.

18. International Law Enforcement Educators and Trainers Association, et al.

Interest: *Amici* include law enforcement organizations, a civil rights organization, scholars, and public policy research institutions.

Argument: Ending handgun prohibition does not harm public safety. After Chicago's handgun ban, Chicago crime rates rose sharply relative to other large cities

Items of Note: Because some home-invasion burglaries turn into assaults or rapes, if the U.S. home-invasion burglary rate (13%) rose to a level similar to other nations' (45%), millions of additional home invasions would result in about 545,713 more assaults every year, raising the overall violent crime rate 9.4%. Ending handgun prohibition does not lead to disaster, as is shown in Washington, D.C. post-*Heller* (homicide rate fell 27%) and in South Carolina after the 1965 handgun sale ban was lifted. Police officers in Chicago are murdered at a rate 79% above the national average, and at a

higher rate than in most other large cities (sixth worst of the 25 largest cities). Chicago's handgun prohibition is so ineffective hat it has not even reduced the percentage of murders perpetrated with handguns—a percentage that has risen notably since the ban was imposed.

19. Jews For the Preservation of Firearms Ownership

Interest: JPFO is a non-profit, tax-exempt Wisconsin corporation with more than 5,000 members and many more Internet-based supporters. JPFO is an educational organization with a vital interest in preserving the individual right to keep and bear arms.

Argument: A right to keep and bear arms equally enforceable against the state and federal governments is essential to prevent the rise of tyranny and genocide. James Madison argued that the American people, unlike most of their counterparts in Europe, have the advantage of being armed, and thus a standing army in the hands of a tyrant could not overcome the collective armed defensive efforts of the citizenry.

20. Maryland Arms Collectors' Association

Interest: The Maryland Arms Collectors' Association is a nonprofit organization with members sharing a common interest in the collecting, preserving, using and/or studying of any type of arms and/or accessories pertaining to the arms field.

Argument: The Fourteenth Amendment was intended as "the amendment to enforce the Bill of Rights," and the Court has said that the Second Amendment is an individual right. Incorporation is possible under the Privileges or Immunities Clause or under the Due Process Clause. **Items of Note**: In the Founders' time, felons were without property rights, essentially civilly dead. The insane and mentally incompetent were not civilly dead but had lost the right to control their property. The right to bear arms only extended to trustworthy people, not to felons or the unbalanced.

21. National Shooting Sports Foundation, Inc.

Interest: The National Shooting Sports Foundation, Inc. is the trade association for the firearms, ammunition, hunting, and shooting sports industry.

Argument: Firearms were a principal and ubiquitous tool of survival in colonial America. The Second Amendment derives from

the American's refusal to be disarmed. The history of the right to bear arms among the states confirms the fundamental nature of that right.

Items of Note: Firearms were commonly viewed as essential to protecting colonists from attacks by Native Americans, slaves, and wild animals. Firearms also proved superior to other weapons in hunting--so much so that Native Americans, when possible, abandoned their traditional weaponry for the new firearms. One report estimates firearms ownership in 1774 at over fifty percent.

22. Professors of Philosophy, Criminology, Law and Other Fields

Interest: *Amici* are distinguished scholars from various fields who are concerned about ensuring accuracy in the scholarship advanced in important matters of public policy such as those involved in this case.

Argument: Philosophers, both at the time of the Founders and at present, have understood that the cardinal right to self-defense embodies a right to arms. Criminological data undermines the frequently-cited bases for blanket gun prohibitions and supports the private ownership of firearms by ordinary citizens.

Items of Note: The vast majority of homicides and violent gun crimes are committed not by ordinary, law-abiding citizens, but by those with criminal backgrounds and mindsets. Firearms uniquely give a victim a reliable, realistic advantage over an attacker. To religiously-oriented thinkers like Samuel Adams, self-defense was as much a duty as a right. Colonial preachers reasoned that God gives men life and, accordingly, to fail to defend life was to denigrate God's gift and to frustrate his plan.

23. Rocky Mountain Gun Owners and National Association of Gun Rights

Interest: The RMGO is Colorado's largest State-based gun lobby, dedicated to protecting the right to keep and bear arms. The NAGR is assists state-based gun-rights organizations, including many in the American West, by providing information and lobbying support.

Argument: The original understanding of the right to keep and bear arms has been preserved in the American West and is an essential component of citizenship.

Items of Note: The West avoided much of the racial motivation behind gun control (slavery was outlawed until 1857). Since possession of arms for self-defense and protection against tyranny have historically been fundamental elements of Western law and culture, under the *Duncan* test, this is strong evidence that Second Amendment rights are necessary to ordered liberty.

24. SAFARI CLUB INTERNATIONAL

Interest: SCI is a nonprofit corporation with a membership of approximately 53,000. Its missions are the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool.

Argument: Without incorporation of the Second Amendment through the Fourteenth Amendment, the states will be free to unduly restrict firearm use. Regardless of their intent, firearms bans affect the firearms hunters' use. Without Second Amendment protections, arbitrary firearms controls could end valuable and beneficial hunting practices

Items of Note: Incorporation of the Second Amendment is necessary to prevent bans and restrictions that could interfere with valued and beneficial hunting activities. Recreational hunting is a tool for wildlife management and conservation. Six states have no constitutional protections of the right to keep and bear arms. Others offer only conditional or limited protections. A significant number of hunters hunt with handguns. A survey of active hunters indicated that eight percent used handguns for their hunting activities.

25. SENATORS KAY BAILEY HUTCHINSON AND JON TESTER, 56 OTHER SENATORS, AND 251 CONGRESSMEN

Interest: Congress has a long history of protecting the right of the people to keep and bear arms. It was Congress, after all, that proposed the Second Amendment, the rest of the Bill of Rights, and the Fourteenth Amendment. Congress has enacted statutes such as 42 U.S.C. § 1983 that protect and enforce the Second Amendment against state action.

Argument: The right to keep and bear arms is uniquely suited to incorporation through the Fourteenth Amendment. The structure of the Constitution and the nature of the individual right to keep and bear arms require the states to respect that right. State restrictions on the right to keep and bear arms would threaten to impede Congress' war powers.

Items of Note: The history of the adoption of the Fourteenth Amendment is replete with references to protecting the right to keep and bear arms. The original Constitution restricted the states' ability to infringe the right to keep and bear arms to the extent that doing so would impair Congress' powers under the Militia Clauses.

26. State Firearm Associations

Interest: The State Firearms Associations include over 40 state firearm associations representing the interests of millions of U.S. citizens and seeking to ensure the right of the people to keep and bear arums is properly recognized as a fundamental right incorporated against the states.

Argument: *Dred Scott, Cruikshank* and their progeny reflect a sad legacy, and the Court should not perpetuate their obsolete anti-incorporation views. Rights that are deeply rooted in this nation's history and traditions, or that are implicit in the concept of ordered liberty, are incorporated as against the states under the Fourteenth Amendment. Second Amendment rights are deeply rooted in this nation's history and traditions, are implicit in the concept of ordered liberty and are properly incorporated as against the states under the Fourteenth Amendment

Items of Note: Cases like *Cruikshank* and *Presser* were written during a time of open animus toward groups such as African-Americans and labor unions, and they bear the stigma of goal-oriented decisions. The Court has long since disavowed such biases.

27. State Legislators

Interest: *Amici* are 891 state government officials from all 50 States. They seek the assistance of the Court in securing the fundamental rights of their constituents and resolve ongoing uncertainty over the validity of state firearm regulations.

Argument: It will do no harm to our system of federalism for the Court to find the Second Amendment incorporated as against the states under either the Due Process Clause or the Privileges or Immunities Clause, or both. Incorporation via the Privileges or Immunities Clause provides an independent basis to reach the same result. The Court's historic precedent under this clause should not be construed in a manner to compromise the fundamental rights of U.S. citizens.

Items of Note: Principles of federalism do not trump fundamental rights. Relying on the factual findings of *Heller,*

reinforced by its own analysis, the *Nordyke* panel easily determined that the right to keep and bear arms is fundamental.

28. TEXAS AND 37 OTHER STATES

Interest: *Amici* are 38 states that serve as the guardians of their citizens' constitutional rights, including the Second Amendment right to keep and bear arms, as a critical liberty interest, essential to preserving individual security and the right to self-defense.

Argument: The Second Amendment applies to the states through the Fourteenth Amendment. The Due Process Clause incorporates "fundamental" rights. The right to keep and bear arms was considered "fundamental" when the Fourteenth Amendment was adopted and it remains so to this day.

Items of Note: The debates around the drafting of the Fourteenth Amendment are replete with evidence that the Second Amendment was understood to protect a fundamental right.

29. THE HEARTLAND INSTITUTE

Interest: The Heartland Institute is a nonprofit public policy research organization based in Chicago. Its mission is to discover, develop, and promote free-market solutions to social and economic problems.

Argument: Chicago's handgun ban is an utter failure; handgun murders have soared during the 25 years the ordinance has been in effect. The police have no legal duty to protect citizens from crime. The police have no practical ability to protect all citizens from every crime.

Items of Note: According to Chicago Police Department data, the percentage of murders committed with handguns has skyrocketed since 1982 and handgun murder rates per 100,000 population more than doubled in the 1990s over 1982 levels. In 2008, these rates were up more than 60% over 1983. Approximately 83% of Americans "will be victims of violent crime at some point in their lives" and "in any given year serious crime touches twenty-five percent of all households."

30. THE PARAGON FOUNDATION

Interest: The Paragon Foundation provides education, research and the exchange of ideas in an effort to promote and support constitutional principles, individual freedoms, private property rights and the continuation of rural customs and culture.

Argument: The right of the people to keep and bear arms, preserved by the Second Amendment, is a fundamental right. Engaging in the Fourteenth Amendment inquiry prescribed by *Heller* leads to the conclusion that the Second Amendment right to keep and bear arms is incorporated as against the states by the Fourteenth Amendment's Due Process Clause. Reliance on federalism to validate local handgun bans is misplaced.

Items of Note: It would be Orwellian to relegate the Second Amendment to a lower tier of constitutional value that is not worthy of incorporation, i.e. all fundamental constitutional rights are equal but some rights are more equal than others.

31. The Rutherford Institute

Interest: The Rutherford Institute is a Virginia-based civil liberties organization that specializes in providing pro bono legal representation to individuals whose civil liberties are threatened or infringed upon, and in educating the public about constitutional and human rights issues.

Argument: Since the adoption of the Bill of Rights, the Court has recognized that a substantial number of its amendments must be applicable to and restrain the several states, either through the Privileges or Immunities Clause or the Due Process Clause. Rather than permit an illogical and indefensible jurisprudence under which the rights of citizens would be protected against infringement by the federal government whilst simultaneously being susceptible to erosion and nullification by state and local governments, the Court should now recognize that the Fourteenth Amendment makes the fundamental individual right secured by the Second Amendment enforceable against the states and their political subdivisions.

Items of Note: "If the argument against allowing handguns in citizens' homes is motivated by safety concerns, the legislative remedy should be the adoption of stricter state laws on the storage of handguns, not to their outright ban. Safety concerns may also be effectively addressed by laws requiring background checks prior to the purchase of a firearm. In fact, a bipartisan 2009 survey of 612 registered voters by the Illinois Campaign to Prevent Gun Violence revealed that 90% of those asked were in favor of background checks for all gun sales. Most importantly, such laws would not threaten or infringe upon the right guaranteed in the Second Amendment, but would simply place reasonable restrictions upon that right as are in the public interest."

32. Women State Legislators and Academics

Interest: *Amici* are an ad hoc group of 75 women state legislators and academics, asserting that women have a fundamental right to self-defense and that possession of a handgun in the home should be a legal option for any law-abiding woman.

Argument: The Second Amendment is a fundamental right that should be incorporated under the Due Process Clause. For women, the fundamental right to self-defense must include the right to possess a handgun in the home. The harms of denying women the choice to possess handguns in the home exceed the social costs claimed for handgun ownership.

Items of Note: For millions of women, the ability to defend themselves effectively is not an activity or an interest, but the very means by which they protect their personal autonomy and bodily privacy. Since Chicago cannot provide a safe environment for women nor guarantee police protection, the City cannot disrespect a woman's privacy interests in her home.

RESPONDENTS' AMICI

1. American Cities, Cook County, Illinois, and Police Chiefs

Interest: *Amici* comprise 10 major American cities (Baltimore, Cleveland, Columbus, Oakland, Philadelphia, Portland, Richmond, Sacramento, San Francisco, and Seattle, Washington); Cook County, Illinois; the Commissioner of the Philadelphia Police Department, and the Chief of Police for the City of Seattle. Each amicus is actively engaged in efforts to reduce the costs, both social and economic, inflicted by gun-related violence upon local communities.

Argument: In *Heller*, the Court reaffirmed that the Second Amendment has its own structural role in preserving what the Founders viewed to be a cornerstone of a free country—namely, the states' ability to raise citizen militias, given that standing armies were disfavored. Unlike the First Amendment, however, the Second Amendment does not also safeguard a right for its own sake; it does so only as a means to the end of preserving citizen militias. Also, unlike speech, bearing arms for self-defense almost always gives rise to a risk of violence and breach of peace. As a result, the Second Amendment is not central to the functioning of a free and democratic government or implicit in the concept of ordered liberty. The Second Amendment operates as "a limitation only upon

the power of Congress and the National government, and not upon that of the States." Incorporation of the Second Amendment right against the states could potentially subject to constitutional review numerous state and local laws that regulate not just the right to possess firearms, but also the propriety of their use in different self-defense situations.

Items of Note: The Second Amendment was designed to prevent the federal elimination of state militias, and is subject to presumptively valid regulatory measures. Incorporation of the Second Amendment against the states would intrude on the states' core police powers and disrupt the federal-state balance struck by the Constitution.

2. ANTI-DEFAMATION LEAGUE

Interest: The ADL was founded to stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike. It has long sought to combat extremists, including through advocacy for strong gun control legislation.

Argument: The significant threats posed by armed extremist groups supports a decision that Second Amendment rights are not incorporated through the Fourteenth Amendment. Incorporating the Second Amendment empowers extremists by increasing access to firearms and calling current Due Process Clause protections into question. Judicial restraint is appropriate because scholars and lower courts have only begun to interpret *Heller*.

Items of Note: ADL data indicate that there have been more than 100 domestic extremist-related killings in the United States since 2005, more than half of which involved a firearm. Incorporating the Second Amendment through the Privileges or Immunities Clause simultaneously calls into doubt Due Process protections enjoyed by non-citizens (DP protects "people" while PI protects "citizens") and grants broader rights to extremists to arm themselves against the fantasized non-citizen "threat."

3. ASSOCIATION OF PROSECUTING ATTORNEYS AND DISTRICT ATTORNEYS

Interest: *Amici* are state and local prosecutors and the communities they protect who rely upon the enforcement of state and local gun laws in prosecuting violent crimes.

Argument: Gun violence is a serious problem in urban areas and has lead many jurisdictions to enact gun laws in order to reduce instances of violent crime. State gun laws play an important role

in preventing escalation of violence in already dangerous law-enforcement activities.

Items of Note: Ninety-four Percent of all gang-related homicides in 2004 involved firearms. About 93% percent of law enforcement officers killed in the line of duty in the U.S. between 1997 and 2006 were killed with firearms. The proportion of homicides and robberies between 1994 and 1996 that involved guns was about six percent lower in Cook County, which is dominated by Chicago, compared to the other 200 largest counties in the country. Incorporation would create a legal environment whereby every house could be defended by a firearm, substantially increasing the risk of miscalculation and escalation, thereby endangering police and citizens alike. Incorporation would further complicate prosecution of violent crimes by providing defendants with a new basis to challenge any arrest in which the arrestee was armed.

4. BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.

Interest: *Amici* are governmental, civic, and religious organizations actively engaged in efforts to reduce handgun violence and the destructive impact it has on the local communities and urban centers they serve.

Argument: The Second Amendment's structure precludes its incorporation. The Due Process Clause does not support incorporation because a fundamental right to have any weapon that is in common use is not essential to ordered liberty. Even if the Court incorporates the right to keep and bear arms, the right remains subordinate to the greater right of all individuals to personal security. The right to arms (even for personal defense) is fundamentally different from other liberties retained by individuals because of their inherent lethality. The Second Amendment was intended to prevent the federal government from destroying state militias, which, when "well-regulated," stood as a check against federal tyranny.

Items of Note: States and local legislatures have always retained their police power to ban common use weapons that posed too great a danger to public safety, so long as access to other weapons sufficient for the asserted needs (such as self-defense) is preserved. The Second Amendment should not be incorporated through the Privileges or Immunities Clause because adoption of a virtually unlimited natural-law-rights definition of "privileges and immunities" would effectively replace elected legislatures with an imperial and unelected judiciary.

5. Brief for the Villages of Winnetka and Skokie, Illinois, the City of Evanston, Illinois, the Illinois Municipal League, and the International Municipal Lawyers Association

Interest: *Amici* are political subdivisions of the State of Illinois concerned with gun violence and associated societal effects.

Argument: Petitioners do not meet the high burden of justification that passing judgment on local legislation requires. The framers of the Fourteenth Amendment did not intend to divest states of their authority to enact neutral, police-power ordinances such as firearm regulations. Local and state regulation of firearms has been nearly exclusive for most of the nation's history. Federal regulation would preclude effective locality-specific regulation, would disrupt the balance of federalism, and would burden the federal courts unduly by "thrust[ing] the Federal Judiciary into an area previously left to state courts and legislatures."

6. Educational Fund to Stop Gun Violence

Interest: EFSGV is an organization that seeks to secure freedom from gun violence through research, strategic engagement, and effective policy advocacy. EFSGV has a strong interest in stemming the tide of gun violence that threatens lives and our communities.

Argument: The Second Amendment should not be incorporated, but if it is, the Court must clarify that the right incorporated does not include an insurrectionary component. The Second Amendment does not protect a right to violent confrontation against the government. An incorporated individual right to keep and bear arms to resist governmental authority cannot be reconciled with our existing constitutional order, national sovereignty, or our democratic form of government.

Items of Note: An insurrectionist right would glorify the murder of law enforcement officials (and, collaterally, that of innocent bystanders and children). The revolutionary militia was not composed of men working separate from government; they were acting collectively for the common defense and within a clear set of legal structures.

7. English/Early American Historians

Interest: *Amici* are scholars and professional historians who have an interest in the Court having a well-informed and accurate understanding of the Anglo-American tradition to "have arms" from which the Second Amendment originated.

Argument: The right to "have arms" embodied in the English Declaration of Rights did not intend to protect an individual's right to possess, own, or use arms for private purposes; rather, it referred to a right to possess arms in defense of the realm. Contrary to the conclusion of the work relied upon by the *Heller* Court, the "have arms" provision was the result of a political dispute over whether ultimate control over the militia resided with the sovereign, or in Parliament, rather than a right to have arms for private self-defense.

Items of Note: The King's grant of power to Catholics to arm the militia and disarm persons deemed "disaffected" gave rise to a fear amongst Protestants that England would be overthrown by Catholics. It was this fear that would lead to the drafting of the Declaration of Rights' "have arms" provision. Not a single document references any claim that the British violated the colonists' right to "have arms."

8. HISTORIANS AND LEGAL SCHOLARS

Interest: *Amici* are six historians and legal scholars who have each studied, taught courses about, and/or published scholarship on the Fourteenth Amendment and its framing: Bret Boyce, Jonathan Lurie, William G. Merkel, William Nelson, Donna Schuele, George C. Thomas III.

Argument: In determining whether the Second Amendment individual right defined in *Heller* is fundamental to our scheme of ordered liberty, the Court will be aided by an examination of the historical context. The Court should examine the history of the underpinnings of the right, the early modern theories of individual and collective self defense, the rise of volunteer militias, the Pennsylvania Constitution, the congressional debates, and the collective rights motivation behind adoption of the Second Amendment. This history demonstrates that the individual right defined in *Heller* is not implicit in and fundamental to our scheme of ordered liberty.

Items of Note: The collective right of self-defense motivated adoption of the Second Amendment. The Second Amendment left the right of individual self-defense unchanged.

9. LAW PROFESSOR AND STUDENTS

Interest: *Amici* are the professor (Douglas A. Berman) and students from an Ohio State Law School seminar on the Second Amendment and seek to enhance the Court's understanding of how

to apply the Second Amendment to state laws if that amendment is to be incorporated.

Argument: Localities regulated firearms during the Framing Era, and have continued to do so to present day. Constitutional doctrine and practical considerations justify a less rigorous form of constitutional scrutiny of local firearm regulation.

Items of Note: The current legal regime poses a problem for localities. Localities are responsible for implementing and enforcing state statutes, but are also subject to liability under § 1983 if its actions are at some point found unconstitutional. Given this threat, the Court's jurisprudence should provide express attentiveness and deference to local needs. For example, every county in Virginia has adopted different firearm regulations tailored to its needs.

10. Oak Park Citizens Committee for Handgun Control

Interest: *Amicus* is an unincorporated, voluntary association of Oak Park residents who lobbied the village board to enact an ordinance banning handguns over 25 years ago, and who later organized the campaign in support of the ban in a public referendum called by the board.

Argument: There is nothing incongruous about states and local communities adopting different standards concerning the role handguns play, if any, in ensuring the right of self-defense, especially in light of the vastly different circumstances that communities face regarding public safety implications of handguns. To incorporate the Second Amendment right to possess handguns in one's home would portend a massive federal intrusion into the administration of the right to self-defense that is as unwarranted as it is unnecessary. There is no reason in law or sound public policy why any supposed contrary nationwide judgment regarding the quintessence of handgun ownership in American society should trump the more specifically tailored considerations of the people of Oak Park and the role handguns play in their community.

Items of Note: The circumstances that warrant allowing an individual to use a handgun in self-defense, if any, will differ depending on demographic and cultural characteristics that vary widely across the United States. Before the ban, Oak Parkers were much more likely to take their own lives with handguns, or to injure or kill another in a domestic dispute or accident, than they were to defend themselves with a handgun kept in the home.

11. Organizations Committed to Protecting the Public's Health, Safety, and Well-Being

Interest: *Amici* are nine not-for-profit organizations united by a commitment to protecting the American public's health, safety, and well being. Each organization is dedicated to preventing violence and injury by removing handguns from homes and communities across the country.

Argument: Public health research may be relevant to assessing the constitutionality of the statutes at issue. Empirical data regarding the effect of handguns on public health may bear on constitutionality. Guns in the home increase the risk of suicide, homicide, and death from accidental shooting. Guns pose a particular risk to women, children and adolescents.

Items of Note: Studies suggest that the challenged statutes may prevent a substantial number of suicides, homicides and accidental fatal gun shootings. Gun safety education is ineffective for children. Because children cannot be made "gun safe," their environments must be made safe by removing handguns.

12. Professors of Criminal Justice

Interest: *Amici* are scholars (James Alan Fox and Jack Levin of Northeastern University) who teach, write, and speak about criminal justice.

Argument: The Chicago handgun ban has reduced handgun violence. Chicago's handgun ban reduces the supply and increases the cost of handguns. *Amici* in support of petitioners misconstrue the statistical data concerning the impacts of the Chicago handgun ban.

Items of Note: The United States experienced a 4.3% drop in intimate partner homicides with female victims from the pre-ban period to the post-ban period. Chicago's drop over the same period was 27.2%. Research shows that even when sub-statute guns from out-of-state enter a jurisdiction with supply-side regulations, such as Chicago, the price of such out-of-state, illegally imported guns is higher, thereby inhibiting demand. The number of homicides that occurred in victims' homes declined in Chicago after the enactment of the handgun ban, indicating that Chicago residents are actually safer in their homes.

13. Representatives Carolyn McCarthy, Mike Quigley, and 53 Other Members of Congress

Interest: *Amici* are members of Congress bound by oath or affirmation to support the Constitution and having an interest in assisting the Court to appropriately construe the Second and Fourteenth Amendments and ensuring the Court considers Congress's experience interpreting and applying those amendments.

Argument: The Second Amendment has never been understood to abrogate the police powers of the states to enact gun control legislation that is reasonably necessary for the public safety. Congress has long recognized and supported the right of states to enact locally appropriate measures restricting gun possession and use. Incorporation of the Second Amendment is not necessary to the effective exercise of Congress's War and Militia powers.

Items of Note: The majority of state constitutions adopted at the time the Fourteenth Amendment was ratified included a right to bear arms, but specifically granted the state legislatures the power to regulate the exercise of that right. Congress enacted the Federal Firearms Act of 1938 in order to establish minimum federal gun controls and to aid state and local efforts at tighter control by prohibiting transactions that would violate local laws. With the enactment of the Gun Control Act of 1968, Congress continued to recognize and support the right of states and local governments to restrict the sale and possession of firearms. Incorporation of the Second Amendment is not necessary to ensure that firearms suitable for the national defense are privately owned because the possession of such firearms is already lawful in every state.

14. States of Illinois, Maryland, and New Jersey

Interest: These states assert an interest in using their police powers to enact and enforce laws governing firearms.

Argument: The history of the Second and Fourteenth Amendments shows that the Framers viewed the right to bear arms as a check on federal, not state, power. Incorporation would strip decision-making from state legislatures and courts and place it in the hands of federal courts, which would have to address a host of new challenges with little guidance from constitutional text or history. If the Court were to incorporate the Second Amendment via the Privileges or Immunities Clause, it would open the door to incorporation of still more rights—such as the Fifth Amendment's grand jury right and the Seventh Amendment's civil jury trial right—

contrary to longstanding practice and the states' well-founded reliance to the contrary.

Items of Note: The English common law recognized a need to regulate firearms only as a check against royal power, while the people, acting through Parliament, retained plenary authority over firearm use and possession; conversely, Americans did not fear oppression by regulation from the states. The Fourteenth Amendment was designed to place the constitutionality of the Freedman's Bureau and other civil rights legislation beyond doubt. The states are adept at balancing the legitimate interests of gun owners against the need for reasonable regulation of firearms and although *Heller* indicated that many firearms regulations would survive Second Amendment scrutiny, deciding which laws pass muster will thrust federal courts into a morass of standardless line-drawing.

15. 34 Professional Historians and Legal Historians

Interest: *Amici* are professional historians and legal historians who have taught courses and published scholarship on the Second Amendment, Reconstruction amendments, federalism, and legal and constitutional history.

Argument: States possessed plenary authority during the antebellum period to regulate arms for public safety, and the Fourteenth Amendment did not reduce this authority. For example, **t**he Texas Constitution of 1868 was one of several to make "the right to keep and bear arms" expressly subject to "such regulations as the legislature may prescribe." These express provisions would have made little sense if those states believed that the Fourteenth Amendment barred such forms of regulation in any event.

16. United States Conference of Mayors

Interest: The U.S. Conference of Mayors is the official non-partisan organization of all U.S. cities with populations of 30,000 or more. Its members suffer a disproportionate share of gun violence in the United States and have a common interest in maintaining the flexibility to address this problem in the manner local officials determine to be most effective and appropriate.

Argument: Gun control laws play a central role in fighting violent crime. Stringent regulation of concealable weapons is critical to the ability of cities to control violent crime. The Fourteenth Amendment does not protect the Second Amendment right to keep

and bear arms. A right's inclusion in the Bill of Rights is not enough to warrant incorporation. If that were sufficient for incorporation, the Court would have adopted a regime of total incorporation. The Second Amendment protects a largely obsolete 18th-century right.

Items of Note: Gun control laws play an important role in decreased crime rates. Confining the right to bear arms to a Framing-era understanding (as *Heller* suggests) would also imperil the use of stop-and-frisk tactics. The 18th-century right to bear arms has given way to a more vigorous conception of state and local police powers. In high-crime, gang-ridden neighborhoods, a right to bear arms seems more likely to imperil ordered liberty than to secure it.

AMICI IN SUPPORT OF NEITHER PARTY

1. NAACP Legal Defense & Education Fund

Interest: The NAACP Legal Defense is a nonprofit corporation seeking to assist African-Americans in securing their civil and constitutional rights through litigation and advocacy.

Argument: In determining whether the Second Amendment right is incorporated as against the states, the Court should look first to its existing due process framework. The Due Process Clause, which the Court has the option of using to answer the question presented, has proven adequate to the task of ensuring the applicability of constitutional guarantees to the states. Any revival of the Privileges or Immunities Clause should supplement and not supplant existing due process protections; should the Court choose to acknowledge the mistakes of the Reconstruction-era Court and correct them, it must protect the Due Process Clause precedents that safeguard the constitutional protections that have been essential to the development of our democracy.

2. Brady Center to Prevent Gun Violence, International Association of Chiefs of Police, International Brotherhood of Police Officers, and National Black Police Association

Interest: *Amici* are groups that seek to ensure that the Second Amendment does not stand as an obstacle to strong gun laws that help police protect the public from gun crime and violence.

Argument: Deferential review of firearms laws is appropriate in light of the unique public welfare concerns implicated by the

right to possess and use firearms. Anglo-American jurisprudence has long recognized that states have broad powers to protect the public by regulating firearms, and such laws have been and continue to be reviewed with deference. Even fundamental constitutional rights that do not create risks akin to the risk of gun possession are not necessarily subject to strict scrutiny. The Court should adopt the reasonable-regulation test for assessing Second Amendment challenges

Items of Note: Researchers have found that as the rate of gun ownership in a community increases, the homicide rate increases as well. One study estimated that the number of gun crimes exceeded the number of self-defense gun uses by a ratio of between 4-to1 and 6-to-1. In light of the unparalleled societal risks associated with firearms, the Second Amendment should not prevent citizens, through their elected representatives, from enacting reasonable gun laws.

No. 08-1521

In The

Supreme Court of the United States

OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,
Petitioners,

v.

CITY OF CHICAGO, et all,
Respondents

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

PETITIONERS' BRIEF

QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

PARTIES TO THE PROCEEDINGS

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. and Illinois State Rifle Association initiated the proceedings below by filing a complaint against Respondent City of Chicago and its Mayor, Richard M. Daley, in the United States District Court for the Northern District of Illinois. Mayor Daley was dismissed at an early stage of the

proceedings and is no longer a party in the matter.

The day after Petitioners filed their complaint in the District Court, similar cases were brought against Respondent City of Chicago and Mayor Daley; and the Village of Oak Park, Illinois and its President, David Pope, by other parties. The plaintiffs in the related Chicago case were the National Rifle Association of America, Inc., Kathryn Tyler, Anthony Burton, Van F. Welton, and Brett Benson. The plaintiffs in the related Oak Park case were the National Rifle Association of America, Inc., Robert Klein Engler, and Gene A. Reisinger.

The three cases were related, but not consolidated, in the District Court. Petitioners and the related case plaintiffs appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit, which consolidated the appeals.

STATEMENT OF THE CASE

1. Respondent City of Chicago requires inhabitants to register their firearms, but generally prohibits the registration of handguns. Chi. Mun. Code §8-20-040(a), 8-20-050(c). This handgun ban functions identically to that struck down as infringing the Second Amendment rights of District of Columbia residents. *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008).

Firearm registrants must immediately notify police of any changes in their registration information, including the loss or other disposition of a gun or registration certificate. Chi. Mun. Code §820-140. However, Respondent requires annual reregistration of firearms, initiated at least sixty days prior to the registration's expiration. Chi. Mun. Code §8-20-200. Re-registration requires the payment of additional fees and re-submission of all initial registration materials. *Id.*

If the annual re-registration process is not timely completed, the particular gun whose registration lapses becomes "unregisterable" and thus illegal to possess in Chicago. *Id.* An identical penalty befalls any firearm (and by extension, any owner of that firearm) that is acquired prior to its registration. Chi. Mun. Code §8-20-090.

On June 11, 2008, Respondent enacted a 120-day amnesty period allowing the re-registration of firearms whose registration had lapsed. The amnesty ordinance was sponsored by a city alderman who had neglected to timely re-register his firearms. App. 53.

A first violation of Chicago's ban on the ownership or possession of unregistered firearms within the home is punishable either by a fine ranging from $300 to $500, incarceration ranging from ten to ninety days, or both. Chi. Mun. Code §8-20-250. Subsequent violations are punishable by a fine of $500 and incarceration ranging from ninety days to six months. *Id.*

2. Respondent denied each individual Petitioner's attempt to register a handgun pursuant to the handgun registration ban. Pet. App. 34-45. Petitioners Orlov and David Lawson were also denied handgun registrations pursuant to the city's pre-acquisition registration requirement. Pet. App. 37, 40.

As the registered owners of long arms, Petitioners McDonald and David Lawson are subjected to the city's re-registration requirements. App. 40-41, 44. The registration for one of Petitioner David Lawson's rifles lapsed, rendering it unregisterable. App. 41.

Petitioner David Lawson also acquired a rifle through the federal Civilian Marksmanship Program ("CMP"), which sent the rifle directly to his Chicago home, rendering it automatically unregisterable as it was acquired prior to its possible registration. Respondent denied Lawson's administrative appeal of its refusal to register the CMP rifle. Pet. App. 46-48, App. 41-42.

3. On June 26, 2008, Petitioners filed suit in the United States District Court for the Northern District of Illinois challenging Chicago's handgun ban, reregistration and pre-acquisition registration requirements, and non-registrability penalty, as violating their Second and Fourteenth Amendment rights.

Petitioners moved for summary judgment on July 31, 2008. The District Court advised that the case should be resolved on a motion to narrow the legal issues under Fed. R. Civ. P. 16. Petitioners thereafter filed such a motion, seeking to establish the Second Amendment binds Respondent under the Fourteenth Amendment's Privileges or Immunities and Due Process Clauses.

On December 4, 2008, the District Court denied Petitioners' Rule 16 and summary judgment motions, citing *Quilici* v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982). Pet. App. 18. *Quilici* followed *Presser* v. *Illinois*, 116 U.S. 252 (1886), declining to apply the Second Amendment to the states through the Privileges or Immunities Clause. *Quilici* had refused consideration of "historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments,"

Quilici, 695 F.2d at 270 n.8, key aspects of the selective incorporation analysis.

Because it held the Second Amendment inapplicable to Respondent, the District Court subsequently granted Respondent's oral motion for judgment on the pleadings. App. 83-84.

On appeal, the Seventh Circuit affirmed, holding the case controlled by this Court's opinions in *United States* v. *Cruikshank*, 92 U.S. 542 (1876), *Presser*, *supra*, and *Miller* v. *Texas*, 153 U.S. 535 (1894). Pet. App. 3. The lower court reached this conclusion despite acknowledging that these three cases "did not consider [the] possibility, which had yet to be devised when those decisions were rendered," that the Second Amendment is selectively incorporated. Pet. App. 2. Respondents acknowledge that the court below did not address the selective incorporation question. Br. in Opp'n, 5.

SUMMARY OF ARGUMENT

1. Although this Court has never squarely addressed either the original public meaning or legislative history of the Fourteenth Amendment, it nonetheless follows a tradition of upholding individual liberty. Should this Court do what the lower courts did not, and apply settled precedent to determine whether the Second Amendment is incorporated as against the States via the Fourteenth Amendment's Due Process Clause, reversal is mandatory.

And yet this Court's various approaches to the Fourteenth Amendment fall short of upholding this provision's essential promise. State violations of rights understood and intended by the ratifying public to receive significant Fourteenth Amendment protection are not meaningfully secured by federal courts. Moreover, the failure to honor the Fourteenth Amendment's original public meaning foments confusion and controversy as courts pursue other approaches to protecting core individual rights.

This case presents a rare opportunity to correct a serious error, honor the Fourteenth Amendment's true meaning, and bring a needed measure of clarity to this Court's civil-rights jurisprudence.

2. The Fourteenth Amendment's Privileges or Immunities Clause forbids the States from abridging civil rights, including those codified in the Bill of Rights. This was the frequently expressed, never controverted purpose of the Amendment's framers, an understanding shared by the ratifying public. With the Fourteenth Amendment,

Americans long dissatisfied with state treatment of free blacks and abolitionists broadly established federal birthright citizenship for all people. And they imbued that citizenship with significant protection for the individual rights that states rampantly violated, including, unambiguously, the right to keep and bear arms.

The language chosen to contain the rights of federal citizenship—"privileges or immunities"— enjoyed an established definition. Long synonymous with "rights" generally, the term acquired additional heft with a landmark decision interpreting Article IV, Section 2's guaranty that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" to encompass a broad range of rights believed naturally inherent in human beings and secured by any free government. *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). On the Civil War's eve, this Court invoked "privileges and immunities" to define citizenship, albeit in the negative sense describing what would be denied to African Americans. In reaction, the Fourteenth Amendment reflected the broad common usage of "privileges or immunities," including the pre-existent natural rights of the sort identified in *Corfield* and the personal rights guaranteed by the Bill of Rights.

3. The Privileges or Immunities Clause was all but erased from the Constitution in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Slaughter-House* refused to consider the clause's original public meaning or its framers' well-known intent. Instead, the *Slaughter-House* majority identified substitute language in place of Article IV's actual text, and utilized this new constitutional language to justify the imposition of its own policies upon the Fourteenth Amendment's contrary command.

SlaughterHouse transformed the Framers' broad protection of individual liberty, commonly understood, into a clause securing only the most obscure rights, rarely exercised by any American and with which the States could not ordinarily interfere even had they the will to do so. It "defeat[ed], by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted . . . turn[ing], as it were, what was meant for bread into a stone." *SlaughterHouse*, 83 U.S. at 129 (Swayne, J., dissenting).

As mandated by *SlaughterHouse*'s rationale, this Court soon held that the Privileges or Immunities Clause did not secure Americans' First and Second Amendment rights against state action. *Cruikshank*, 92 U.S. 542; *Presser* v. *Illinois*, 116 U.S. 252 (Second Amendment); *cf*. *Miller*, 153 U.S. 535 (stating in dicta that the Second and Fourth

Amendments are inapplicable to states).

SlaughterHouse's illegitimacy has long been allbut-universally understood. It deserves to be acknowledged by this Court. Because *SlaughterHouse* rests on language not actually in the Constitution, contradicts the Fourteenth Amendment's original textual meaning, defies the Framers' intent, and supplies a nonsensical definition for Section One's key protection of civil rights, overruling this error and its progeny remains imperative. No valid reliance interests flow from the wrongful deprivation of constitutional liberties. The reliance interest to be fulfilled remains Americans' expectation that the constitutional amendment their ancestors ratified to protect their rights from state infringement be given its full effect.

4. The Fourteenth Amendment's requirement that no person be deprived of life, liberty or property without due process of law has long been properly understood to offer substantive as well as procedural protection. Accordingly, most of the rights secured in the first eight amendments have been deemed incorporated as against the States.

The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968), or "necessary to an Anglo-American regime of ordered liberty," *id.* at 150 n.14. *Duncan* looks to the right's historical acceptance in our nation, its recognition by the States (including any trend regarding state recognition), and the nature of the interest secured by the right. The right to bear arms clearly satisfies all aspects of the selective incorporation standard.

ARGUMENT

I. THE RIGHT TO KEEP AND BEAR ARMS IS AMONG THE PRIVILEGES OR IMMUNITIES OF AMERICAN CITIZENSHIP THAT STATES MAY NOT ABRIDGE.

"[W]e are guided by the principle that the 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." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2788 (2008) (citations and internal quotation marks omitted). Constitutional interpretation may also rely upon the framers' apparent intent. *Id.* at 2822 (Stevens, J., dissenting). "Before invoking the [Privileges or Immunities] Clause, . . . we should endeavor to understand what the framers

of the Fourteenth Amendment thought that it meant." *Saenz* v. *Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).

In this case, either interpretive method leads to the same result. In 1868, the "privileges" and "immunities" of American citizenship were popularly understood to include a broad array of pre-existent natural rights believed secured by all free governments, as well as the personal rights memorialized in the Bill of Rights. The Fourteenth Amendment's Framers used language that successfully accomplished their intent.

A. A Constitutional Amendment Broadly Securing Americans' Rights Proved Necessary Following the Civil War.

The Fourteenth Amendment was understood and intended to provide the Union a legal framework commensurate with its military victory. The Thirteenth Amendment ended slavery, but did not improve the legal status of free blacks and their supporters. Repression of civil rights by state officials had long agitated Americans prior to the war. Continuing outrages in the unreconstructed South could no longer be tolerated.

Chief among the North's complaints, "[b]lacks were routinely disarmed by Southern States . . . Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms." *Heller*, 128 S. Ct. at 2810 (collecting examples). Initially, the Army sought to secure the right to arms, among other rights, by fiat. For example, in South Carolina, the occupying Union commander ordered that "[t]he constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed." Order of Gen. Sickles, Disregarding the Code, Jan. 17, 1866, in *Political History of the United States of America During the Period of Reconstruction* 37 (Edward McPheron, ed., 2d ed. 1875).

The freedmen appreciated the protection of their rights to armed self-defense:

> We are glad to learn that Gen. Scott, 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.

CHRISTIAN RECORDER (AFRICAN METHODIST EPISCOPAL CHURCH), Feb. 24, 1866, at 1, col. 7-2, col. 1.

But the South could not remain forever under military rule, and Congress noted the situation. "[M]en who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are being done in other sections of the country." Cong. Globe, 39th Cong., 1st Sess. 40 (1865) (Statement of Sen. Wilson); House Ex. Doc. No. 70, *id.* at 236-39 (1866) (Kentucky "marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs," while outlaws "make brutal attacks and raids upon freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders").

Congress responded by enacting the Civil Rights Act of 1866, and the renewed Freedmen's Bureau Act. The Civil Rights Act established birthright American citizenship, and secured to all "citizens of the United States," against state action, their rights

> to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.

14 Stat. 27 (April 9, 1866).

Likewise, the Freedmen's Bureau Act secured "the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms . . . ." 14 Stat. 173, 176 (July 16, 1866).

Presidential vetoes and Southern resistance fueled doubts about such mere legislative approaches to Reconstruction, as did two antebellum precedents: *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857), holding blacks could not be citizens; and *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), holding that states were not bound to respect constitutionally-guaranteed rights absent specific textual instruction.

Sympathetic Northerners saw the need to constitutionalize civil-rights protection. Ohio Representative John Bingham reacted to the Civil Rights Act by expressing his "earnest desire to have the bill of rights in [the] Constitution enforced everywhere. But I ask that it be enforced in accordance with the Constitution of my country." Cong. Globe, 39th Cong., 1st Sess. 1291 (1866).

Bingham would author the Fourteenth Amendment's Section One, which achieved this purpose.

Dismantling *Dred Scott* required securing both federal and state citizenship. Securing state citizenship directly responded to *Dred Scott*'s holding that states could not be compelled to accept blacks as citizens. *Cf. Cooper* v. *Mayor of Savannah*, 4 Ga. 68, 72 (1848) ("[f]ree persons of color have never been recognized here as citizens; they are not entitled to bear arms . . . . "); *Aldridge* v. *Commonwealth*, 4 Va. 447, 449 (1824) (same). In the absence of constitutional correction, states could deprive black residents of state citizenship benefits—even as Article IV required they extend those benefits to visiting citizens of other states.

Indeed, southern courts also denied Congress's authority to establish federal citizenship. Mississippi's Chief Justice held the Civil Rights Act unconstitutional in upholding the conviction of black Union veteran James Lewis for carrying a gun, reasoning that only states could establish citizenship—to which Lewis was not entitled. *Decision of Chief Justice Handy, Declaring the Civil Rights Bill Unconstitutional,* N.Y. TIMES, Oct. 26, 1866, at 2, col. 2.

The Fourteenth Amendment left unaddressed the content of state citizenship. But there can be no serious question that the Fourteenth Amendment's framers intended to include basic civil rights, such as those identified in the Civil Rights Act, together with those memorialized in the Bill of Rights, within the protection of federal citizenship.

B. "Privileges" and "Immunities" Were Popularly Understood to Encompass Pre-Existent Fundamental Rights, Including Those Enumerated in the Bill of Rights.

Whatever its language might signify to modern ears, "an amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption, . . . For it was for public adoption that it was proposed.' " *Adamson* v. *California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (citation omitted), *overruled on other grounds by Malloy* v. *Hogan*, 378 U.S. 1 (1964).

An examination of what "privileges" and "immunities" of citizenship meant to the Fourteenth Amendment's Framers shows that this language was selected neither casually nor at random.

The words "privileges and immunities" often were used to describe fundamental rights and liberties such as those in the

> Federal Bill of Rights . . . . This usage stretches from the English and Colonial period, in which such rights were considered privileges of freeborn Englishmen, through the struggle for American independence, to the American Civil War and the framing of the Fourteenth Amendment and beyond.

Michael Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1090 (2000) (containing exhaustive survey of American historical usage of "privileges" and "immunities").

1. Privileges and Immunities in the Early Republic.

The national debate over the Bill of Rights frequently invoked "privileges" and "immunities" to refer to the rights eventually codified therein. *Id.* at 1098-1104.

James Madison proposed that no state should violate "equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases" under Article I, Section 10. 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1027 (1971), "because it must be admitted . . . that the State governments are as liable to attack the invaluable privileges as the General Government is . . . . " *Id.* at 1033.

Referring to the Privileges and Immunities Clause of Article IV, Section 2, Madison interchangeably employed "privileges" and "rights" in discussing the Constitution's improvement over the Articles of Confederation with respect to treatment shown visiting citizens by the States. THE FEDERALIST No. 42 (James Madison). Justice Washington supplied a most-influential early definition of these "privileges and immunities":

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union . . . .

Corfield, 6 F. Cas. at 551.

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: 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.

Id. at 551-52. "[S]ome" examples of privileges and immunities "deemed fundamental" included:

> 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 . . . [and] the elective franchise . . . .

Id. at 552.

2. Privileges And Immunities In Antebellum Usage.

The Fourteenth Amendment's framers were heavily influenced by abolitionist thought. *See generally* Jacobus tenBroek, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Richard Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 Cath. U. L. Rev. 881 (1988). Abolitionists echoed *Corfield*'s definition of "privileges and immunities," condemning slave state mistreatment of free blacks and their supporters as Article IV violations.

Quoting Article IV, Section 2, Representative Horace Mann chided the President for assisting slave apprehension, while slave states searched the mails for abolitionist sermons to burn, offered bounties for the abduction of individual Northerners, and imposed "unconstitutional imprisonment" upon free black sailors calling on southern ports. Cong. Globe, 31st Cong., 2nd Sess. 249 (1851).

> [E]very man found within the limits of a free state is prima facie FREE . . . [and] has a right to stand on this legal presumption, and to claim all the privileges and immunities that grow out of it until his presumed freedom is wrested from him by legal proof.

Id. at 241.

Referring to Article IV, Section 2 in protest of an Ohio law restricting the immigration of free blacks, an Ohio Senate committee asked:

> Was it not intended to secure to all the citizens, in each state, the right of ingress and egress to and from them, and the privileges of trade, commerce, and employment in them, of acquiring and holding property, and sustaining and defending life and liberty in any state in the Union? Does it not form one of the conditions of our national compact?

Unconstitutional Laws of Ohio, THE LIBERATOR, Apr. 6, 1838, at 53, col. 5.

Months later, an abolitionist newspaper grouped "the privileges and immunities of citizens in every State" with a host of rights enumerated in the first eight amendments, including "the uninfringeable right to keep and bear arms." *The Claim of Property in Man*, THE LIBERATOR, Sept. 21, 1838, at 149, col. 6.

Influential abolitionist attorney Joel Tiffany explained:

> What are the privileges, and immunities of citizenship, of the United States? . . . [T]o be a citizen of the United States, is to be entitled to the benefit of all the guarantys of the Federal Constitution for personal security, personal liberty, and private property.

Joel Tiffany, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 97 (1849). Among these is "the right to keep and bear arms." *Id.* at 99.

Not only abolitionists held an expansive view of "privileges and immunities." One definition of citizenship's "privileges and immunities" foremost on the public mind would have been that supplied by *Dred Scott*:

> [I]f [blacks] were so received, and entitled to *the privileges and immunities of citizens*, it would exempt them from the operation of the special laws and from the police regulations [related to blacks]. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold

> public meetings upon political affairs, *and to keep and carry arms wherever they went*.

Dred Scott, 60 U.S. at 416-17 (emphasis added).

Abolitionists found that *Dred Scott*'s description of "privileges and immunities" ironically underscored the decision's essential injustice:

> Thank heaven! there are higher *privileges* embraced in this term, "Citizen of the United states," than all that comes to; and it is of these *privileges and rights* that the colored man is deprived, and it is of that deprivation he complains. I could find, sir, in that very *Dred Scott* decision, an enumeration, by the Supreme Court itself, of the rights guaranteed by the Constitution of the United States . . . *Those rights are to bear arms* . . . and various other rights therein enumerated, entirely distinct from that class of political rights . . . Of all these, in the express terms of the decision, the colored man is deprived . . .

Who Are American Citizens?, THE LIBERATOR, Jan. 21, 1859, at 10, col. 2 (emphasis added) (quoting Massachusetts State Rep. Wells).

Illinois Rep. Owen Lovejoy, brother of abolitionist martyr Rev. Elijah Lovejoy, insisted he had

> the privilege, as an American citizen, of writing my name and recommending the circulation of any and every book . . . the right of discussing this question of slavery anywhere, on any square foot of American soil . . . to which the privileges and immunities of the Constitution extend. Under that Constitution, which guaranties to me free speech.

Cong. Globe, 36th Cong., 1st Sess. app. 205 (1860).

3. Privileges and Immunities Among the Fourteenth Amendment's Framers.

The Privileges or Immunities Clause was intended to constitutionalize the preexistent natural rights protected by the Civil Rights Act, including the rights of personal security. Additionally, it was meant to protect the personal guarantees enumerated in the Bill of Rights. The framers of the Fourteenth Amendment accomplished their purpose by adopting the language of "privileges or immunities," the public meaning of which had come to include both sets of rights.

"[D]ictionaries in the 1860s treated these terms as synonyms. Accordingly, the term 'privilege or immunities' can easily be read to

denote, at the least, the rights and freedoms enumerated in the Bill of Rights." Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1302 (2000) (hereafter "Tribe") (citing WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1039 (1866) (listing "immunity" and "right" as synonyms of "[p]rivilege"); *id.* at 542 (defining "[f]reedom" as "particular privileges; . . . immunity"); *id.* at 661 (defining "[i]mmunity" as "[f]reedom from an obligation" or a "[p]articular privilege"); *id.* at 1140 (defining "[r]ight" as "[p]rivilege or immunity granted by authority")).

At least one judge in 1866 understood that the right to arms is a "privilege" of citizenship:

> The citizen has the right to bear arms in defence of himself, secured by the constitution. . . . *Should not then, the freedmen have and enjoy the same constitutional right to bear arms in defence of themselves, that is enjoyed by the citizen? It is a natural and personal right—the right of self-preservation* . . . [t]he citizens of the state and other white persons are allowed to carry arms, *the freedmen can have no adequate protection against acts of violence unless they are allowed the same privilege.*

N.Y. TIMES, Oct. 26, 1866, at 2, col. 2 ("cases of Wash Lowe and other discharged United States colored soldiers").

By 1859, Bingham firmly believed that "the Constitution of the United States does not exclude [blacks] from the body politic, and the privileges and immunities of citizens of the United States." Cong. Globe, 35th Cong., 2nd Sess. 984-85 (1859). Protesting Oregon's admission to the Union owing to the state's exclusion of blacks, Bingham declared,

> I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the "privileges and immunities" of a citizen of the United States . . . . I maintain that the persons thus excluded from the State by this section of the Oregon constitution, are citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all *the privileges and immunities of citizens of the United States, amongst which are the rights of life and liberty and property*, and their due protection in the enjoyment thereof by law.

Id. (emphasis added).

Recalling *Corfield*'s definition of "privileges and immunities," Bingham continued, "I cannot, and will not, consent that the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights," which are "those rights common to all men, and to protect which, not to confer, all good governments are instituted." *Id.* at 985.

Bingham would add enumerated rights to his vision of "privileges and immunities." For example, he referred to the Eighth Amendment's Cruel and Unusual Punishment Clause as among the "guarantied privileges" the Fourteenth Amendment would protect. Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). Two years earlier, Rep. James Wilson referenced "the privilege of free discussion." Cong. Globe, 38th Cong., 1st Sess. 1202 (1864).

Introducing the Fourteenth Amendment in the Senate, Reconstruction Committee Member Jacob Howard explicitly defined "privileges" and "immunities" as including *Corfield* rights, as well as the personal rights secured by the Bill of Rights. Bingham and others had referred to rights both enumerated and unenumerated as "privileges" and "immunities." Howard's critical introductory speech unified both sources.

After reciting *Corfield*'s definition of "privileges and immunities," Howard continued:

> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . and the right to keep and to bear arms . . . .
>
> [H]ere is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . .

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

The Fourteenth Amendment's opponents shared this broad view of the Privileges or Immunities Clause. Representative Rogers stated,

> What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the

> definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities.

Cong. Globe, 39th Cong., 1st Sess. 2538 (1866).

In sum, a straight line of popular understanding of "privileges" and "immunities" runs from Madison through *Corfield*, leading abolitionists, *Dred Scott*, and the Fourteenth Amendment's Framers. The "privileges" and "immunities" of American citizens include two sets of overlapping rights: the natural, fundamental rights, believed to fall under Article IV, Section 2, and the rights codified in the first eight amendments.

C. The Fourteenth Amendment's Framers Intended to Apply Fundamental Rights, Including Those Secured in the Bill of Rights, Against the States.

Identifying the rights of American citizenship was insufficient. The Privileges or Immunities Clause would have to be designed as an enforcement mechanism.

> With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.

Adamson, 332 U.S. at 72 (Black, J., dissenting).

This question is now squarely before the Court.

Introducing the Fourteenth Amendment in the Senate, Reconstruction Committee Member Jacob Howard described the personal guarantees of the Bill of Rights, in addition to *Corfield*'s delineated natural rights, as being among the privileges and immunities of federal citizenship. He then declared:

> [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied

> by the Constitution or recognized by it . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them . . . there is no power given in the Constitution to enforce and to carry out any of these guarantees . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866).

The broad array of rights Howard declared would be enforced were earlier encompassed by the Civil Rights Act that the Amendment sought to constitutionalize. "[C]ivil rights are the natural rights of man." *Id.* at 1117 (Statement of Rep. Wilson). "[T]he term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country." *Id.* at 1291 (Statement of Rep. Bingham).

Representative Broomall connected the "civil rights" protected by the Act to *Corfield* privileges and immunities:

> For thirty years prior to 1860 everybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of other States: the right of speech, the right of transit, the right of domicil, the right to sue, the writ of *habeas corpus*, and the right of petition.

Id. at 1263. Representative Raymond explained that the Act's broad language also encompassed "the right of free passage . . . a right to defend [one]self . . . to bear arms . . . [and] to testify in the Federal courts . . . " *Id.* at 1266.

> If the states would all observe the rights of our citizens, there would be no need of this bill. If the states would all practice the constitutional declaration, that [reciting Article IV, §2 Privileges or Immunities Clause], and enforce it, as meaning that the citizen has [reciting *Corfield*'s natural rights definition] we might very well refrain from the enactment of this bill into a law.

Id. at 1117-18 (Statement of Rep. Wilson).

And were it not for *Dred Scott* and *Barron*, Congress might have been satisfied with the Civil Rights Act, and refrained from submitting the Fourteenth Amendment for ratification. Opponents understood as much, declaring Section One "no more nor less than an attempt to embody in the Constitution . . . that outrageous and miserable civil rights bill." *Id.* at 2538 (Statement of Rep. Rogers).

"Congress in 1866 understood perfectly well that section one was intended to repudiate *Barron*. 'Over and over [Bingham] described the privileges-or-immunities clause as encompassing 'the bill of rights'—a phrase he used more than a dozen times in a key speech . . . .' " Michael Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 19 (2007) (quoting Akhil Amar, THE BILL OF RIGHTS 182 (1998)).

> [T]hese great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States . . . [T] he legislative, executive, and judicial officers of eleven States within this Union within the last five years . . . have violated in every sense of the word these provisions . . . the enforcement of which are absolutely essential to American nationality.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866) (Statement of Rep. Bingham).

> The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? . . . Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.

Id. at 1090.

> I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights . . .

Id. at 1291-92. Although Bingham at one point stated that the amendment would have "that extent—no more," *id.* at 1088, it would be a mistake to simplistically seize on this remark out of context, for Bingham then explained the amendment "seeks the enforcement of " Article IV, Section 2. *Id.* at 1089.

That states were not already bound to respect federal civil rights surprised one representative, who demanded Bingham produce precedent proving the necessity of amending the Constitution. Bingham obliged:

I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this

amendment . . . on this subject I refer the House and the country to a decision of the Supreme Court . . . in the case of *Barron* . . . I read one further decision on this subject— the case of the *Lessee of Livingston* vs. *Moore* . . . . Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights. . .

Id. at 1089-90 (citing *Barron*, 32 U.S. (7 Pet.) 243 and *Livingston* v. *Moore*, 32 U.S. (7 Pet.) 469 (1833) ("[I]t is now settled that those amendments do not extend to the States")).

Bingham would later explain that his desire to defeat *Barron* directed the choice of language employed in the Privileges or Immunities Clause:

> [T]he Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention." . . . Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said "no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;" imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution . . .

Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871). "*Barron* asked for 'Simon Says' language, and that's exactly what the Fourteenth Amendment gave [the Court]." Amar, *supra*, at 164.

This understanding of the Amendment was widely shared. Thaddeus Stevens stated in offering the Fourteenth Amendment: "[T]he Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect . . . " Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). Congressman Donnelly demanded "all the guarantees of the Constitution" be enforced, lest "the old reign of terror revive in the South." *Id.* at 586. Proponents viewed constitutional security for privileges and immunities just as broadly, interpreting it to secure "the natural rights which necessarily pertain to citizenship." *Id.* at 1088 (Statement of Rep. Woodbridge).

"Not a single Senator or Congressman contradicted" Bingham and Howard's assertions that the Privileges or Immunities Clause would apply the Bill of Rights to the States. Michael Curtis, NO STATE SHALL ABRIDGE 91 (1986). Indeed, approximately thirty

speeches in both houses supported this view. Akhil Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 Harv. J.L. Pub. Pol'y 443, 447 (1996).

If the Fourteenth Amendment is to be interpreted by reference to the declared intentions of its framers, the right to keep and bear arms clearly applies to Respondent.

D. The Ratifying Nation Understood that the Privileges or Immunities Clause Encompasses the Second Amendment.

That the Fourteenth Amendment compels state obedience to fundamental rights, including those codified in the Bill of Rights, did not remain a secret from the ratifying public. The nation knew full-well what the Framers intended to achieve, and shared their understanding of the Privileges or Immunities Clause.

1. Dissemination of Congressional Intent.

Congressional debates explaining the Amendment's impact received wide coverage in the press. The *New York Herald*, the largest circulation paper of the day, carried Bingham's February 26, 1866 speech on its front page. David Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 Whittier L. Rev. 695, 711-12 (2009) ("Hardy") (citation omitted). The *Herald*, along with the *Chicago Tribune*, carried on their front pages Bingham's February 28, 1866 speech, stridently demanding enforcement of the Bill of Rights among other privileges and immunities. *Id.* at 712 (citations omitted).

Bingham's speeches were also covered by the *New York Times*, and smaller newspapers, including the *Daily National Intelligencer* (Washington, D.C.), *Ft. Wayne's Daily Gazette*, and the *Bangor Daily Whig & Courier*. *Id.* at 712-13 (citations omitted).

> Bingham's hometown newspaper, the *Cadiz Republican*, reprinted many of his speeches; others were bound in pamphlet form for mass distribution. Since these speeches were intended for circulation among constituents as well, they "provide clues to the sentiments of [those] constituents."

Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 69 n.66 (1993) (hereafter "Aynes") (quoting Kenneth Stamp, AMERICA IN 1857, at viii (1990)).

Senator Howard's speech, defining "capital privileges or immunities" to contain *Corfield*'s natural rights and the Bill of Rights, re-

ceived even greater play. Its core aspects were reprinted in the *New York Times, New York Herald, Philadelphia Inquirer, National Daily Intelligencer,* among others, and was encapsulated in other newspapers. Hardy, at 715-17 (citations omitted). One reported:

> The first clause of the first section was intended to secure to the citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government.

The Reconstruction Committee report detailed the need for a constitutional requirement binding the states to respect civil rights. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. Rep. 39-30 (1866); Sen. Rep. 39-112 (1866).

> [A] student of the period reports that 150,000 copies of the Report and the testimony which it contained were printed in order that senators and representatives might distribute them among their constituents. Apparently the Report was widely reprinted in the press and used as a campaign document in the election of 1866 [and] was "eagerly . . . perused" for information concerning "conditions in the South."

Adamson, 332 U.S. at 108-9 (Black, J., dissenting) (alteration in original) (citing Benjamin Kendrick, JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 265 (1914)).

2. Ratification Debate.

The proposed amendment generated letters to editors, op-ed pieces, and magazine expositions discussing its impact. Paraphrasing *Corfield*, and Senator Howard's widely-publicized speech, "Madison" wrote the *New York Times*:

> The one great issue really settled is, that the people will not lose the fruits of the victory won in the suppression of the rebellion. They demand and will have protection for every citizen of the United States, everywhere within the national jurisdiction—*full and complete protection* in the enjoyment of life, liberty, property, the pursuit of happiness, the right to speak and write his sentiments, regardless of localities; *to keep and bear arms in his own defence*, to be tried and sustained in every way as an equal . . . Let us see how far the Constitutional Amendment is calculated to effect this object . . . What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; enjoyment of

> life and liberty, with the rights to possess and acquire property of every kind, and to pursue happiness and safety; the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of habeas corpus to take, hold, and dispose of property, either real or personal, &c., &c. These are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.

"Madison," *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. TIMES, Nov. 10, 1866, at 2, cols. 2-3 (second emphasis added).

Twelve days before its ratification, *The Nation* explained that the Amendment "would, indeed, be almost a revolution; it would give to the liberty of the individual inhabitant the will of the nation as its basis, instead of the will of a State." *Pomeroy's Constitutional Law*, THE NATION, July 16, 1868, at 54.

Negative Southern reaction confirmed the proposed Amendment's impact. The Texas House Committee tasked with reviewing the amendment urged its rejection:

> [I]n these privileges would be embraced the exercise of suffrage at the polls, participation in jury duty in all cases, bearing arms in the militia, and other matters which need not be here enumerated . . . these [are] "privileges and immunities," now sought to be forced on the Southern States.[5]

TEX. HOUSE JRNL., 11TH LEGISLATURE, 578 (1866).

Southern resistance to the Privileges or Immunities Clause manifested itself in President Johnson's proposed compromise. The alternative amendment duplicated Section One's language with one exception: Article IV's Privileges and Immunities Clause was repeated in place of the Privileges or Immunities Clause. 1 Walter Fleming, DOCUMENTARY HISTORY OF RECONSTRUCTION 238 (1906).

Interior Secretary Orville Browning publicly conveyed President Johnson's opposition to the Fourteenth Amendment, predicting the Due Process Clause would "subordinate the State judiciaries in all things to Federal supervision and control; [and] totally annihilate the independence and sovereignty of State judiciaries," in civil and criminal matters. Browning charged the Amendment would be unnecessary as states could be entrusted with the protection of civil rights. *The Political Situation: Letter from Secretary Browning*, N.Y. TIMES, Oct. 24, 1866, at 1, col. 1.

The *New York Times* retorted:

> The Constitution of the United States . . . provides that "the right of the people to keep and bear arms shall not be infringed." But this restriction is . . . a restriction upon the power of the United States alone, and gave to James Lewis no protection against the law of Mississippi, which deprived him, because of his color, of a right which every white man possessed.

Mr. Browning's Letter and Judge Handy's Decision, N.Y. TIMES, Oct. 28, 1866, at 4, col. 1; *see discussion, supra,* at 14.

Mississippi's Constitution contained a Second Amendment analog, "[b]ut Judge Handy got round that safeguard very easily . . . which he could hardly have done if the proposed amendment had formed part of the Constitution." *Id.* at col. 2. Repeating *Wash Lowe*'s description of the right to carry arms as a "privilege," *supra*, 22-23, the Times concluded: "It is against just such legislation and such judicial decisions that the first section of the Amendment is designed to furnish a protection." *Id.*

Northern debate confirmed this point. Speaking before constituents, Ohio Congressman Columbus Delano declared that citizens

> have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the chivalry of Southern slaveholders . . . . We are determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected.

Cincinnati Commercial, Aug. 31, 1866, at 2, col. 3.

Speaking in Philadelphia, Connecticut Governor Joseph Hawley reportedly stated that

> [t]here were men who had been honorably discharged from our armies who had been ruthlessly stripped of the very weapons given them by the Government for their fidelity to it. He claimed that the war was not over until every man should have free and uninterrupted possession of every right guaranteed him by the Constitution.

Philadelphia Inquirer, Sept. 5, 1866, at 8, col. 3.

Summing up a wide array of speeches debating the amendments' ratification, one commentator concluded:

> The declarations and statements of newspapers, writers and speakers, . . . show very clearly . . . the general opinion held in the North . . . that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States.

Horace Flack, THE ADOPTION OF THE FOURTEENTH AMENDMENT 153 (1908). Flack's survey overlooked statements specifically contemplating the Bill of Rights' application to the states, some of which are noted here, but he nonetheless "inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it." *Id.* at 153-54.

3. Legal Scholarship.

The earliest treatises covering the Fourteenth Amendment period asserted that it applied fundamental rights. Pomeroy referred to "the immunities and privileges guarded by the Bill of Rights." John Pomeroy, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 147 (1868). Describing *Barron* as "unfortunate," *id.* at 149, Pomeroy added that "a remedy is easy, and the question of its adoption is now pending before the people," referring to the Fourteenth Amendment. *Id.* at 151.

Judge Farrar agreed. Referring to precedent holding the Bill of Rights inapplicable to the states, Farrar wrote: "All these decisions . . . are entirely swept away by the 14th amendment." Timothy Farrar, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 546 (2d ed. 1869). Writing during the Fourteenth Amendment's ratification period, Judge Paschal offered that "[t]he new feature declared is that the general principles, which had been construed to apply only to the national government, are thus imposed upon the States." George Paschal, THE CONSTITUTION OF THE UNITED STATES 290 (1868). Added Israel Andrews:

> And as it has been maintained that the first eight Amendments had no reference to the State governments, but were restraints upon the general government only, this Fourteenth Amendment declares explicitly that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Israel Andrews, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 274 (1874).

It is simply impossible to maintain that the public, including political leaders, common citizens, and the Bar, did not comprehend that the Privileges or Immunities Clause applies fundamental civil rights against the States. This understanding was widely communicated, and never denied.

II. THE *SLAUGHTERHOUSE CASES, UNITED STATES V. CRUIKSHANK,* AND *PRESSER V. ILLINOIS* MUST BE OVERRULED.

As late as 1937, this Court referred to the Bill of Rights as securing "privileges" and "immunities," in describing the "exclusion of . . . immunities and privileges from the privileges and immunities protected against the action of the states . . . ." *Palko* v. *Connecticut*, 302 U.S. 319, 326 (1937), *overruled by Benton* v. *Maryland*, 395 U.S. 784 (1969).

The error should have been self-evident. But *Palko* described accurately the state of affairs produced by *The SlaughterHouse Cases* and its unavoidable progeny, *Cruikshank* and *Presser*. These cases established that the States could continue to violate virtually all privileges and immunities of American citizens, including those codified in the Bill of Rights, notwithstanding Section One's clear textual command to the contrary.

One notable scholar described *SlaughterHouse* as "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court." Charles Black, Jr., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 55 (1997). The decision, and its progeny, lack legitimacy. Faced with a clear conflict between precedent and the Constitution, this Court should uphold the Constitution.

A. This Court's Privileges or Immunities Doctrine Is Profoundly Erroneous.

The earliest federal court decisions interpreting the Fourteenth Amendment correctly interpreted the Privileges or Immunities Clause. Before being reversed by the Supreme Court, Justice Bradley held New Orleans's slaughtering monopoly unconstitutional as states were forbidden from "interfer[ing] with the fundamental privileges and immunities of American citizens." *Live-Stock Dealers' & Butchers' Ass'n* v. *Crescent City Live-Stock Landing & Slaughter-House Co.,* 15 F. Cas. 649 (C.C.D. La. 1870). Justice Bradley thereafter urged this view upon future Justice William Woods, who had written him seek-

ing advice in deciding the then-pending case of *United States* v. *Hall*, 26 F. Cas. 79 (S.D. Ala. 1871). Aynes, *supra*, at 97. *Hall* held that the Fourteenth Amendment's Privileges or Immunities "are undoubtedly those" as described in *Corfield*, and "[a]mong these we are safe in including those which in the constitution are expressly secured to the people . . . " *Hall*, 26 F. Cas. at 81.

Yet when this Court first passed on the Fourteenth Amendment, it announced a theory of the Privileges or Immunities Clause never apparently considered by anyone during the framing and ratification process, standing diametrically opposed to every statement of intent and understanding related to the Privileges or Immunities Clause.

SlaughterHouse first observed that while individuals held both federal and state citizenship, the Clause at issue protects only privileges and immunities of national citizenship. *SlaughterHouse*, 83

U.S. at 74. It then purported to quote Article IV as securing "the privileges and immunities of citizens of the several States." *Id.* at 75. Reading these asserted rights of state citizenship broadly, in line with *Corfield*, *SlaughterHouse* declared Article IV "did not create those rights, which it called privileges and immunities of citizens of the States." *Id.*

Was the Fourteenth Amendment intended "to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?" *Id.* at 77. Incorrectly, *SlaughterHouse* answered in the negative. Without consulting the Fourteenth Amendment's history, the *SlaughterHouse* majority simply refused to contemplate so great a change had occurred, *id.* at 78, although the nearly-contemporaneous Thirteenth and Fifteenth Amendments undeniably effected significant change.

With this decision, civil rights inhering naturally in individuals, and which predate the Constitution, would be left to the States' protection. The Fourteenth Amendment would protect only rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. In dicta, *SlaughterHouse* suggested that these included the right to visit the federal subtreasuries, petition the federal government, access federal seaports, seek diplomatic protection abroad, enjoy treaty benefits, and travel among the States. *Id.* at 79-80. Except for the last one, none of these rights were consistent with *SlaughterHouse*'s view that the Fourteenth Amendment was primarily meant to resolve the Freedmen's problems.

Three years later, *Cruikshank* explored whether the Justice Department could prosecute anyone for violating the First and Second Amendment rights of freedmen, massacred in a coup against the government of Grant Parish, Louisiana. Under *Slaughter-House*, this proved impossible: citizens "can demand protection from each [government] within its own jurisdiction." *Cruikshank*, 92 U.S. at 550.

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government . . . The government of the United States when established found it in existence.

Id. at 551. Likewise, the Second Amendment right to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *Id.* at 553. *Presser* reaffirmed as much. *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886).

It is hard to quarrel with *Cruikshank*'s assessment of the First and Second Amendments' provenance. Yet precisely because these amendments secure ancient, natural rights, under *SlaughterHouse*, protection of their enjoyment by freedmen fell to Louisiana's government. Months following the *Cruikshank* decision, a former Confederate General was declared the winner of the state's gubernatorial election.

The Framers' condemnation of this doctrine was predictable, Aynes, *supra*, at 99, but their opponents did not substantively disagree. Reconstruction's foes acknowledged the error—and celebrated it. *Id.* at 99-101. One commentator applauded this Court for having "dared to withstand the popular will as expressed in the letter of [the Fourteenth] amendment." Christopher Tiedeman, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 103 (1890). At this Court's Memorial Service for Chief Justice Waite, a congressman

> noted that [*Cruikshank*] contravened the intent of the framers of the Fourteenth Amendment: "[M]any of the framers of these Amendments received information regarding their intentions which was new, and was not calculated to allay the apprehensions with which they saw Chief Justice Waite go upon the bench" . . . historians would later praise Waite

> primarily because "the lapse of years has matured men's views and cooled their feelings regarding the results of the late war."

Aynes, *supra*, at 100 (quoting *Appendix, In Memoriam, Morrison Remick Waite, L.L.D.*, 126 U.S. 585, 600 (1888)).

The *SlaughterHouse* doctrine vindicated the Court's role as a check on the Constitution itself, specifically, against the Fourteenth Amendment's alleged "immaturity":

> [A]fter the lapse of years, when the temper and spirit in which the text of the Amendments was penned have cooled, and the views of men have matured, it is seen on a survey of all the decisions considered as a body, that the value of the Court as the great conservative department of the government was never greater than then.

2 Hampton Carson, HISTORY OF THE SUPREME COURT 485-86 (1891).

Today the Civil War and the Reconstruction Amendments are widely viewed as having been necessary steps toward increased protection of individual liberty. But consensus regarding *SlaughterHouse*'s analytical merit stands unchanged. "Virtually no serious modern scholar—left, right, and center— thinks that [*SlaughterHouse*] is a plausible reading of the Amendment." Akhil Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001).

SlaughterHouse's errors are obvious:

> 1. The Privileges or Immunities Clause Implemented Significant Changes.

Justice Miller refused to accurately interpret the Privileges or Immunities Clause because the consequences of doing so would be

> so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions . . . . [that we] are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

SlaughterHouse, 83 U.S. at 78.

Of course the Fourteenth Amendment enacted a "serious," "far-reaching and pervading," "great departure from the structure and spirit of our institutions." Countless Civil War dead and the chaos of Reconstruction demanded that the States be forced to respect the basic civil rights of American citizens. For the Fourteenth

Amendment's framers, *Barron* and the ugly history of antebellum repression refuted the notion that the States were traditional guarantors of federally protected rights.

Less enthusiastically, opponents predicted the Fourteenth Amendment would "result in a revolution worse than that through which we have just passed." Cong. Globe, 39th Cong., 1st Sess. 2538 (1866) (Statement of Rep. Rogers). Another opponent decried that the amendment would defeat

> the reserved rights of the States . . . declared by the framers of the Constitution to belong to the States exclusively and necessary for the protection of the property and liberty of the people. The first section of this proposed amendment . . . is to strike down those State rights and invest all power in the General Government.

Id. at 2500.

A Texas House committee declared the amendment "would profoundly modify if not destroy our political and even our social institutions," TEX. HOUSE JRNL., *supra*, at 579, and "virtual[ly] repeal" the Tenth Amendment. *Id.* at 580. It would "centralize all power in the Federal Congress, making the States mere appendages to a vast oligarchy, at the National Capitol." TEX. SENATE JRNL., 11TH LEGISLATURE, 42223 (1866).

President Johnson's surrogate not only declared the amendment would "totally annihilate the independence and sovereignty of State judiciaries in the administration of state laws," he predicted it would "change the entire structure and texture of our Government, and sweep away all the guarantees of safety devised and provided by our patriotic sires of the revolution." N.Y. TIMES, Oct. 24, 1866, at 1, col. 1.

Opponents of the Amendment may have overstated its impact on federalism, but any examination of the Amendment's history reveals an intent to effect significant change. Substituting its preferences for those historically expressed, *SlaughterHouse* reduced the Fourteenth Amendment to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *SlaughterHouse*, 83 U.S. at 96 (Field, J., dissenting).

As Bingham foreshadowed in 1859,

> the failure to maintain [natural rights] inviolate furnishes, at all times, a sufficient cause for the abrogation of such government . . . impos[ing] a necessity for such abrogation, and the reconstruction of the political fabric on a juster basis, and with surer safeguards.

Cong. Globe, 35th Cong., 2nd Sess. 985 (1859). The Privileges or Immunities Clause effected change "novel and large [but] the novelty was known and the measure deliberately adopted." *Id.* at 129 (Swayne, J., dissenting).

2. *SlaughterHouse* Contradicts History.

> It is a little remarkable that, so far as the reports disclose, no one of the distinguished counsel who argued this great case (*the SlaughterHouse Cases*), nor any one of the judges who sat in it, appears to have thought it worth while to consult the proceedings of the Congress which proposed this amendment to ascertain what it was that they were seeking to accomplish.

William Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S. L. Rev. 558, 563 (1879).

Ignoring the amendment's historical context and ratification proceedings allowed the *SlaughterHouse* majority to substitute its own conjecture for the Framers' and their public's contrary understanding. *SlaughterHouse* found it

> a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.

SlaughterHouse, 83 U.S. at 74.

What is remarkable is *SlaughterHouse*'s premise that the Amendment could only be given broad interpretation were it concerned with protecting "the citizen of a State." The Framers shared the long-held view of many that all American citizens, as such, enjoyed a broad array of "privileges and immunities" regardless of their state citizenship. Their amendment "caus[ed] citizenship of the United States to be paramount and dominant instead of being subordinate and derivative." *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918).

SlaughterHouse's refusal to acknowledge the primacy of federal citizenship was not unprecedented:

In what manner are we citizens of the United States? . . . [E]very citizen is a citizen of some State or Territory, and, as such, under an express provision of the constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this, and no other sense, that we are citizens of the United States.

2 The Works of John C. Calhoun 242-43 (Richard Cralle, ed., 1888). This is exactly what the Fourteenth Amendment rejected.

In any event, the Citizenship and Privileges or Immunities Clauses had different origins, the former a late Senate amendment, the latter a heavily debated product of the Joint Committee, and there is no evidence that Congress considered the impact of one upon the other. "[O]nce the textual discrepancy between the citizenship and privileges or immunities clause is removed as a viable rationale, *Slaughter-House* simply fails." Michael Lawrence, *Rescuing the Fourteenth Amendment Privileges or Immunities Clause: How "Attrition of Parliamentary Processes" Begat Accidental Ambiguity; How Ambiguity Begat SlaughterHouse*, 18 Wm. & Mary Bill of Rights Jrnl. ___ (forthcoming 2009), available at: http://ssrn.com/ abstract=1462184. *SlaughterHouse*'s

> studied distinction between the privileges deriving from state and national citizenship . . . should have been seriously doubted by anyone who read the Congressional debates of the 1860s.

Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877, at 530 (2002).

3. *SlaughterHouse* Rests on a Misquotation, Reflecting a Premise Rejected by the Amendment's Framers.

The other errors notwithstanding, *SlaughterHouse*'s attempt to distinguish the privileges and immunities of the Fourteenth Amendment from those of Article IV fails for "an even more astounding and obvious difficulty." Tribe, AMERICAN CONSTITUTIONAL LAW at 1306. The distinction rests upon a misquotation of Article IV, which secures the rights of "citizens *in* the several States," U.S. Const. art. IV, §2 (emphasis added), not the rights of "citizens *of* the several States." *SlaughterHouse*, 83 U.S. at 75 (quoting U.S. Const. art. IV, §2) (emphasis added). Justice Bradley identified the error, to no avail. *Id.* at 117 (Bradley, J., dissenting).

Bingham specifically rejected the construction *SlaughterHouse* placed on Article IV's alleged language. "There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens *of the United*

States in the several States' that it guaranties." Cong. Globe, 35th Cong., 2nd Sess. 984 (1859) (emphasis added).

In any event, the language *SlaughterHouse* claims to exist in Article IV—"citizens of the several States"—was understood differently in the Thirty-Ninth Congress. Contrary to *SlaughterHouse*'s supposition, the Framers used that same language to describe the Fourteenth Amendment's Privileges or Immunities Clause. Introducing the Fourteenth Amendment, Senator Howard remarked: "[t]he first section of the amendment they have submitted for the consideration of the two Houses relates to the privileges of *citizens of the several states* . . . " Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). Section One's correct text, "privileges or immunities of citizens of the United States," then follows in the record. *Id.*

Even had it existed, *SlaughterHouse*'s distinction—"citizens of the several states" as opposed to "citizens of the United States"—would have been one without a difference to the Fourteenth Amendment's Framers.

4. *SlaughterHouse* Is Illogical.

Construing the rights of federal citizenship as necessarily relating to the creation of the federal government misreads the Fourteenth Amendment's plain text. The privileges and immunities states are forbidden to infringe are those "of citizens of the United States," meaning, of "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof," U.S. Const. amend. XIV, §1, as opposed to the rights of some other category of people.

It does not logically follow that American citizenship fails to secure pre-existing natural rights. With the Privileges or Immunities Clause, the Framers sought to protect "rights that attach to citizenship in all free Governments." Cong. Globe, 39th Cong., 1st Sess. 3031 (1866) (Statement of Sen. Henderson). "To be a citizen of the United States carries with it some rights, and what are they? They are those inherent, fundamental rights, which belong to free citizens or free men in all countries . . . . " *Id.* at 1757 (Statement of Sen. Trumbull). In *Corfield*'s oft-cited words, they are "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." *Corfield*, 6 F. Cas. at 551.

"It must be remembered that the National Government, too, is republican in essence and in theory . . . . 'To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection." *U.S.*

Term Limits, Inc. v. *Thornton*, 514 U.S. 779, 839 (1995) (Kennedy, J., concurring) (quoting THE FEDERALIST No. 2, at 38-39 (Clinton Rossiter ed. 1961)). Under the original understanding of American citizenship, *SlaughterHouse*'s narrow reading of "Privileges or Immunities" defines the federal government as unfree.

The rights secured by the Privileges or Immunities Clause are not merely important. Presumably, the Clause protects rights that states were abridging—hence, its ratification. Justice Miller believed the Amendment protected an individual's "life, liberty, and property when on the high seas or within the jurisdiction of a foreign government." *SlaughterHouse*, 83 U.S. at 79. Yet in proposing protection for Privileges and Immunities, Bingham lamented, "We have the power to vindicate the personal liberty and all the personal rights of the citizen in the remotest sea . . . while we have not the power in time of peace to enforce the citizens' right to life, liberty, and property within the limits of South Carolina . . . . " Cong. Globe, 39th Cong. 1st Sess. 1090 (1866).

> The right to travel to the seat of government had been protected by the Court since 1867, before ratification of the Fourteenth Amendment, so the amendment would not affect it, and exactly how a state would abridge an American citizen's rights in France or on the high seas is unclear. The Arkansas navy perhaps? Finally, rights under treaties were already protected by the Supremacy Clause. In other words, Miller's effort to show that fundamental rights were left completely under state control was shameful.

Lucas Powe, Jr., THE SUPREME COURT AND THE AMERICAN ELITE 1789-2008, at 136 (2009).

B. *Stare Decisis* Does Not Secure the *SlaughterHouse* Line.

"[T]he *stare decisis* hurdle posed by *Slaughter-House* appears fairly insignificant. It would take but a little wind, and far from a hurricane, to blow that House down." Tribe, at 1324.

At times, "a prior judicial ruling should come to be seen so clearly as error that its enforcement [is] for that very reason doomed." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 854 (1992). Petitioners submit this to be the case with *SlaughterHouse* and its progeny.

> [T]he construction put upon the language of [Section One] by [*SlaughterHouse*] is not its primary and most obvious

> signification. Ninety nine out of every hundred educated men, upon reading this section over, would at first say that it forbade a state to make or enforce a law which abridged any privilege or immunity whatever of one who was a citizen of the United States; and it is only by an effort of ingenuity that any other sense can be discovered that it can be forced to bear.

Royall, 4 S. L. Rev. at 563.

A doctrine originally celebrated for defying the Constitution, and which cannot seriously be defended against the overwhelming weight of text and history, must not be allowed to continue depriving Americans of their civil rights. "[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes."

Payne v. *Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

Stare decisis protects erroneous decisions out of "prudential and pragmatic considerations." *Casey*, 505 U.S. at 854. The doctrine has particular value in the common law, which is inherently judge-made, and in the interpretation of statutes and regulations where error can be easily corrected by the coordinate branches. *Stare decisis*,

> to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts.

Payne, 501 U.S. at 834-35 (Scalia, J., concurring).

Yet "*stare decisis* is not 'an imprisonment of reason.' " *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting). Nor is it "an inexorable command." *Payne*, 501 U.S. at 828 (citation omitted).

> [W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice . . . .[6]

Smith v. *Allwright*, 321 U.S. 649, 665 (1944).

"The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the pres-

ervation of basic liberties than that which was contemplated by its framers when they added the Amendment to our constitutional scheme." *Malloy*, 378 U.S. at 5. When "[m]embers of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding" of constitutional text, this Court has been receptive. *Crawford* v. *Washington*, 541 U.S. 36, 60 (2004).

Beyond cases such as the *SlaughterHouse* line, plainly compelling correction, this Court may look to four prudential factors in considering to overrule precedent:

> We may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Casey, 505 U.S. at 854-55 (citations omitted).

The *SlaughterHouse* doctrine fails each of these factors.

1. *SlaughterHouse* Is Not Truly Practical.

The *SlaughterHouse* doctrine offers a workable definition of the Privileges or Immunities Clause—by virtually eliminating it—but workability measured by the impact on the Fourteenth Amendment as a whole is less satisfying.

"[T]he demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence," *Saenz*, 526 U.S. at 527-28 (Thomas, J., dissenting), by closing off the natural textual mechanism for securing basic rights against state action. "There is a very real threat that the doctrinal shakiness of substantive due process may in turn undermine public confidence in the institution of judicial review and in the ability of judges honestly to interpret the dictates of the Constitution." Tribe, at 1317.

2. Correcting This Court's Privileges or Immunities Doctrine Would Not Upset Legitimate Reliance Interests.

The *SlaughterHouse* doctrine has engendered only the sort of reliance interests never meriting this Court's protection. The statute at issue in *Slaughter-House* might have been upheld as a legitimate "restraint[ ] as the government may justly prescribe for the general good of the whole," *Corfield*, 6 F. Cas. at 552. Sustaining the measure by trivializing the fundamental rights of American citizenship was excessive.

SlaughterHouse was originally the redoubt of monopolists, while *Cruikshank* helped place Klan violence beyond the Justice Department's reach. For the latter reason, one early commentator called the decisions "most fortunate":

> They largely eliminated from National politics the negro question which had so long embittered Congressional debates; they relegated the burden and the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.

3 Charles Warren, THE SUPREME COURT IN UNITED STATES HISTORY 330 (1922). Of course, *Slaughter-House* and *Cruikshank* restored only *some* Southern people's confidence in this Court.

But there can be no valid reliance interests in depriving individuals of their constitutional rights. If anything, reliance interests cut against preserving the *SlaughterHouse* doctrine. Americans are inclined to believe that their "citizenship is not an empty name, but . . . has connected with it certain incidental rights, privileges, and immunities of the greatest importance." *SlaughterHouse*, 83 U.S. at 116 (Bradley, J., dissenting). "[W]e are not bound to resort to implication, or to the constitutional history of England, 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 (Bradley, J., dissenting).

Nor would invocation of the Privileges or Immunities Clause, referencing the rights of "citizens," rather than under the Due Process Clause, which protects "person[s]," necessarily deprive noncitizens of any rights. One way to read the Privileges or Immunities Clause comprehends that "the reference to citizens may define the class of rights rather than limit the class of beneficiaries." John Ely, DEMOCRACY AND DISTRUST 25 (1980). That is, rights of the

sort belonging to citizens cannot be the subject of abridgment, regardless of who would benefit.

Moreover, honoring the Privileges or Immunities Clause does not require abandonment of the Due Process or Equal Protection Clauses. Regardless of a right's textual anchor in the Privileges or Immunities Clause, non-citizens are procedurally entitled to challenge any unlawful alienage restriction. Courts would continue to subject alienage classifications to strict scrutiny. *See Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). Approving of a state law banning immigrants from possessing hunting guns, this Court suggested barring aliens from having "pistols that may be supposed to be needed occasionally for self-defence" could be viewed differently. *Patsone* v. *Pennsylvania*, 232 U.S. 138, 143 (1914). Perhaps more critically, in *SlaughterHouse*'s absence, state-level alienage restrictions would remain broadly preempted by the federal immigration power. *Toll* v. *Moreno*, 458 U.S. 1, 12-13 (1982).

Had the Framers intended for Fourteenth Amendment rights, rooted in citizenship, to be denied wholesale to non-citizens, surely the concept would have engendered some debate considering the amendment was designed in part to prevent arbitrary denial of citizenship as a tool of denying substantive rights. Yet the opposite is true. Without contradiction, Senator Howard offered that the Amendment, "if adopted by the States, [would] forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, *and to all persons who may happen to be within their jurisdiction*." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (emphasis added).

Bingham agreed: "That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment." *Id.* at 2543. The purpose of Section One is "to protect by national law the privileges and immunities of all the citizens of the Republic *and the inborn rights of every person within its jurisdiction* whenever the same shall be abridged by the unconstitutional acts of any State." *Id.* at 2542 (emphasis added). "It seems to be generally agreed that no conscious intention to limit the protection of the clause to citizens appears in the historical records." Ely, *supra*, at 25.

3. *SlaughterHouse* Is Largely Anachronistic.

The third *Casey* factor clearly militates against sustaining *SlaughterHouse*. The *SlaughterHouse* majority's limitation of the Fourteenth

Amendment's purpose to redress solely the problems of the freedmen, 83 U.S. at 81, is not considered authoritative today. *Compare*, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515 (1996) *with SlaughterHouse*, 83 U.S. at 81 ("[w]e doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]").

Most of the rights codified in the Bill of Rights, and many others likely included within the privileges and immunities of citizenship as historically understood, are protected against state infringement under the Due Process Clause. "[T]he law's growth in the intervening years has left" [*SlaughterHouse*'s] "central rule a doctrinal anachronism discounted by society." *Casey*, 505 U.S. at 855. Even the "privileges and immunities" rejected in *SlaughterHouse*, today remain protected under the non-discrimination provisions of Article IV. *See, e.g., Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985) (privilege of practicing law). It is unclear why a state violating civil rights without regard to residence is preferable to a state that honors those rights only when exercised by its residents. The Constitution condemns both, via the Fourteenth Amendment and Article IV, §2, respectively, and the American people are entitled to its full protection.

4. Modern Factual Understandings Render *SlaughterHouse* Untenable.

This Court is not merely presented with a situation in which the facts have "come to be seen so differently." *Casey*, 505 U.S. at 855. The facts had never been examined by this Court at all. *SlaughterHouse* announced a set of assumptions, which later courts would not re-examine. Notwithstanding the precedent, with respect to the Privileges or Immunities Clause, this is arguably a case of first impression.

III. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS INCORPORATED AS AGAINST THE STATES BY THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

Although the case for applying the Second Amendment to the States, textually and historically, rests primarily upon the Privileges or Immunities Clause, Petitioners are also entitled to relief pursuant to the Fourteenth Amendment's Due Process Clause.

It is now well-established that the Due Process Clause has a substantive dimension, and that deprivation of enumerated constitutional rights is thus largely incompatible with due process. A "law" depriving one of life, liberty or property "must not have exceeded the limits of legislative power marked by natural and customary rights." Frederick Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585, 644-45 (2009). Almost every provision of the Bill of Rights considered for incorporation in the modern era has been incorporated.

Given that the Due Process Clause has incorporated virtually all other enumerated rights, "[t]he obvious question . . . is what exactly justifies treating the Second Amendment as the great exception." Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 653 (1990). Second Amendment rights must be among those incorporated.

In the early days of incorporation, this Court explained that

> immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

Palko, 302 U.S. at 324-25. The Second Amendment, given its forceful command and basis in the inherent human right of self-preservation, would surely pass this test.

More recently, this Court settled on an analysis proven yet more amenable to incorporation. The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968), or "necessary to an Anglo-American regime of ordered liberty," *id.*, 150 n.14. *Duncan*'s analysis suggests looking to the right's historical acceptance in our nation, its recognition by the states (including any trend regarding state recognition), and the nature of the interest secured by the right. The right to bear arms clearly satisfies all aspects of the selective incorporation standard.

A. The Right to Arms Is Secured in the Nation's Legal Traditions.

"By the time of the founding, the right to have arms had become fundamental for English subjects." *Heller*, 128 S. Ct. at 2798 (citations omitted). When the Constitution was written, English law

had "settled and determined" that "a man may keep a gun for the defence of his house and family." *Mallock* v. *Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). The violation of that right by George III "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Heller*, 128 S. Ct. at 2799. "[T]he right contains both a political component—it is a means to protect the public from tyranny—and a personal component—it is a means to protect the individual from threats to life or limb." *Nordyke* v. *King*, 563 F.3d 439, 451 (9th Cir.), *reh'g en banc granted*, 575 F.3d 890 (2009) (citation omitted).

There should be no need to recite the exhaustive historical evidence considered in *Heller*. The matter is settled: the Second Amendment "codified a right inherited from our English ancestors." *Heller*, 128 S. Ct. at 2802 (citation omitted).

B. States Historically Acknowledge the Right to Arms.

All five state constitutional ratifying conventions that proposed amendments to the Constitution sought a right to arms. Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836), 1:326 (New Hampshire), 1:328 (New York), 1:335 (Rhode Island) 3:659 (Virginia), 4:244 (North Carolina). Free speech merited only three requests, *id.*, 1:328 (New York), 1:335 (Rhode Island), 3:658-9 (Virginia), 4:244 (North Carolina), while protection from double-jeopardy was sought only by New York. *Id.* at 1:328.

Today, forty-four of the fifty states secure a right to arms in their constitutions. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006). Of these, fifteen are either new or strengthened since 1970. *Id.*

These Second Amendment analogs are effective and consequential. Modern state courts enforce these provisions against laws impermissibly restricting the possession and carrying of arms. *See, e.g., Kellogg* v. *City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State ex rel. City of Princeton* v. *Buckner*, 377 S.E.2d 139 (W. Va. 1988); *State* v. *Delgado*, 692 P.2d 610 (Ore. 1984).

C. The Interest Secured by the Right to Arms Is an Aspect of Liberty.

The Second Amendment's purpose confirms its incorporation. "The inherent right of self-defense has been central to the Second

Amendment right." *Heller*, 128 S. Ct. at 2818. Blackstone described that right as preserving " 'the natural right of resistance and self-preservation,' and 'the right of having and using arms for self-preservation and defence.' " *Id.* at 2792 (citations omitted). This concept was well-accepted in 1868 America. *See* Clayton Cramer, Nicholas Johnson, and George Mocsary, *"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. ___ (forthcoming 2010), available at http://ssrn.com/abstract=1491365.

"[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) (citation omitted). States must respect various rights which, like the Second Amendment, are rooted in deference to preserving personal autonomy. Observing that

> no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law,

Cruzan v. *Dir., Mo. Dep. of Health*, 497 U.S. 261, 269 (1990) (citation omitted), this Court recognized a right to refuse life-sustaining medical care. *Id.* at 278; *see also Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) ("the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Lawrence* v. *Texas*, 539 U.S. 558, 562 (2003) ("liberty of the person both in its spatial and more transcendent dimensions" supports right to consensual intimate relationships); *Rochin* v. *California*, 342 U.S. 165 (1952) (right of bodily integrity against police searches).

"[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. It is unfathomable that the states are constitutionally limited in their regulation of medical decisions or intimate relations, because these matters touch upon personal autonomy, but are unrestrained in their ability to trample upon the enumerated right to arms designed to enable self-preservation.

Casey invoked the second Justice Harlan's celebrated passage describing the liberty protected by the Due Process Clause as broader than

> a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.

Id. at 848 (quoting *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (emphasis added). Liberty cannot now be defined so narrowly as to exclude one of its more obvious attributes.

Indeed, the right to purchase contraception was discovered as related to the "indefeasible right of personal security." *Griswold* v. *Connecticut*, 381 U.S. 479, 484 n.* (1965) (citation omitted). This Court's landmark abortion right decision in *Roe* v. *Wade*, 410 U.S. 113 (1973) "may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity." *Casey*, 505 U.S. at 857. "[T]he right to define one's own concept of existence" lying "[a]t the heart of liberty," *id.* at 851, includes the right of armed self-defense against violent criminal attack.

The Second Amendment also has another purpose, spelled out in the prefatory clause: preservation of the people's ability to act as militia. *Heller*, 128 S. Ct. at 2800-01. The Amendment's framers believed this purpose was "necessary to the security of a free state." U.S. Const. amend. II. By its own terms, the Second Amendment secures a fundamental right.

Heller has defined the contours of the Second Amendment right: it identified the right's origins, traced its history, and described its core purposes. Applying these variables to this Court's established selective incorporation doctrine yields a judgment of reversal.

CONCLUSION

The judgment below must be reversed.

Respectfully submitted,
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NOTES

1. Although the primary inquiry explores the text's original public meaning, unambiguously expressed legislative intent can supply evidenc.e of public meaning, and exclude interpretations that are nonsensical in historical context.

2. Abolitionists had long attacked this incongruity. *See A Fact*, THE LIBERATOR, Mar. 26, 1831, at 51, col. 1 (suggesting a Massachusetts free black citizen challenge a Savannah racial tax assessment under Article IV, §2).

3. Similarly, when the House added an express protection of the right to arms to the general language protecting the "security of person and estate" in the Freedmens' Bureau Act, Senator Trumbull explained that it "[did] not alter the meaning." *Id.* at 743.

4. Order sheet records for the printing of Bingham's speeches ran into the thousands. *Id. Reconstruction: The Debate in the Senate*, BOSTON DAILY ADVERTISER, May 24, 1866, at 1, col. 2.

5. Individuals bearing arms in an organized militia "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *United States* v. *Miller*, 307 U.S. 174, 179 (1939).

6. For the frequency of this Court's practice in overruling past decisions, *see* cases collected in *Payne*, 501 U.S. at 828 n.1; *Smith,* 321 U.S. at 665 n.10; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393, 407 n.2 (1932) (Brandeis, J., dissenting).

No. 08-1521

In The

Supreme Court of the United States

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OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,
Petitioners,

v.

CITY OF CHICAGO,
Respondents

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

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RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

In 1982, Chicago enacted a handgun ban, along with other firearms regulations, because "the convenient availability of firearms and ammunition has increased firearm related deaths and injuries" and handguns "play a major role in the commission of homicide, aggravated assaults and armed robbery." Chicago City Council, Journal of Proceedings, Mar. 19, 1982, at 10049. Under Chicago's ordinance, "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm," and no person may possess "any firearm which is unregisterable." Municipal Code of Chicago, Ill. § 8-20-040(a) (2009). Unregisterable firearms include most handguns, but rifles and shotguns that are not sawed-off, short-barreled, or assault weapons are registerable. *Id.* § 8-20-050. Registerable firearms must be registered before being possessed

in Chicago (*id.* § 8-20-090(a)), and registration must be renewed annually (*id.* § 8-20-200(a)). Failure to renew "shall cause the firearm to become unregisterable." *Id.* § 8-20-200(c).

Otis McDonald, several other individual plaintiffs, the Illinois State Rifle Association, and the Second Amendment Foundation (collectively "petitioners") filed a lawsuit against Chicago, challenging the handgun ban and certain registration requirements. J.A.16-31. The individual petitioners allege that they legally own handguns they wish to possess in their Chicago homes for self-defense; that they applied for permission to possess the handguns in Chicago; and that their applications were refused. J.A. 19-21. Petitioners allege in count I that Chicago's handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause. 26. Counts II, III, and IV raise Second and Fourteenth Amendment claims against the requirements of annual registration of firearms, registration as a prerequisite to possession in Chicago, and the penalty of rendering firearms unregisterable for failure to comply with either requirement. J.A. 27-29. Count V is an equal protection challenge to the unregisterability penalty. J.A. 30.

Meanwhile, the National Rifle Association of America, Inc., and several individual plaintiffs (collectively "NRA") filed two similar lawsuits: one challenging Chicago's handgun ban, and another challenging Oak Park's.[1] *McDonald* and the two *NRA* cases proceeded before the same district court judge. Petitioners moved for summary judgment, which the district court deferred. Subsequently, petitioners and NRA filed motions to narrow the issues, asking the court to rule on the threshold question whether the Second Amendment is incorporated into the Fourteenth Amendment. The district court ultimately granted Chicago and Oak Park judgment on the pleadings in all three cases, on the basis that the Second Amendment does not apply to the States. *E.g.*, Pet. App. 11-18; J.A. 85.

The court of appeals consolidated the cases and affirmed. The court held it was bound by decisions of this Court (Pet. App. 4-5) rebuffing requests to apply the Second Amendment to the States (*id.* at 2). The court further reasoned that the outcome of this case under the Court's more recent jurisprudence "is not as straightforward" as in other situations when the Court has applied the "selective incorporation" doctrine and overruled precedent. *Id.* at 5-6. The court of appeals observed that "local differences are to be cherished as elements of liberty rather than extirpated in order to produce a

single, nationally applicable rule," and "[f]ederalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon." *Id.* at 9. And the court noted that "[t]he prevailing approach is one of 'selective incorporation'" and "the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and immunities clause, despite scholarly arguments that it should do this." *Id.* at 5.

SUMMARY OF ARGUMENT

To address the problem of handgun violence in their communities, Chicago and Oak Park have enacted stringent firearms regulations prohibiting the possession of handguns by most individuals. The Court should reaffirm that the Second Amendment does not bind state and local governments. Neither the Court's selective incorporation doctrine under the Due Process Clause nor the Privileges or Immunities Clause provides a basis for imposing the Second Amendment on the States and establishing a national rule limiting arms regulation.

I. Bill of Rights provisions are incorporated into the Due Process Clause only if they are implicit in the concept of ordered liberty. That is an exacting standard that appropriately protects federalism values at the root of our constitutional system and is particularly appropriate when addressing firearms regulation. Firearms are designed to injure or kill; conditions of their use and abuse vary widely around the country; and different communities may come to widely varying conclusions about the proper approach to regulation. Thus, Chicago and Oak Park may reasonably conclude that in their communities, handgun bans or other stringent regulations are the most effective means to reduce fear, violence, injury, and death, thereby enhancing, not detracting from, a system of ordered liberty. Although other approaches are possible and may be effective elsewhere, it cannot be concluded that easy and widespread availability of firearms everywhere is necessary to ordered liberty.

The practice in the States throughout our history does not support incorporating the Second Amendment. While many States have adopted firearms rights in one form or another, the nature of these rights differs substantially from the Second Amendment right. The Second Amendment precludes an "interest balancing" approach and a ban on weapons in common use. But the States have generally adopted a "reasonable regulation" approach under which even strin-

gent restrictions or outright bans of particular firearms are ordinarily upheld.

The Court has sometimes consulted the Framing-era history of a provision in considering incorporation. For the Second Amendment, that history does not support incorporation. Although a right to firearms for personal use was recognized in a variety of sources of law that pre-existed the Constitution, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), makes clear that it was not included in the Bill of Rights for its own sake or to protect it against the political process; rather, it was codified to protect the militia by eliminating the threat that the federal government would take away the arms necessary for militia service. Nothing in the congressional debate over the Amendment suggests any view that a private arms right unconnected to preservation of the militia was thought implicit in the concept of ordered liberty. The scope of the Second Amendment right— weapons in common use—also reflects its purpose of protecting the militia, rather than an individual right related to self-defense, since the Second Amendment protects weapons regardless of whether they are useful for self-defense.

Petitioners' argument that an unenumerated constitutional right to self-defense supports incorporation should be rejected. Even if this Court were to recognize such a right, it would at most protect against an (unlikely) law eliminating all reasonable tools (or perhaps, all firearms) necessary for its effectuation; it would not support incorporation of the Second Amendment, which grants a right to any weapon in common use, regardless of the reasons for limiting it or the availability of other weapons or firearms.

II. The Privileges or Immunities Clause does not apply the provisions of the Bill of Rights, or the Second Amendment individually, to the States. In a long series of cases beginning with *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Court has consistently held that the Privileges or Immunities Clause does not incorporate any of the provisions of the Bill of Rights. All of the *stare decisis* factors the Court typically examines counsel adherence to those precedents. The current rule is workable and venerable; significant reliance interests are in place; and there is nothing petitioners cite that was not known to and considered by the Court whose Members actually lived through the Civil War and Reconstruction. Adopting petitioners' view would throw into doubt the rights of aliens and corporations; make the Grand Jury Clause and Seventh Amendment applicable to the States; and unsettle the legal status of unenumerated

rights, both those that have been recognized and those that have not. *Stare decisis* concerns are of overwhelming force in this case.

Even reviewed *de novo*, the historical record does not support petitioners' argument that the Privileges or Immunities Clause was intended to incorporate the Bill of Rights (plus some class of unenumerated rights). That history shows no general public understanding or congressional intent that the Privileges or Immunities Clause was meant to impose the Bill of Rights on the States. The ambiguous text of the Clause, which does not mention "rights" at all, would not have alerted the public to this purpose. *Slaughter-House* itself was decided just five years after Fourteenth Amendment ratification, by a Court uniquely situated to know the history that led to the Amendment, the congressional intent, and the public understanding at the time of ratification. The congressional and ratification debates show that while a few believed that the Privileges or Immunities Clause would make the Bill of Rights applicable to the States, most held a variety of other views on the meaning and effect of the Clause. Treatise writers of the era were similarly divided.

Petitioners and NRA argue that the Reconstruction Congress wanted to embody in the Constitution a firearms right against the States because of concern over the disarmament of freedmen after the Civil War. But Congress was concerned with discriminatory measures taken against freedmen, which it addressed by adopting a non-discrimination principle in the Fourteenth Amendment. Indeed, the manner in which firearms were regulated during the period shows public acceptance of state regulation, including outright bans, so long as it was not done in a discriminatory manner.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT INCORPORATE THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

A. A Provision Of The Bill Of Rights Applies To The States Under The Due Process Clause If It Is "Implicit In The Concept Of Ordered Liberty."

This Court held long ago that the provisions of the Bill of Rights, of their own force, apply only to the federal government and do not limit state or local governments. *Barron v. Mayor of Baltimore*,

32 U.S. (7 Pet.) 243 (1833). That continues to be the law. See *Virginia v. Moore*, 128 S. Ct. 1598, 1603 (2008); *United States v. Balsys*, 524 U.S. 666, 675 (1998). In a series of cases beginning in the late 19th century, the Court has recognized that the Due Process Clause of the Fourteenth Amendment incorporates— and therefore applies to the States—fundamental rights included in the Bill of Rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969). As the Court explained in *Thornhill v. Alabama*, 310 U.S. 88 (1940), First Amendment rights were incorporated because they are "essential to free government." *Id.* at 95; see also *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) ("at the foundation of free government by free men"). Likewise, incorporation of the Fourth Amendment's protection against unreasonable search and seizure rested on the Court's conclusion that "the 'security of one's privacy against arbitrary intrusion by the police' is 'implicit in the concept of ordered liberty.'" *Mapp v. Ohio*, 367 643, 650 (1961) (quoting *Wolf v. Colorado*, 338 25, 27 (1949)).

1. To be "implicit in the concept of ordered liberty," a right must be "implicit"—that is, essential—to the very "concept" of ordered liberty. As the Court has explained, that means that "neither liberty nor justice would exist if [the right] were sacrificed." *Palko*, 302 U.S. at 326; see also NRA Br. 8 ("a fundamental principle of liberty that is basic to a free society"). In what is regarded as the first selective incorporation case, the Court described such a 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.R. v. City of Chicago*, 166 U.S. 226, 238 (1897) (incorporating Takings Clause); see *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) ("[I]f a civilized system could be imagined that would not accord the particular protection," incorporation is not appropriate); see also *Malloy v. Hogan*, 378 U.S. 1, 4 (1964) (selective incorporation originated with *Chicago* case); *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) ("a fundamental principle of liberty and justice which inheres in the very idea of free government"), overruled on other grounds by *Malloy*. Cf. *Danforth v. Minnesota*, 128 S. Ct. 1029, 1034-35 (2008) (Due Process Clause "requires state criminal trials to provide defendants with protections 'implicit in the concept of ordered liberty'") (quoting *Palko*).[2]

In determining whether a provision of the Bill of Rights is incorporated under that standard, the Court has looked at the protection provided by the right and whether that protection is necessary

in a system of ordered liberty. See, *e.g.*, *Duncan*, 391 U.S. at 155-56; *Pointer v. Texas*, 380 U.S. 400, 404 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). It has also examined the extent to which it has been embodied in federal and state law (*e.g.*, *Duncan*, 391 U.S. at 154) and the history of the right in question (*e.g., Klopfer v. North Carolina*, 386 U.S. 213, 223-26 (1967)).[3]

2. While it protects rights essential to a free society, incorporation necessarily limits the ability of state and local governments to make their own decisions. Accordingly, the standard for incorporation under the Fourteenth Amendment is and should be an exacting one. Federalism is based on two essential premises. First, because conditions vary from one place to another, residents in different locales, facing widely different conditions and social problems, should be able to address them with widely varying solutions. Second, and more fundamental, even if conditions in two States may be similar, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As the court of appeals noted, "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." Pet. App. 9.

These concerns have particular force with respect to the Second Amendment. It is the only Bill of Rights provision that confers a substantive right to possess a specific, highly dangerous physical item— an item designed to kill or inflict serious injury on people. And there may well be a wider range of opinion on the basic issue whether and how to regulate firearms than on any other enumerated right. Some believe that, subject only to limited regulation, permitting easy and widespread gun ownership may reduce the overall level of gun violence; others believe that, under at least some conditions, stringent regulation of the possession of handguns (and other firearms) is necessary to reduce the level of gun violence, injury, and death. The genius of our federal system ordinarily leaves this type of social problem to be worked out by state and local governments, without a nationally imposed solution excluding one choice or the other. See *United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."). Under "the theory and utility of our federalism . . . States

may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

3. The present-day operation and effect of a right is crucial to whether it should be recognized as protected by the Due Process Clause. That Clause was designed to be adaptive rather than fixed:

> Had those who drew and ratified the Due Process Claus[e] of . . . the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.

Lawrence v. Texas, 539 U.S. 558, 578-79 (2003). Indeed, a "conception of due process" incorporation that "ignores the movements of a free society . . . belittles" the Clause; due process is to be defined by "the gradual and empiric process of 'inclusion and exclusion.'" *Wolf,* 338 U.S. at 27 (overruled on other grounds by *Mapp*).

B. Regulation Or Prohibition Of Firearms, Particularly Handguns, May Reasonably Be Thought To Preserve, Not Intrude On, Ordered Liberty.

While Chicago and Oak Park ban handgun possession nearly entirely, we do not contend that such regulation is necessary, advisable, or appropriate in many, most, or all States. Local conditions regarding firearms risks and uses vary widely around the country. Local views on the necessarily contentious issues that underlie firearms regulation—how to reduce crime and violence, as well as accidental injuries caused by highly dangerous instruments like firearms—also vary widely. Our submission is simply that data exist to support a conclusion that under some conditions stringent firearms regulations can limit violence; reduce injury and death; and lead to the preservation of, not the intrusion upon, a system of ordered liberty. Because Second Amendment incorporation would severely limit such regulation in those communities that believe this approach best suited to their own local conditions, it should be rejected.

1. There is no dispute that some communities, including Chicago, face an exceptionally serious problem of firearm—and, in particular, handgun— violence and crime. Handguns were used in 402 of the 412 firearm homicides in Chicago in 2008. See Chicago Police Department, *2008 Murder Analysis in Chicago* 22 (2009)

(https://portal.chicagopolice.org/ portal/page/portal/ClearPath/ News/Statistical Reports/ Homicide Reports/2008 Homicide Reports). Handguns are used to kill in the United States more than all other weapons—firearms and otherwise—combined. See Josh Sugarmann, *Every Handgun is Aimed at You: The Case for Banning Handguns* 75 (2001). A study of data collected between 1976 and 2005 demonstrated that "[h]omicides are most often committed with guns, especially handguns," and nearly 60% of those homicides take place in large cities. James Alan Fox, *et al.*, Bureau of Justice Statistics, Department of Justice, *Homicide Trends in the United States* (available at "Weapons trends" and "Trends by city size" links at http://bjs.ojp.usdoj.gov/content/pub/pdf/ htius/pdf). And handguns cause death at a rate significantly higher than other generally available firearms. See Sugarmann, *supra*, at 177 (more than two out of three fatalities from firearms caused by handguns, even though two-thirds of guns owned by Americans are rifles or shotguns). Handguns are also far more frequently used in suicides than other firearms, especially in urban environments. See *id.* at 36-38. And handguns are, by definition, concealable and therefore facilitate unlawful use. Between 1993 and 2001, handguns were used in 87% of violent nonlethal crimes (*e.g.*, assault, rapes/sexual assault, robbery, and theft) committed with firearms. See Craig Perkins, Bureau of Justice Statistics, Department of Justice, *National Crime Victimization Survey*, *1993-2001*: *Weapon Use and Violent Crime* 3 (2003). As for accidental injuries, 5,974 unintentional firearms deaths were reported in the United States between 1999 and 2006. In 4,231 of them, the firearm was not identified, and in 856 it was specifically identified as a handgun. See Centers for Disease Control and Prevention, WONDER On-Line Database Compressed Mortality File 1999-2006 (http:// wonder.cdc.gov/mortSQL.html) (query based on ICD10 code W32 for "handguns" and W34 for "other and unspecified" firearms). See also Brief of the Association of Prosecuting Attorneys as *Amicus Curiae* in Support of Respondents; Brief of Professors of Criminal Justice as *Amici Curiae* in Support of Respondents; Brief of Chicago Board of Education, *et al.*, as *Amici Curiae* in Support of Respondents.

2. The people of Chicago, a major urban center plagued by gangs and firearms violence, and Oak Park, an abutting suburb confronting negative spillover effects, have determined that, of the various alternative regulatory approaches to firearms, a handgun ban and stringent firearms regulation will best address the very serious problem of handgun crime and violence in their communities.[4] That approach is at the very least a reasonable approach to a difficult so-

cial problem on which definitive answers remain elusive. Because that approach aims to protect personal security, it is consistent with, and supportive of, a free society and a system of ordered liberty.

Features that cause handguns to be regarded by many as the "quintessential self-defense weapon" (*Heller*, 128 S. Ct. at 2818) also make them attractive for criminal purposes, including homicide, suicide, and other violent crimes. Handguns can be stored where readily accessible; they are small and lightweight; they are easier to control if someone tries to take them away; and they can be pointed at someone with one hand while leaving the other hand free. See *ibid.*

Because handguns are so well adapted for the commission of crimes and the infliction of injury and death, stringent handgun regulations, including prohibitions, can be reasonably thought to create the conditions necessary to foster ordered liberty, rather than detracting from it. Enforcing handgun control laws can make a difference in curbing firearms violence. See, *e.g.*, Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny*, *Incorporation, Well-Regulated Militias*, *and Criminal Street Gangs*, 41 Urb. Lawyer 1, 30-44 (2009) (discussing studies showing New York City crime reduction correlating to police tactics directed at handguns); Phillip J. Cook, *et al.*, *Underground Gun Markets*, 117 Economic J. F558, F581-82 (2007) (important contributing factor to high transaction costs of underground gun market is that handguns are illegal in Chicago, and "law enforcement efforts targeted at reducing gun availability at the street level seem promising"); Colin Loftin, *et al.*, *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991) (District's handgun ban coincided with abrupt decline in firearms-caused homicides and suicides with no comparable decline elsewhere in the region); Brief of the Association of Prosecuting Attorneys as *Amicus Curiae* in Support of Respondents; Brief of United States Conference of Mayors as *Amicus Curiae* in Support of Respondents; Brief of Professors of Criminal Justice as *Amici Curiae* in Support of Respondents.

Handgun restrictions can be an effective tool for curbing criminal street gangs, a major source of crime and violence in Chicago. When the police see gang members suspected of carrying guns, they can make an arrest and remove the gun from the street. This makes it riskier for gang members to ply their trade outdoors, thus making the streets safer. Criminal street gangs with the right to carry guns could use those guns to increase fear in their communities and violence used to control the drug trade that is their lifeblood. See

Rosenthal, *Second Amendment Plumbing*, *supra*, at 39-48. Chicago and Oak Park may legitimately conclude that, in "an urban landscape, the Second Amendment becomes the enemy of ordered liberty, not its guarantor." *Id.* at 87. For that reason, it should not be incorporated.

3. Not all state and local firearms regulations would be in jeopardy if the Second Amendment were applied to the States.[5] But incorporating the Second Amendment would place at risk, in addition to handgun bans, many other firearms regulations that may equally be viewed as necessary to reduce fear, violence, and injury, and therefore to foster, not threaten, a system of ordered liberty. Insofar as those types of regulations would be invalid, *all* levels of government would be disabled from adopting (or even experimenting with) sensible firearms regulations that could fight crime and save lives under at least some local conditions.

For example, although *Heller* recognized that prohibitions on concealed carrying of firearms had been frequently upheld, the Court did not directly address the status under the Second Amendment of laws prohibiting or severely regulating *any* carrying of firearms. Nor did the Court comment on requirements that those who carry firearms be licensed. At least eight States condition the possession or carrying of handguns in many or all instances on a permit[6] that generally issues only upon a showing of at least good cause or necessity.[7] And these States generally have wide discretion in issuing them.[8]

The extent to which these requirements would be upheld under the Second Amendment is at present unclear. The Court noted that the term "bear" in the Second Amendment "refers to carrying for a particular purpose—confrontation." *Heller*, 128 S. Ct. at 2793; see *id.* at 2818 (citing state decision holding that statute forbidding openly carrying a pistol violated state Second Amendment analogue). Conditioning the open or concealed carrying of firearms on particular showings of good cause or need could therefore conflict with the Second Amendment. Of course, there may be many places in which a State would conclude that the unlicensed open or concealed carrying of weapons poses no concern. But surely there are others, such as gang-infested areas of major cities, in which such carrying could increase gang-related domination and intimidation and cause the local community to prohibit it. See *In the Matter of Atkinson*, 291 N.W.2d 396, 400 (Minn. 1980) ("'such widespread handgun possession in the streets, somewhat reminiscent of frontier days, would not be at all in the public interest'") (citation omitted). Insofar as the Second Amendment would limit the ability of those jurisdictions to do so, incorporation could substantially affect the security of residents

and correspondingly decrease—not increase—the zone of "ordered liberty" in which they may exercise their other freedoms.[9]

There are numerous other types of regulations that are or have been used to limit the possession and use of firearms, and many of them as well would be subject to attack—and more than a few of them may well succumb—if the Second Amendment were applied to the States. See pp. 25-28, *infra*.[10] Irrespective of the merits of such challenges, the States would have to spend scarce resources defending them. Indeed, federal arms bans have already come under careful scrutiny in the wake of *Heller*. See, *e.g.*, *United States v. Skoien*, 2009 WL 3837316, at *1 (7th Cir. 2009) (vacating conviction on ground that "*Heller*'s language about certain 'presumptively lawful' gun regulations—notably, felon dispossession laws . . . cannot be read to relieve the government of its burden of justifying laws that restrict Second Amendment rights").[11] Costly Second Amendment challenges to arms regulations would no doubt force state and local governments to consider repealing them (and refrain from enacting new ones), even when, in their judgment, they could substantially contribute, under local conditions, to reducing violence, injury, and death.

4. Finally, the treatment of firearms rights in other countries—especially countries that share our Anglo-American heritage—supports the conclusion that the Second Amendment right is not implicit in the concept of ordered liberty. The legal systems of England, Canada, and Australia each have their roots in the same English law as does this country, and each should be seen as a country in which "ordered liberty" is valued. Yet each of them imposes stringent regulations on firearms that would be impermissible or at least suspect under Second Amendment standards.

For example, England itself—from whose arms right ours is derived—bans handguns. See Firearms (Amendment) Act, 1997, c. 5, § 1 (Eng.); Firearms (Amendment) (No. 2) Act, 1997, c. 64, § 1 (Eng.). In addition, applications to possess other firearms for protection "should be refused on the grounds that firearms are not an acceptable means of protection in Great Britain." Home Office, *Firearms Law Guidance to the Police* (2002) (located at http://police.homeoffice.gov.uk/publications/operational-policing/HOFirearms-Guidance2835.pdf?view=Binary), ch. 13.72. Arms possession is generally limited to "good reasons" such as hunting, target shooting, pest control, slaughtering, and collecting, and requires extensive governmental investigation and verification. See generally *id.* ch. 13.

Canada, too, imposes stringent regulations on the possession and storage of handguns. While handguns are available for target practice, competitions, and collecting activities, they may be possessed for self-defense only upon a showing that the gun is needed for self-protection. See Firearms Act, S.C. 1995, c. 39, §§ 4, 28, 54. Approval to carry a handgun requires a showing that someone's life "is in imminent danger" and that "police protection is not sufficient." Authorizations to Carry Restricted Firearms and Certain Handgun Regulations, SOR/98-207, § 2. See also Firearms Act, § 20. Moreover, a handgun must be stored unloaded and either (i) rendered inoperable by a locking device and stored in a locked case or room or (ii) locked in a specially constructed vault or room. See Storage, Display, Transportation and Handling of Firearms by Individuals Regulations, SOR/98-209, §§ 6, 7. Australia too has similar, very stringent regulations. Although it permits possession of handguns, it does so only for a limited number of reasons, not including self-defense. See Australian Police Ministers' Council, Special Firearms Meeting, Genuine Reason for Owning, Possessing or Using a Firearm Resolution (1996) (available at http:// www.austlii.edu.au/au/other/apmc/#RTFToC3).

Other countries, whose legal systems derive from a variety of sources, but which nonetheless would reasonably be seen as countries in which "ordered liberty" is respected, have similarly stringent controls over firearms. Japan, for example, has stringently restricted not only handguns but indeed all firearms since 1958. See generally Jūhō tōkenrui shoji tō torishimarihō [Law Controlling Possession, Etc. of Fire-arms And Sword], Law No. 6 of 1958, as amended, last translated in 3 EHS Law Bull. Ser. No. 3920 (1978). Other than extremely limited exceptions, such as hunting, athletic events, and research, "no person shall possess" a firearm or sword. *Id.*, Art. 3. See also *id.*, Art. 4. A 1998 United Nations study found that other countries such as Denmark, Finland, Luxembourg, and New Zealand do not permit handgun ownership for "protection of persons or property" or for "private security," although some of them do permit gun ownership for hunting, target shooting, and collection. United Nations International Study on Firearm Regulation 38-39 (Table 2.1) (1998).

C. The Treatment Of Firearms Rights By The States Does Not Support Incorporation Of The Second Amendment.

The Court in *Heller* held that the Second Amendment protects weapons "in common use." 128 S. Ct. at 2815, 2817; see also *United*

States v. Miller, 307 U.S. 174, 179 (1939) (recognizing that persons called to militia used arms "of the kind in common use at the time"). As a result, the federal government may not ban these weapons, including handguns, no matter how dangerous they are in a particular community and no matter the benefits of doing so. Categorical protection of weapons in common use is required because that is the scope the Second Amendment "[was] understood to have when the people adopted" it. *Heller*, 128 S. Ct. at 2821. Since "the enshrinement of constitutional rights necessarily takes certain policy choices off the table," the Court concluded that "the problem of handgun violence in this country" could not justify a ban on handguns in the home under the Second Amendment (*id.* at 2822) and rejected Justice Breyer's "interest-balancing" approach (*id.* at 2821).

The scope of firearms rights protected by the States, however, varies widely and does not hew to the Second Amendment right to weapons in common use. Nor does it preclude an outright ban, if other weapons are allowed. State law accordingly does not support incorporation.

1. *Interest balancing by the States.* The right protected by the Second Amendment is quite different from the right that has been adopted by the States.[12] The consensus in States that recognize a firearms right is that arms possession, even in the home, is indeed subject to interest-balancing.[13] Those States evaluate firearms regulations under a "reasonable regulation" standard. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686, 716-17 (2007); Brief of the Brady Center, *et al.*, as *Amici Curiae* in Support of Neither Party 18-24. See also, *e.g.*, *Benjamin v. Bailey*, 662 A.2d 1226, 1233 (Conn. 1995) ("State courts that have addressed the question under their respective constitutions overwhelmingly have recognized that the [arms] right is not infringed by reasonable regulation by the state in the exercise of its police power to protect the health, safety and morals of the citizenry.") (citing cases); *Robertson v. City and County of Denver*, 874 P.2d 325, 329-30 (Colo. 1994) (citing cases). That standard inherently "focuses on the balance of the interests at stake." Winkler, *supra*, at 717 (citation omitted). Courts "identif[y] the underlying governmental objectives and weig[h] those goals against the burden on the individual." *Ibid.* See also, *e.g.*, *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986) (statute "imposes some limitation on a person's right to bear arms in defense of himself; but, when balanced against the object of the statute, we do not find the limitation unreasonable, particularly when we recognize that it is not always necessary, nor is it always lawful, to use deadly force in one's own

defense"). The standard recognizes that gun regulation "requires highly complex socioeconomic calculations" regarding how to balance within a particular community "the individual's ability to defend herself against the collective need to protect all others"—a balance "that courts are not institutionally equipped to make." Winkler, *supra*, at 715.

Applying that standard, state courts generally approve a wide variety of firearms regulations. Highly specific regulations, differing markedly across jurisdictions, control who may possess weapons; what kinds of weapons may be possessed; where they may be possessed; how they may be used and stored; whether and how they may be transported; how they may be bought and sold; what kinds of ammunition may be used; and more. See generally, *e.g.*, Legal Community Against Violence, *State and Local Laws* (available at http://www.lcav.org/content/state_ local.asp) (arms regulations in each State). No other substantive Bill of Rights protection has been regulated nearly as intrusively. And restrictions are almost always upheld. In the half century before 2007, there were only six published state-court decisions striking down firearms regulations on the basis of a right to bear arms, and none in 36 of the 42 States protecting individual arms rights. See Winkler, *supra*, at 718, 723-25.

2. *Weapons bans by the States*. Under the Second Amendment's common-use rule, weapons enjoy protection merely because they are in common use: "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 128 S. Ct. at 2818. But, under the widespread practice in the States that recognize firearms rights, the availability of other arms very much permits bans of particular weapons. "So long as a gun control measure is not a *total ban* on the right to bear arms"—that is, if it does not wholly "eviscerate[]" or "destr[oy]" the right—the courts will consider it a mere reasonable regulation of the right. Winkler, *supra*, at 717 (citations omitted).[14]

a. Applying this approach, state courts uphold handgun bans where other arms are permitted. For instance, *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266 (Ill. 1984), upheld an Illinois suburb's handgun ban because the arms right is merely a right "to possess some form of weapon suitable for self-defense or recreation." *Id.* at 273. Therefore, "a ban on all firearms that an individual citizen might use would not be permissible, but a ban on discrete categories of firearms, such as handguns, would be." *Ibid.* Likewise, *City of Cleveland v. Turner*, No. 36126, 1977 WL 201393 (Ohio Ct. App.

Aug. 4, 1977), upheld a handgun ban because it "does not absolutely interfere with the right of the people to bear arms, but rather proscribes possession of a specifically defined category of handguns." *Id.* at *5. See also *State v. Bolin*, 662 S.E.2d 38, 39 (S.C. 2008) (ban on handgun possession by persons under 21 did not infringe arms right because they can "posses[s] other types of guns"); Winkler, *supra*, at 719.

A wide array of bans on other firearms has been upheld under this approach. See *Benjamin*, 662 A.2d at 1232 (assault weapons ban; state constitution "does *not* guarantee the right to possess any weapon of the individual's choosing for use in self-defense" but protects only "each citizen's right to possess a weapon of reasonably sufficient firepower to be effective for self-defense"); *Robertson*, 874 P.2d at 333 (assault weapons ban; "ample weapons [remained] available for citizens to fully exercise their right to bear arms in self-defense"); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (assault weapons ban; "practical availability of certain firearms for purposes of hunting, recreational use and protection" remained); *Carson v. State*, 247 S.E.2d 68, 73 (Ga. 1978) (short-barreled shotgun ban "does not prohibit the bearing of *all* arms" and state constitution does not confer right to keep and carry arms "*of every description*"); *City of Cincinnati v. Langan*, 640 N.E.2d 200, 205-06 (Ohio Ct. App. 1994) (semi-automatic weapon ban; following *Arnold*).[15]

b. Banning weapons routinely used for self-defense when necessary for the public welfare also has ample historical pedigree. The 19th century saw a sudden and dramatic increase in the availability of personal weapons "designed primarily for personal self-defense." Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 137 (2006). These weapons included pistols, sword canes, dirks (a kind of small dagger), and bowie knives (also known as Arkansas toothpicks). See *id.* at 137-38. They were particularly deadly. See *ibid.* Yet they were also popular. Knives in particular were widely used for lawful purposes. See Eric H. Monkkonen, *Murder in New York City* 36 (2001) ("In contrast to handguns, knives and other sharp instruments were certainly more prevalent in the nineteenth century than they are today, because they served as essential multipurpose tools in a world of wood-using technology."). Like the handguns of today, the popularity of these 19th-century weapons led to frequent violent confrontations; legislation restricting or banning these weapons as public nuisances followed. See Cornell, *supra*, at 138-41. See also Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73

Fordham L. Rev. 487, 51216 (2004). Such legislation was frequently upheld. See *Aymette v. State*, 21 Tenn. 154 (1840) (upholding power to ban keeping and bearing of bowie knife); *State v. Buzzard*, 4 Ark. 18 (1842) (upholding ban on carrying concealed pistol); *Day v. State*, 37 Tenn. 496, 500 (1858) ("Legislature intended to abolish these most dangerous weapons [bowie-knives] entirely from use"); *English v. State*, 35 Tex. 473, 1872 WL 7422, at *2 (1871) (upholding ban on carrying of "pistols, dirks, daggers, slungshots, swordcanes, spears, brass-knuckles and bowie knives"). As one court explained:

> Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; and where certain weapons are forbidden to be kept or used by the law of the land, in order to the prevention of [sic] crime—a great public end—no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or willful desire to use a particular weapon in his particular self-defense. The law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully prescribed by this statute. The object being to banish these weapons from the community by an absolute prohibition for the prevention of crime, no man's particular safety, if such case could exist, ought to be allowed to defeat this end.

Andrews v. State, 50 Tenn. 165, 188-89 (1871); see *id.* at 186-87 (upholding ban on carrying of dirk, swordcane, Spanish stiletto, belt or pocket pistol, or revolver if not a militia weapon). See also Brief of Professional Historians and Legal Historians as *Amici Curiae* in Support of Respondents.[16]

And, of course, bans on common weapons addressed unique local conditions. For example, responding to violence during the western cattle drives, Dodge City, Kansas, in 1876, banned the carrying of pistols and other dangerous weapons. See Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876) (on file with Kansas Historical Society). Indeed, by the 1870s, most Western cattle towns effectively banned firearms, requiring cowboys to "'check' their guns when they entered town, typically by exchanging them for a metal token at one of the major entry points or leaving them at the livery stable." David T. Courtwright, *The Cowboy Subculture*, in *Guns in America: A Reader* 96 (Jan E. Dizard, *et al.,* ed. 1999); see also Robert R. Dykstra, *The Cattle Towns* 121-22 (1968).

c. The longstanding consensus approach in the States reflects "a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155. See also Winkler, *supra*, at 720 ("State courts in the modern era have uniformly upheld state prohibitions on particular types of guns, without requiring any legislative fact-finding to support the bans."). And it is worlds away from the Second Amendment's common-use rule. Unlike the "deep commitment of the Nation to the right of jury trial in serious criminal cases" discernable from state practice in *Duncan* (391 U.S. at 156), there is no deep commitment in the States to a rule of arms possession without regard to harm to the public welfare, and regardless of whether other weapons are permitted. To the contrary, state and local governments routinely ban weapons whose availability, in their considered judgment, harms the public welfare, while, at the same time, permitting other weapons for purposes of self-defense. Incorporation of the Second Amendment in the teeth of this considered and established state practice would be unwarranted.

D. The Framing-Era History Of The Second Amendment Does Not Support Incorporation.

This Court has sometimes considered the Framing-era history of a Bill of Rights provision in considering whether the provision is incorporated in the Due Process Clause.[17] That history is not determinative, because the due process standard is an adaptive one. See pp. 10-12, *supra*. And even the fact that a right was sufficiently valued to include in the Bill of Rights is not sufficient to establish that it was implicit in the concept of ordered liberty and therefore should be applied to the States. See, *e.g., Malloy*, 378 U.S. at 4; *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916) (Seventh Amendment); *Hurtado v. California*, 110 U.S. 516 (1884) (Grand Jury Clause).

Nonetheless, the Framing-era history can cast light on the extent to which the right was viewed—and should still be viewed—as implicit in the concept of ordered liberty. In this case, that history does not support incorporation.

1. This Court in *Heller* extensively canvassed the Framing-era history of the Second Amendment because contemporary public understanding was decisive in determining the question before the Court: whether the Second Amendment right was "only the right to possess and carry a firearm in connection with militia service" or a "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." 128 S. Ct. at 2789. The Court held that the right was an "individual right to possess and carry weapons in case of confrontation." *Id.* at 2797.

The Court explained that the Second Amendment right was an "individual right protecting against both public and private violence" that originated at the time of the Glorious Revolution. *Heller*, 128 S. Ct. at 2798-99. That pre-existing right to keep and bear arms, however, was not codified in the Constitution to protect "self-defense and hunting," though doubtless many "thought it even more important for self-defense and hunting" than for "preserving the militia." *Id.* at 2801. Instead, "the purpose for which the right was codified" was "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms," as the English had attempted to do to the colonists. *Ibid.* Thus, "self-defense had little to do with the right's *codification*," although "it was the *central component* of the right itself." *Ibid.* The Framers realized that, "unlike some other English rights" that remained outside the Constitution, the pre-existing right to keep and bear arms should be codified in order to protect the militia, which in turn was thought to be necessary to address "the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia." *Ibid.*[18]

2. The Second Amendment's history thus varies widely from the history examined by the Court in prior incorporation cases. When the Court has examined the Framing-era history as support for incorporating a right in the Due Process Clause, the right was included in the Bill of Rights because its protection of individual liberty was valued for its own sake. See, *e.g.*, *Duncan*, 391 U.S. at 151-53; *Klopfer*, 386 U.S. at 225-26. Even where the Court has not found it necessary expressly to canvass the Framing-era history, the same holds true. For example, it is obvious that the great rights of the First Amendment—freedom of speech and the press, the prohibition of establishment of religion and the right of free exercise, the rights to petition and peaceably assemble—were codified precisely because their protection of the individual from governmental intrusion was thought essential to a free society. See, *e.g.*, *Schneider*, 308 U.S. at 161 (characterizing freedoms of speech and press "as fundamental personal rights and liberties . . . reflect[ing] the belief of the framers . . . that exercise of the rights lies at the foundation of free government by free men"). In answering the incorporation question, there was no need separately to examine the Framing-era history or whether the Framers viewed the right as essential to personal liberty.

The Second Amendment is in this respect entirely different. As *Heller* explained, the Second Amendment right was *not* codified because the Framers believed that its protection of a non-militia-related individual liberty was essential to a free society. Although they valued the right as it had been reflected in a variety of legal sources, they codified it for a different reason: "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms." 128 S. Ct. at 2801. Indeed, the preamble to the Second Amendment, which is "unique in our Constitution" (*id.* at 2789), serves precisely the function of explaining to the public why codifying the right in the Constitution was thought necessary; the other rights in the Bill of Rights required no similar explanation, because the need to protect them from governmental intrusion and from the political process was obvious. Nor does anything in *Heller* suggest (and there is otherwise no reason to believe) that the right to keep and bear arms would have been included in the Bill of Rights were it not for this militia-related purpose. See *id.* at 2801 ("the reason" the right was codified was to preserve the militia). Rather, although the right was valued and embodied in a variety of other sources of law, there is every reason to believe that the Framers thought that the non-militia-related aspect of the right—primarily, the desire to have arms available for self-defense—would be adequately protected in the political process (as the right was in England, see 128 S. Ct. at 2798) by the ordinary process of democratic decision making.[19]

The congressional debate surrounding Madison's proposal for the Second Amendment tends to confirm that conclusion. If the Second Amendment right were thought essential to protect a non-militia-related personal liberty from governmental intrusion and from the political process, some trace of that belief would likely have surfaced. But nothing in the congressional debate over Madison's proposal for the Second Amendment suggests any view that a private arms right unconnected to preservation of the militia was essential. See *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 169-76, 185-91 (Cogan ed. 1997); Jack Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 127-28 (2000).[20]

3. The scope of the Second Amendment right also reflects the purpose to protect the militia rather than to further a fundamental aspect of personal liberty. The Second Amendment protects weapons in common use because that is what was required to "secur[e] the militia" in the founding era. *Heller*, 128 S. Ct. at 2811. At that time, weapons possessed commonly for purely private uses such as

self-defense and the weapons used by private citizens in the militia "'were one and the same.'" *Id.* at 2815 (citation omitted). Militia members had to "appear bearing arms supplied by themselves and of the kind in common use at the time" (*id.* at 2815 (quoting *Miller*, 307 U.S. at 179)), and knowing how "to handle and use [arms] in a way that makes those who keep them ready for their efficient use" (*id.* at 2811-12 (quoting Thomas Cooley, *Treatise on Constitutional Limitations* 271 (1868))). Consequently, the Second Amendment generally protects weapons in common use, regardless of how useful they are for self-defense, and it does not protect weapons not in common use that would undoubtedly be useful for self-defense (*e.g.*, machine guns). See *id.* at 2817.

4. In short, the Framing-era history of the Second Amendment is unique, 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. Unlike the other provisions of the Bill of Rights, there is no reason to believe that the Framers thought that highly valued individual interests, such as self-defense, could not be protected without the blanket right. Nor does the history indicate that the Framers believed it was implicit in a system of ordered liberty that the right to keep and bear arms be protected from the democratic political process.

E. The Other Arguments Advanced By Petitioners And Their Supporters Should Be Rejected.

1. The constitutional status and incidents of a right to self-defense are not at issue.

NRA argues that the Second Amendment should be incorporated because "Americans' personal right to possess . . . firearms for . . . self-defense has long been an essential and fundamental component of Americans' view of themselves as a free people." NRA Br. 35; see also Pet. Br. 69-70. *Heller* noted that "the inherent right of self-defense has been central to the Second Amendment right" (128 S. Ct. at 2817), and contentions about the need for firearms for self-defense have long dominated the controversies about the extent to which governments at various levels should regulate or limit firearms. This case, however, does not present any question about the constitutional status or incidents of an unenumerated right to self-defense, and the presumed existence of such a right would not support incorporating the Second Amendment in any event.

This Court has had many cases working out the law of self-defense (*e.g.*, *Brown v. United States*, 256 U.S. 335 (1921)) and addressing the constitutional consequences of recognizing a defense of self-defense to a criminal charge (*e.g.*, *Martin v. Ohio*, 480 U.S. 228 (1987)). But, because no State or the federal government to our knowledge has ever tried to eliminate self-defense as a defense in the criminal law, the Court has never had occasion to address whether or how the Due Process Clause protects it. While there may be significant support for recognizing an unenumerated right to a defense of self-defense in the criminal law if the occasion arose (*cf. Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality opinion)), substantial care would be warranted to avoid freezing the continuing evolution of the self-defense doctrine and the wide variation in its incidents in various jurisdictions. See, *e.g.*, Wayne R. LaFave, *Substantive Criminal Law* § 10.4 (2d ed. 2003).

Assuming that there is an unenumerated right to self-defense that extends beyond its recognition as a defense to criminal charges, such a right would not support incorporation of the Second Amendment. To be sure, the question could arise whether there is an ancillary right to the tools necessary to engage in self-defense, and a state law that purported to deprive people of all such tools would raise the question whether such an ancillary right should be recognized. But even if the Court were to recognize not merely the existence of a constitutional right to self-defense but also an ancillary right to tools necessary for its effectuation, and even if that ancillary right included a right to some kind of firearm, it would not provide support for incorporating the Second Amendment. So long as the States permitted the use of reasonable tools (including perhaps some kind of firearm) for self-defense, any constitutional right to self-defense would surely be adequately protected.[21] Yet such a regime would stop short of including the Second Amendment right to choose a weapon from among those in common use.

Indeed, neither petitioners nor NRA has attempted to make a showing that Chicago's ordinance eliminates a right to self-defense, or even the ability to have tools necessary to effectuate any such right. Nor could such a showing be made. Both Chicago and Oak Park permit the possession of long guns for self-defense or other purposes. [22] Petitioners and NRA make no argument that they are unable to adequately exercise a protected liberty interest in self-defense without access to handguns. Although there is a variety of views on the subject, there is a wealth of authority among experts that handguns are not the best weapon for self-defense purposes.

See Sugarmann, *supra*, at 58-59. See also Chris Bird, *The Concealed Handgun Manual: How to Choose, Carry, and Shoot a Gun in Self Defense* 140 (2008) (handgun is "a compromise," "the least-effective firearm for self defense," and "the hardest firearm to shoot accurately," while "shotguns and rifles are much more effective in stopping a drug-hyped robber or rapist"); Violence Policy Center, *Unintended Consequences: Pro-Handgun Experts Prove that Handguns are a Dangerous Choice for Self-Defense* (2001) (available at www.vpc.org/studies/unincont.htm).

2. Incorporation of other Bill of Rights provisions does not support incorporation of the Second Amendment.

According to petitioners, "[g]iven that the Due Process Clause has incorporated virtually all other enumerated rights, the obvious question is what exactly justifies treating the Second Amendment as the great exception." Pet. Br. 66 (internal quotation marks and ellipsis omitted). But there is no "me, too" principle applicable to incorporation. To establish that a particular provision of the Bill of Rights applies to the States, that particular provision—not some other one—must be so fundamental that it warrants displacing the ability of state and local governments to make their own sovereign choices and legislate for their own conditions.

In fact, the Second Amendment right is much closer to the Fifth Amendment grand jury and Seventh Amendment civil jury rights that are not incorporated than to the First, Fourth, Fifth, Sixth, and Eighth Amendment rights that are. The latter rights are incorporated not because they are means to greater ends, but because they themselves have been recognized as core aspects of liberty. To be sure, both the grand jury and civil jury rights could also be described as serving more significant background values that are much closer to the core of "ordered liberty": the need for regularized institution of criminal proceedings and for an impartial decision maker to decide civil cases. Nonetheless, this Court has held that the grand jury right, while important enough to be included in the Fifth Amendment, was not essential to due process because the underlying value could be served through other mechanisms, such as initiation of a criminal proceeding by information. See *Hurtado*, 110 U.S. at 537-38. And the Court has accepted that a judge may be an adequate fact-finder in a civil case. See *Minneapolis*, 241 U.S. at 217-18. Similarly, the right to keep and bear arms may have a relationship to an unenumerated right to self-defense, which this Court could recognize as fundamental in an appropriate setting. But, as we explain above, that

right, insofar as it is protected by the Due Process Clause, may be protected in many ways aside from the particular means embodied in the Second Amendment.

Finally, the Second Amendment is different from the other rights that have been incorporated in another important respect. As this Court has worked out the meanings of each of the provisions of the Bill of Rights, it has had to address hotly contested issues concerning the incidents of each of those rights. But the necessity to a free society of the substantive rights that have been incorporated—the freedom of the press, freedom of speech, Establishment Clause and free exercise rights, the right against government expropriation of private property in the Just Compensation Clause, etc.—is not seriously open to question. The subject matter of the Second Amendment, however, is a highly dangerous item, firearms. The desirability of regulating or prohibiting certain firearms is very much a subject of dispute and contention among those committed to a free society—precisely the sort of dispute that should be worked out in the political systems of the States.

II. THE COURT SHOULD ADHERE TO PRECEDENT REJECTING INCORPORATION UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE.

A. This Court Has Repeatedly Held That The Privileges Or Immunities Clause Does Not Incorporate Any Provisions Of The Bill Of Rights.

Petitioners devote the bulk of their brief to urging this Court to overrule a long line of precedent holding that the Privileges or Immunities Clause does not incorporate any or all of the provisions of the Bill of Rights. Pet. Br. 9-65. The *stare decisis* considerations that this Court examines overwhelmingly support continued adherence to those precedents. At the same time, the historical record on which petitioners rely does not nearly establish that such incorporation was understood by members of Congress, the ratifiers, or the public as a consequence of adopting the Clause; certainly an intent to incorporate under the Clause is not clear enough to upset settled precedent.

1. The Privileges or Immunities Clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV. The Court first construed this clause in the seminal *Slaughter-House Cases*, ruling that it includes only those rights that "are dependent upon

citizenship of the United States, and not citizenship of a State." 83 U.S. at 80. The Court noted that the immediately prior Citizenship Clause makes "persons born or naturalized in the United States and subject to the jurisdiction thereof . . . citizens of the United States and of the State in which they reside"; if the Privileges or Immunities Clause "was intended as a protection to the citizen of a State against the legislative power of his own State," it was "remarkable . . . that the word citizen of the State should be left out" when the distinction from "citizens of the United States" had appeared elsewhere. *Id.* at 73-74. Accordingly, the Court construed the "privileges or immunities of citizens of the United States" to be those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 78-79. They did not include those derived from other sources.

The Court gave some examples of the privileges or immunities of national citizenship, such as the right to "come to the seat of government to assert any claim he may have . . ., to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions." *Slaughter-House*, 83 U.S. at 79 (quoting *Crandall v. Nevada*, 75 U.S. (6 Wall.) 36 (1867)). They also included, *inter alia*, the "privilege of the writ of habeas corpus" (U.S. Const. art. I, § 9) and the privilege "that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein." *Slaughter-House*, 83 U.S. at 80. But before the Clause was enacted, the privileges of *national* citizenship under *Barron* had not included a right against *state* abridgment of freedom of speech, freedom of the press, or the other provisions of the Bill of Rights; those sorts of protections and others were instead provided by state laws or state constitutions. See *id.* at 76. Nothing in the Privileges or Immunities Clause purported to or did alter that situation.

2. As petitioners acknowledge, in the wake of *Slaughter-House*, the Court expressly rejected incorporation of Bill of Rights provisions, including the Second Amendment, under the Privileges or Immunities Clause. Pet. Br. 7-8. In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court held that the Second Amendment does not apply to the States, finding the right to bear arms is not "in any manner dependent upon [the Constitution] for its existence." *Id.* at 553. In *Presser v. Illinois*, 116 U.S. 252 (1886), the Court reaffirmed that the Second Amendment right "to keep and bear arms" is not a privilege or immunity of United States citizenship. *Id.* at 266-67.

3. Relying on *Slaughter-House*, the Court has consistently rejected incorporation of other Bill of Rights provisions under the Privileges or Immunities Clause. In *Maxwell v. Dow*, 176 U.S. 581 (1900), the Court rejected the argument that the Privileges or Immunities Clause requires the States to adhere to the Fifth Amendment right to grand jury indictment or the Sixth Amendment right to jury trial in criminal cases. See *id.* at 596-02. The Court explained that under *Slaughter-House*, the protection of the privileges and immunities of state citizenship "still remains with the state," and the privileges or immunities of national citizenship do not "include all the rights protected by the first eight amendments." *Id.* at 597. Similarly, in *Twining*, the Court reaffirmed that civil rights "which before the war Amendments were enjoyed by state citizenship and protected by state government, were left untouched by" the Privileges or Immunities Clause (211 U.S. at 96); the Clause "did not forbid the states to abridge the personal rights enumerated in the first eight Amendments" (*id.* at 99). See also *In re Kemmler*, 136 U.S. 436, 446-49 (1890) (Eighth Amendment prohibition against cruel and unusual punishment); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (Seventh Amendment). Finally, in *Adamson v. California*, 332 U.S. 46 (1947), the Court held that the privilege against self-incrimination was a privilege or immunity of state, rather than national, citizenship. See *id.* at 52-53.

In those cases and afterwards, the Court has relied on the Due Process Clause to address incorporation claims. For example, it overruled the due process holding of *Maxwell* in *Williams v. Florida*, 399 U.S. 78 (1970), and the due process holdings of *Adamson* and *Twining* in *Malloy*. But the Court has never departed from or cast doubt on the holdings of any of those cases that the Privileges or Immunities Clause does not incorporate any of the provisions of the Bill of Rights.

B. Considerations Governing *Stare Decisis* Militate Strongly For Adherence To Settled Precedent In This Case.

Petitioners admit that *Slaughter-House* forecloses incorporation under the Privileges or Immunities Clause; they urge this Court to overrule it and the many cases that have relied on it (Pet. Br. 42), and to embrace an interpretation of the Privileges or Immunities Clause that includes not only the first eight amendments, but also an undefined "broad array of pre-existing natural rights believed secured by all free governments" (*id.* at 10). Overruling *Slaughter-House* and its progeny at this late date would upset strong reliance interests, throw the structure of constitutional law applicable to the States

into disarray, and serve no useful purpose. It also would be inconsistent with the bulk of the historical evidence concerning the meaning of the Privileges or Immunities Clause and would merely substitute the views of the current Members of this Court for the considered views of a Court whose Members had recently lived through the proposal and ratification of the Clause and were therefore in a uniquely favorable position to discern its meaning. Petitioners' argument should be rejected. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood v. Casey*, 505 833, 854 (1992). Adhering to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). While "*stare decisis* is not an 'inexorable command,'" especially in a constitutional case (*Casey*, 505 U.S. at 854), its application to a particular case is governed by four primary factors: the workability of the prior rule and the new proposal; the antiquity of the precedent; individual or societal reliance that would be upset by overruling; and evolution of the law or a change in premises of fact that has undermined the original rationale. See, *e.g.*, *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009); *Casey*, 505 U.S. at 854-55; see also *Lawrence*, 539 U.S. at 576-77 (erosion of prior decisions and non-reliance supported overruling *Bowers Hardwick*, 478 U.S. 186 (1986)). These factors cut overwhelmingly in favor of *stare decisis* here. Against them, only the most compelling rationale could support overruling *Slaughter-House* and its progeny.

1. *Workability*. The Court's privileges or immunities jurisprudence is clear and easy to apply. Under it, only laws that trammel protections that the Constitution itself grants as incidents of national citizenship, like the right to become a citizen of any State (see *Saenz v. Roe*, 526 U.S. 489, 503 (1999)), are invalid. The Court has had relatively few cases arising under the Clause over the course of its history and has not had great difficulty deciding them.

Overruling *Slaughter-House* and its progeny would create a chaotic situation in constitutional law. It would immediately call into doubt the scope of constitutional rights enforceable against the States by two important classes: aliens and corporations. If the Privileges or Immunities Clause were to displace the Due Process Clause as the vehicle of incorporation, then, according to petitioners, all of the first eight Amendments (and additional rights besides) would apply to the States. Pet. Br. 6, 7, 14, 15, 22, 26, 27, 33. Indeed, it would be

difficult to understand an argument that the Privileges or Immunities Clause was understood to incorporate the Second Amendment but *not* the other provisions of the Bill of Rights; the Clause does not expressly refer to the Second Amendment, and there is no basis on which the Court could determine that the Second Amendment, but not these other rights, is incorporated.

The Privileges or Immunities Clause, however, is worded distinctly from the Due Process Clause, which until now has governed the incorporation issue. While the Due Process Clause provides "nor shall any State deprive any *person* of life, liberty, or property, without due process of law," the Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States." U.S. Const. amend. XIV, § 1 (emphases added). Aliens and legal entities such as corporations are "persons" under the Due Process Clause. See, *e.g.*, *First National Bank v. Bellotti*, 435 U.S. 765, 780 n.15 (1978) (corporations); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (aliens). But aliens are not "citizens," and it has long been settled that corporations too are not "citizens" under the Privileges or Immunities Clause. See, *e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363 (1907); see also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869) (same under Art. IV, § 2); *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 884 (1985) (O'Connor, J., dissenting). Accordingly, if the Privileges or Immunities Clause were the source of constitutional protections against the States, the extent to which aliens and corporations could claim such rights would immediately be thrown into doubt.

To be sure, it is possible that the Due Process Clause would remain applicable to provide redundant incorporation of at least some provisions of the Bill of Rights, and that the rights of aliens and corporations under those provisions would remain secure. But the argument for shifting incorporation of Bill of Rights protections to the Privileges or Immunities Clause rests largely on dissatisfaction with the current protection of at least substantive rights under the Due Process Clause. See *Saenz*, 526 U.S. at 527-28 (Thomas, J., dissenting). Indeed, if both Clauses continued to protect the same rights, overruling *Slaughter-House* and its progeny would be an empty gesture and could not be justified.

Petitioners themselves recognize the problem with respect to aliens (Pet. Br. 62-64), although they ignore the impact on corporations. They argue, however, that the reference of the word "citizens"

in the Privileges or Immunities Clause is to the class of rights protected, rather than the individuals who may assert them; that aliens would continue to have rights against States under the Equal Protection Clause; that state laws regarding alienage may be preempted by federal law; and that Sen. Howard and Rep. Bingham argued that the Fourteenth Amendment would protect everyone within a State's jurisdiction. *Ibid.*[23] Of course, it could equally be argued that by far the most natural reading of the Clause is to protect only citizens; that equal protection rights for aliens would not replicate Bill of Rights provisions that apply to the States; that some state laws may not be preempted and, even if they were, the protections of the Bill of Rights extend beyond possibly preempted state laws (for example, to actions of individual police officers in violation of the Fourth Amendment); and that it was the text of the Clause, not the speeches given in Congress, that was proposed and ratified as part of the Fourteenth Amendment. Accepting petitioners' argument would throw the entire question of the rights of aliens and corporations into doubt that could take many years to resolve. Other uncertainties flow from accepting petitioners' argument, too. Petitioners base their argument on sources that, if credited, would establish not only that the Privileges or Immunities Clause incorporates all of the Bill of Rights provisions, but that it also makes applicable to the States unenumerated fundamental rights of uncertain scope. See, *e.g.*, Pet. Br. 26 ("the natural, fundamental rights, believed to fall under Article IV, section 2, and the rights codified in the first eight amendments"), 33 ("fundamental rights, including those codified in the Bill of Rights"), 55 ("pre-existing natural rights"). Thus, petitioners' argument would require this Court to sort out which unenumerated and previously unrecognized rights are protected by the Privileges or Immunities Clause. Moreover, even unenumerated rights this Court *has* recognized under the Due Process Clause would need to be reassessed, given petitioners' theory that the Due Process Clause does not provide an adequate means of protecting enumerated or unenumerated rights. Finally, because the Privileges or Immunities Clause does not grant any rights against the federal government, petitioners' "pre-existing natural rights"—whatever they turn out to be—would presumably apply *only* against the States, not the federal government.

2. *The antiquity of the precedent.* *Slaughter-House* was decided 137 years ago. While Members of the Court have debated whether a 20-year-old precedent has sufficient age to warrant extra care before overruling it (compare *Montejo*, 129 S. Ct. at 2089, with *id.* at 2098 (Stevens, J., dissenting)), there can be no doubt that exceptional justi-

fication is required before overruling a venerable precedent that has been consistently reaffirmed.

3. *Reliance*. Policies supporting *stare decisis* are "at their acme . . . where reliance interests are involved." *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009). There has been very substantial reliance on this Court's repeated reaffirmations that the Privileges or Immunities Clause does not make the Bill of Rights applicable to the States. In particular, this Court has regularly (and recently) made clear that two provisions of the Bill of Rights (at least)—the Grand Jury Clause of the Fifth Amendment and the civil jury right in the Seventh Amendment—do not apply to the States. See, *e.g.*, *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007) (Seventh Amendment); *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (Grand Jury Clause). Many States have constructed their systems of criminal and civil justice in reliance on those holdings.[24] Petitioners' argument leads inexorably to making *all* of the provisions of the Bill of Rights, including the grand jury and civil jury rights, applicable to the States. Accordingly, overruling *Slaughter-House* would require the States to overhaul their systems that are not in compliance with the newly applicable provisions; call into doubt settled judgments in civil (and possibly even criminal) cases; and require the States to tailor their criminal and civil justice systems to federal standards that have previously been found *not* to be necessary or fundamental. Those reliance interests counsel strongly against overruling *Slaughter-House* and its progeny.

4. *Erosion of legal and factual premises*. There has been no erosion of the foundation of *Slaughter-House*. No related areas of law have changed in a way that renders *Slaughter-House* "anachronistic." *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992). Nor have more recent cases "undermined the assumptions" (*Agostini v. Felton*, 521 U.S. 203, 222 (1997)) or "substantially weakened" its "analytical underpinnings" (*State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997)). The Court's path in this area has been consistent.

Petitioners argue that *Slaughter-House* is an anachronism because most Bill of Rights protections have been incorporated under the Due Process Clause and the prediction in *Slaughter-House* that the Equal Protection Clause would ultimately serve only to protect the rights of African-Americans (see 83 U.S. at 81) has not proven true (Pet. Br. 64). But *Slaughter-House*'s "central rule" (*id.* at 64-65) with respect to Privileges or Immunities has been reaffirmed every time this Court has addressed it. Both incorporation of many Bill of Rights provisions under the Due Process Clause and the Court's

recognition that the Equal Protection Clause affords protection to others besides African-Americans demonstrate that the Court's jurisprudence provides amply workable means to protect individual rights without overturning settled precedent. In no sense does either development render the Court's steady approach to the Privileges or Immunities Clause an anachronism.

Petitioners also fail to show that the factual premises underlying *Slaughter-House* and its progeny have been undermined. The historical record was scoured in *Adamson*, when Justice Black's dissent urged incorporation of the Bill of Rights through the Privileges or Immunities Clause (see 332 U.S. at 6892), relying heavily upon many of the same Congressional Globe excerpts as petitioners. Like petitioners, Justice Black reviewed debates surrounding the Civil Rights Act of 1866 and the Freedmen's Bureau Act. See *id.* at 99-113. The Court in *Adamson*, however, rejected the argument for incorporation (see *id.* at 5253), as did Justice Frankfurter's concurrence (see *id.* at 62-67). The history has not changed since then, and there is no need for the Court to again reexamine the same factual claims that it has already, and correctly, rejected many times.

C. Even If Viewed *De Novo*, The Historical Record Provides No Basis For Imposing The Second Amendment On The States.

In construing the Second Amendment, *Heller* undertook a historical analysis to discern the meaning according to "public understanding" at the time of ratification. 128 S. Ct. at 2805. As the Court explained:

> [W]e 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." 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.

Id. at 2788 (citations omitted). The original meaning must be gleaned from the understanding of voters and ordinary citizens.

Petitioners claim that the "privileges or immunities of citizens of the United States" include the Bill of Rights and a host of other fundamental rights. Pet. Br. 26. NRA stops short of arguing that the entire Bill of Rights should be incorporated and is noncommittal about which clause was meant to incorporate the Second Amendment, asserting instead that it could be "nestled" in either clause.

NRA Br. 10. Neither position is supported by the historical record.

1. The historical record does not support a public understanding of total incorporation.

In 1833, this Court in *Barron* settled a question "of great importance, but not of much difficulty," holding that the Bill of Rights did not restrict the States. 32 at 247; see also *Lessee of Livingston v. Moore*, 32 (7 Pet.) 469, 551-52 (1833). Thus, long before the 1866 debates on the Fourteenth Amendment, it was clear that the privileges or immunities of national citizenship did not include protection from state infringement of any of the rights in the Bill of Rights. The historical record does not show that the public understood, or even had reason to suspect, that the situation changed in 1868, and that the privileges and immunities of national citizenship now included protection from state infringement of the Bill of Rights generally, or the Second Amendment specifically. To the contrary, while the historical record reveals that a few Members of Congress had incorporationist designs, many others expressed confusion or opined that the Privileges or Immunities Clause was meant only as a nondiscrimination rule, or to constitutionalize either the Privileges and Immunities Clause in Article IV, § 2 or the Civil Rights Act of 1866.

a. *Text.* The Privileges or Immunities Clause forbids state abridgement of "the privileges or immunities of citizens of the United States." By 1866, the phrase "Bill of Rights" had long been applied to the first ten amendments of the Constitution. Moreover, while the Bill of Rights refers to its protections as "rights" many times (Amendments I, II, IV, VI, VII, 55 IX), the Bill of Rights does not employ the words "privilege" or "immunity." Surely the most natural way to refer to the first eight amendments would have been to refer directly to the "first eight Amendments," to the "Bill of Rights," or, at the very least, to have used the word "right" in some way to designate the object of the Clause. The Privileges or Immunities Clause does none of those things. If the Fourteenth Amendment's drafters intended to apply the Bill of Rights to the States, and for the public to understand that the Privileges or Immunities Clause would have this effect, they chose an indirect and uncertain way to do so.

In this respect, the Privileges or Immunities Clause may be usefully contrasted with other constitutional amendments that have been similarly designed to overturn decisions of this Court. Petitioners claim the Clause was intended to overrule *Barron*. But where a legislature intends to alter long-settled, clear law, it ordinarily can be

expected to act with some clarity. And, in other instances in which the Constitution was amended to undo prior judicial rulings or to modify earlier provisions, the amendments were clearly worded to have that effect, such that the ratifying public would have had little doubt about what it was being asked to approve. While controversy over the full meaning of the Eleventh Amendment has endured, all accept that its terms unambiguously overruled the result in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 723 (1999) ("[T]he Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court."); *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 289 (1985) (Brennan, J., dissenting). Similarly, the terms of the Sixteenth Amendment clearly overturned this Court's decision in *Pollock v. Farmers' Loan & Trust*, 157 429 (1895). See *Brushaber v. Union Pac. R.*, 240 1, 18 (1916) ("[I] n the light of . . . the decision in the *Pollock* Case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* Case was decided."). Finally, the Fourteenth Amendment's Citizenship Clause itself shows that, when Congress wants to overturn a well-known decision of this Court, the most natural way to do it is to make its intent clear. As the Court in *Slaughter-House* explained, while *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), held that African-Americans could not be citizens, the terms of the Citizenship Clause clearly "overturn[] the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States." 83 U.S. at 73.

In each of these instances, there was no reason to hide the purpose of the amendment from the public. To the contrary, given the high stakes and importance of reversing a foundational constitutional decision by this Court, Congress had every reason to make its intent clear. The opacity of the language of the Privileges or Immunities Clause, and the failure to use any of the numerous more direct ways to refer expressly to the Bill of Rights, strongly suggests that the Clause was not intended to affect the settled law governing the application of the Bill of Rights to the States.

Petitioners argue that the words "privileges" and "immunities" were "[p]opularly [u]nderstood to [e]ncompass [p]re-existent [f] undamental [r]ights, [i]ncluding [t]hose [e]numerated in the Bill of Rights." Pet. Br. 15. At most, petitioners show that those words were sometimes used to describe natural or fundamental rights, particular Bill of Rights guarantees, or, more generally, the guarantees of the

federal Constitution. *Id.* at 16-19. The words "privileges" and "immunities" appeared in many different contexts (see George C. Thomas III, *Newspapers and the Fourteenth Amendment: What did the American Public Know About Section 1?*, 18 J. Contemp. Legal Issues (forthcoming 2009) (available at http://ssrn. com/abstract=1392961, at 7 (search of "privileges and/or immunities" in newspapers for 1865-69 showed numerous and varied uses of those terms)), and carried other meanings that, insofar as they referred to rights at all, connoted a narrower or different set of rights.

For example, Webster defined "privilege" as "[a] peculiar benefit or advantage; a right or immunity not enjoyed by others or by all" (Noah Webster, *An American Dictionary of the English Language* 1039 (G & C Merriam 1866)), and "immunity" as "[f]reedom from an obligation; exemption from any charge, duty, office, tax, or imposition" (*id.* at 661). As would be expected from its use in the phrase "Bill of Rights," the word "right" was more generally defined as "[t]hat to which one has a claim" (*id.* at 1140)—a much broader meaning that fits more comfortably with the broadly applicable guarantees of the first eight amendments. Similarly, Rep. Kerr discussed Worcester's definition of the terms during debate over Fourteenth Amendment enforcement legislation:

> It is most erroneous to suppose that the words "rights," "privileges," and "immunities" are synonymous. They are not. The word "rights" is generic, embracing all that may be lawfully claimed, and it is affirmative; but the others are, in the most exact and legal definition, both restrictive and negative.

Cong. Globe, 42d Cong., 1st Sess. app. 47 (1871).

Because "privileges" and "immunities" had more than one meaning, it cannot be concluded that the public would have understood those words to invoke petitioners' collection of all broadly defined natural and fundamental rights, and the Bill of Rights too. One of petitioners' own examples makes the point. Justice Washington's lengthy list in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823), of "privileges" and "immunities" subject to Article IV, § 2 conspicuously did *not* include the first eight amendments. Pet. Br. 17. Nor does combining "privileges or immunities" with "of citizens of the United States" clarify that Bill of Rights provisions were included. As we have explained, *Barron* made plain that provisions against state intrusion on Bill of Rights protections is not a privilege or immunity of national citizenship.

b. *Judicial decisions.* Judicial opinions around the time that a con-

stitutional provision is adopted are potent evidence of public understanding. See *Heller*, 128 S. Ct. at 2808-10. The Reconstruction-era Court surely would have been aware of a new understanding of the privileges or immunities of national citizenship designed to undo *Barron*, especially if such a public understanding were reflected in the Senate debates over the Fourteenth Amendment that took place next door. See George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L. J. 1627, 1652 (2007). But the Court's decisions in the wake of Fourteenth Amendment ratification reflect no such incorporationist understanding. Just months after ratification, *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (1868), rejected Fifth and Sixth Amendment challenges to a state indictment, based on *Barron*. If the public understood the Privileges or Immunities Clause to undo *Barron*, surely this Court and Twitchell' s lawyer—who was himself a "constitutional theorist who had promoted the concept of incorporation" (Thomas, *Riddle*, *supra*, at 1653)—would have noted that. Besides *Twitchell*, two lower court decisions around the same time also rejected incorporation of Bill of Rights provisions. See *United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.D.S.C. 1871) (No. 14,893); *Rowan v. State*, 30 Wis. 129, 148-50 (1872).

Then came *Slaughter-House*, just five years after the ratification of the Fourteenth Amendment, in which the majority rejected the incorporationist understanding of the Privileges or Immunities Clause. In dissent, Justice Field, joined by three others, described the Clause as encompassing a nondiscrimination obligation. See 83 U.S. at 96-101. Only Justice Bradley's dissent, joined by Justice Swayne, endorsed a view that the Clause encompassed the first eight amendments. See *id.* at 118-19.[25] *Slaughter-House* received mixed reviews. As Charles Warren observed, *Slaughter-House* was a "tremendous shock and disappointment" to radical Republicans, but "the country at large may not have understood, at the time of the passage of the Fourteenth Amendment, the full purpose" those Republicans had in mind. 2 *The Supreme Court in United States History* 539 (rev. ed. 1926). Others endorsed the soundness of the decision, and not simply because they thought the Court had "dared to withstand the popular will" of the people, as petitioners suggest. Pet Br. 46. Christopher Tiedeman characterized the Court as defying "the letter of this amendment" (*The Unwritten Constitution of the United States* 103 (1890)), but doubted "that the majority of those, whose votes brought about the adoption of this amendment, intended it to have th[e] effect" of an extreme shift in power to the federal government (*id.* at 102). In the

press, a New York Times editorial reported that *Slaughter-House* was "calculated to maintain, and to add to, the respect felt for the Court, as being at once scrupulous in its regard for the Constitution, and unambitious of extending its own jurisdiction." Editorial, *The Scope of the Thirteenth and Fourteenth Amendments*, N.Y. Times, Apr. 16, 1873. The Boston Daily Advertiser reported that the decision "attracted little attention outside of legal circles," and that "[t]he opinion of Mr. Justice Miller is held by the Bar to be exceedingly able." Warren, *supra*, at 539 (citing Boston Daily Advertiser, Apr. 16, 1873).

To be sure, the precise question whether Bill of Rights guarantees were privileges or immunities of national citizenship was not presented in *Slaughter-House*. But in *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874), the Court unanimously rejected a claim that the Seventh Amendment right to trial by jury was a privilege or immunity of citizenship. Then *Cruikshank* held that the Second Amendment restrains only Congress. See 92 U.S. at 553.

The Reconstruction-era Court that decided *Slaughter-House*, *Cruikshank*, and *Edwards* was in a uniquely advantageous position to discern the meaning of the Privileges or Immunities Clause. Eight of the nine Members of the Court were Republican appointees (see Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. Contemp. Legal Issues (forthcoming 2009) (available at http://ssrn.com/abstract=1358473, at 32)) and all of them lived through the national trauma of the Civil War, the postwar legislative efforts up to and including Congress's adoption of the Fourteenth Amendment, and the subsequent ratification process in the States. Indeed, the Court itself explained that the issues before it could not be resolved without reference to recent history:

> [F]or in [that history] is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

Slaughter-House, 83 U.S. at 67-68; see *id.* at 71 ("events . . . almost too recent to be called history, but which are familiar to us all"). See also *Morrison*, 529 U.S. at 621-22 (noting special "insight" of Justices who "obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment").

If there had been a public understanding that the Privileges or Immunities Clause made the Bill of Rights applicable against the States, those Justices would have been unable in good faith to ignore it, and commentators on the Court's decision in *SlaughterHouse* would have been equally clear that a dreadful error had been made. Petitioners simply ask this Court to address the same question that the Justices in *Slaughter-House* addressed, but with the disadvantages of 140 years' distance and a cold historical record. Even without the added force provided by *stare decisis*, petitioners' arguments should be rejected.

c. *Congressional record.* As petitioners observe (Pet. Br. 11-12), the Fourteenth Amendment—as well as the Civil Rights Act of 1866 and the Freedmen's Bureau Act—was intended to address discriminatory treatment of freedmen under Black Codes and atrocities committed against freedmen after the Civil War (see Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 243-52 (1988); *Slaughter-House*, 83 U.S. at 70 (recounting, *inter alia*, that southern States had imposed "onerous disabilities and burdens" on the freedmen "and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value")). And as NRA emphasizes (NRA Br. 11-14), the Freedmen's Bureau Act was one of Congress's first efforts to restore order, targeting discriminatory laws, including the discriminatory disarmament of freed slaves. That statute provided for the "*full and equal benefit* of all laws . . . including the constitutional right to bear arms . . . without *respect to race or color, or previous condition of slavery*." Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77 (emphasis added). While this was a start for securing equal rights in rebel territories, it did not grant any substantive rights or purport to define the privileges or immunities of national citizenship; it required only nondiscriminatory treatment. The Civil Rights Act similarly required equal treatment, providing that United States citizens

> of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the *same* right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to *full and equal benefit* of all laws and proceedings for the security of person and property, *as is enjoyed by white persons*.

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added). The Act did not embrace the first eight amendments or mention the right to arms. And petitioners cite no historical evidence that the public understood any of the rights listed, including the right to "full and equal benefit of all laws and proceedings for the security of person and property," to mean the Bill of Rights. Even with respect to the rights that were named, the Act required only nondiscrimination. During debate, several members expressed doubt that Congress had the authority to enact the legislation without a constitutional amendment. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 504 (1866) (Sen. Johnson); *id.* at 1290-93 (Rep. Bingham). Nevertheless, the Act was passed, and the President's veto was overridden. See *id.* at 1861.

Meanwhile, the debates on Rep. Bingham's initial proposed Fourteenth Amendment (see Cong. Globe, 39th Cong., 1st Sess. 1033 (1866)), and on the version introduced by Sen. Howard (see *id.* at 2764) began. Like the equality provisions of the Freedmen's Bureau Act and the Civil Rights Act, "the Amendment's central principle" was to establish "a national guarantee of equality before the law." Foner, *supra*, at 257. Overwhelmingly, Representatives viewed Section 1 as an antidiscrimination rule. See generally John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992). For example, Rep. Raymond described Section 1 as "secur[ing] an equality of rights among all the citizens of the United States." Cong. Globe, 39th Cong., 1st Sess. 2502 (1866). And Rep. Bingham himself defined "immunity" to mean "[e]xemption from unequal burdens." *Id.* at 1089. While Rep. Stevens stated that "the Constitution limits only the action of Congress, and is not a limitation on the States" and "[t]his amendment supplies that defect," he quickly clarified that it "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." *Id.* at 2459. He conveyed the same message with respect to the first version of the Fourteenth Amendment proposed by Bingham. To the claim that the Amendment meant that "all State legislation . . . may be overridden . . . and the law of Congress established instead" (*id.* at 1063 (Rep. Hale)), Rep. Stevens responded:

> Does the gentleman mean to say that, under this provision, Congress could interfere in any case where the legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress shall have

> power to correct such discrimination and inequality? Does this proposition mean anything more than that?

Ibid.

Many other Members of Congress expressed, more specifically, the notion that Section 1 would cure any lack of constitutional authority to enact the Civil Rights Act, and even constitutionalize that rule of law. This was "[p]erhaps the single most frequently expressed understanding of the proposed Amendment." Rosenthal, *Second Amendment Plumbing*, *supra*, at 58. "[O]ver and over in this debate, the correspondence between Section 1 of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other." Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5, 44 (1949). For instance, Rep. Latham stated that "the 'civil rights bill' . . . covers exactly the same ground as this amendment." Cong. Globe, 39th Cong., 1st Sess. 2883 (1866). Rep. Garfield explained that Section 1 was necessary, even after enacting the Civil Rights Act, in order to "lift that great and good law above the reach of political strife . . . and fix it . . . in the eternal firmament of the Constitution." *Id.* at 2462. Other examples of that understanding abound. See, *e.g.*, *id.* at 2459 (Rep. Stevens); *id.* at 2465 (Rep. Thayer); *id.* at 2467 (Rep. Boyer); *id.* at 2498 (Rep. Broomall); *id.* at 2502 (Rep. Raymond); *id.* at 2511 (Rep. Eliot); *id.* at 2538 (Rep. Rogers); *id.* at 2961 (Sen. Poland); *id.* at 3035 (Sen. Henderson); *id.* at 3069 (Rep. Van Aernam). Yet the Civil Rights Act, as we explain above, applied a non-discrimination principle, not a rule granting substantive rights. See 14 Stat. at 27. Those who construed the Amendment to simply duplicate and support the Civil Rights Act would not have understood it to achieve the entirely distinct purpose of applying the Bill of Rights to the States.

Others believed that the Privileges or Immunities Clause rendered Article IV, § 2 enforceable. Sen. Poland, for example, said that the Clause "secures nothing beyond what was intended" by Article IV, § 2. Cong. Globe, 39th Cong., 1st Sess. 2961 (1866). Rep. Bingham himself described "the privileges or immunities of a citizen of the United States" as being the same as the rights against state discrimination found in Article IV, § 2. *Id.* at 1089. Article IV, § 2 was itself a nondiscrimination obligation, requiring States to afford the same "fundamental" privileges and immunities provided its own citizens to citizens "in every other State." *Corfield*, 6 F. Cas. at 551-52. See also *Paul*, 75 U.S. at 179-83 (Article IV, § 2 prohibits "discrimi-

nating legislation against" citizens of other States). And *Corfield* did not indicate that the Privileges or Immunities Clause included the Bill of Rights.

Certainly, Sen. Howard was straightforward about his view that the Bill of Rights should be included among the privileges or immunities of national citizenship. See Pet. Br. 27. While he understood that *Corfield* itself did not refer to the Bill of Rights or its provisions, he argued that to the list of "fundamental" rights in *Corfield* "should be added the personal rights guarantied and secured by the first eight amendments of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). But no one else expressly agreed with, or clearly articulated, that idea. To the contrary, despite his speech, several Senators bemoaned the lack of any clear meaning to the clause. Sen. Hendricks stated that he had not "heard any Senator accurately define, what are the rights and immunities of citizenship" or that "any statesman has very accurately defined them." *Id.* at 3039. He described the terms as "not very certain" and "vague." *Ibid.* Similarly, Sen. Johnson proposed, just before the Amendment's passage, to delete the Privileges or Immunities Clause, "simply because [he did] not understand what [would] be the effect of that." *Id.* at 3041. Rep. Boyer found Section 1 "objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions." *Id.* at 2467. No one responded to these claims of ambiguity, although it would have been simple to defeat them if the general understanding was that "privileges or immunities of citizens of the United States" includes the protections of the Bill of Rights. Indeed, while there was vigorous debate on other aspects of the Amendment—including Section 2's solution to apportionment of Congress and Section 3's restrictions on political office for rebels—there was comparatively little said about the Privileges or Immunities Clause. See Thomas, *Riddle*, *supra*, at 1638-39.

As for Rep. Bingham (see Pet. Br. 29-31), he may have desired incorporation, but he did not clearly articulate that desire during Fourteenth Amendment debates. He and "[o]ther leading Republicans . . . spoke on occasion as if section one guaranteed nothing more than equality, but at other times they interpreted it as a guarantor of absolute rights." William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 119 (1988). Many of his comments reflected an erroneous, *Barron*-contrarian view that States were already bound by the first eight amendments, and that a constitutional amendment was necessary only for federal enforcement of those rights. See Cong. Globe, 39th Cong., 1st Sess. 1034, 1088-90

(1866). And, on several occasions, he denied that the Amendment would "take away from any State any right that belongs to it." *Id.* at 1088; accord *id.* at 1090.

Rep. Bingham's clearest statement that Section 1 would incorporate the Bill of Rights did not come until 1871, long after the ratification of the Amendment. In the debates over the Civil Rights Act of 1871, he said the first eight amendments "never were limitations upon the power of the states, until made so by the fourteenth amendment" and that privileges or immunities "are chiefly defined in the first eight amendments." Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871). Even then, Rep. Bingham was sending mixed signals. Only two months earlier, he issued a contradictory statement in a report from the Committee on the Judiciary, stating that the Privileges or Immunities Clause does not "refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2" and "did not add to the privileges or immunities before mentioned." H.R. Rep. No. 22 (Jan. 30, 1871). Based on Rep. Bingham's mixed messages, he has been referred to by scholars as "befuddled" (Fairman, *supra*, at 26), or, to give him more credit, as a "consummate politician" (Thomas, *Newspapers*, *supra*, at 12). See also Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 140-46 (1977) (noting Bingham's conflicting explanations and questioning "upon which . . . did the framers rely"); Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 Am. J. Legal Hist. 41, 70 (1996) (Bingham "often expressed this intent in very confusing terms"). Rep. Bingham's incorporationist view, if indeed he held such a view, simply was not clear and fails as evidence of public understanding.

Other Representatives expressed the notion that the Fourteenth Amendment would facilitate enforcement of constitutional provisions against States. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 586 (1866) (gives Congress "power to enforce by appropriate legislation all the guarantees of the Constitution") (Rep. Donnelly); *id.* at 1054 (would "give vitality and life to portions of the Constitution") (Rep. Higby); *id.* at 1057 (protects rights "already to be found in the Constitution") (Rep. Kelley); *id.* at 1088 (protects "privileges and immunities which are guarantied . . . under the Constitution") (Rep. Woodbridge). But none of them refers to the Second Amendment or the Bill of Rights; and, given the overwhelming emphasis on addressing the Black Codes and combating discrimination, those comments are

just as easily read as giving strength to Article IV, § 2—construed a few months after ratification as a non-discrimination provision. See *Paul*, 75 U.S. at 179-83.

As one scholar observes, there is "support in the legislative history for no fewer than four interpretations of the . . . Privileges [or] Immunities Clause." David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 406 (2008). Given the variety of meanings offered during the debates, the record establishes no incorporationist understanding. Moreover, the drafters' intent is only one piece of assessing the public understanding of constitutional terms, since the point is to discern how the words were understood "by the voters." *Heller*, 128 S. Ct. at 2788. Congressional intent is therefore valuable only if "Congress clearly, publicly, and candidly conveyed its intent to the country." Thomas, *Riddle*, *supra*, at 1656. Here, evidence is "vague and scattered" of "any strong public awareness of nationalizing the *entire* Bill of Rights." Bryan H. 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).

d. *Ratification.* While scholars tend to agree that there is a dearth of evidence about state ratification debates, two careful studies of the available material reveal no incorporationist understanding. In Illinois, Ohio, and Pennsylvania, the ratifiers—like many Members of Congress—generally understood Section 1 as an antidiscrimination rule or embodying either Art. IV, § 2 or the Civil Rights Act. See James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 448-49 (1985). Some said privileges or immunities were natural or other important rights including First Amendment rights, but neither Fourteenth Amendment advocates nor its opponents contended that it conferred "all the rights guarantied in the Bill of Rights." *Id.* at 450. In southern States, similarly, argument over the scope of the Privileges or Immunities Clause "raged as both proponents and opponents repeatedly tried to categorize the rights included within its ambit," but no one "ever stated that it was a concise summary of the Bill of Rights." James E. Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* 253 (1997).

As an early survey of the press coverage and speeches during ratification observed, "[t]he declarations and statements of newspapers, writers and speakers . . . show very clearly . . . the general opinion in the North . . . that the Amendment embodied the Civil Rights Act" and not "whether the first eight Amendments were to

be made applicable to the States or not." Horace E. Flack, *The Adoption of the Fourteenth Amendment* 153-54 (1908). And a recent survey of the press coverage found a "mountain of evidence" that the Fourteenth Amendment was portrayed as protecting certain fundamental rights, natural rights, and equal protection, but not the Bill of Rights, much less as undoing *Barron* and imposing the first eight amendments upon the States. See Thomas, *Newspapers*, *supra*, at 4.

Some of petitioners' own examples of news coverage demonstrate the same broad themes of natural rights and equality, while failing to mention the Bill of Rights. For example, an editorial by "Madison" (see Pet. Br. 35-36) discussed the Fourteenth Amendment's mandate that every person be "sustained in every way as an equal without distinction to race, condition or color" and as "carrying out the advanced sentiment of the great masses in favor of *equal rights and protection to all*," but the first eight amendments were not on his list of "rights and privileges of a citizen of the United States." "Madison," Letter to the Editor, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. Times, Nov. 10, 1866, at 2, cols. 2-3 (emphasis added). And the letter by Interior Secretary Orville Browning cited by petitioners (Pet. Br. 38) discusses "the Due Process Clause"—not the Privileges or Immunities Clause—as the clause that would "subordinate the State judiciaries in all things to the Federal Supervision and control" and "annihilate the[ir] independence . . . in the administration of State laws." *The Political Situation: Letter from Secretary Browning*, N.Y. Times, Oct. 24, 1866. See also *Mr. Browning's Letter and Judge Handy's Decision*, N.Y. Times, Oct. 28, 1866 (law that deprived black person "of a right which every white man possessed" could not have been enforced "if the proposed amendment had formed part of the Constitution").

Even Republicans who espoused incorporationist views of the Fourteenth Amendment during congressional debate often explained it during ratification as requiring States to treat citizens equally. See Cornell, *supra*, at 174. For instance, Rep. Bingham portrayed the Fourteenth Amendment as "the golden rule . . . to do as we would be done by," requiring "equal laws and equal and exact justice," and declared that "[i]t takes from no State any right which hitherto pertained to the several States of the United States." *Id.* at 174-75 (quoting speeches in Cincinnati Commercial). And the republication of one of his speeches in Congress assured readers that "[t]he proposed amendment imposed no obligation on any State nor on any citizen in a State which was not now enjoined upon them by the very letter of the constitution." *Another Amendment to the Constitu-*

tion, N.Y. Herald, Feb. 27, 1866. Rep. Bingham's assurances of no change in state obligations did not alert the public that the entire Bill of Rights would be imposed upon the States.

Sen. Howard's speech was reprinted in some newspapers. See Pet. Br. 34-35. But it was lengthy, discussing five sections in the Amendment, and none of the papers reprinting the speech drew special attention to the single paragraph about the Bill of Rights. See, *e.g.*, *The Thirty-Ninth Congress*, N.Y. Times, May 24, 1866; *The Reconstruction Committee's Report*, N.Y. Herald, May 24, 1866. Even when the New York Times gave "prominent front-page coverage to Congress's final passage and submission of the Amendment to the states . . . there was no mention of incorporation." Wildenthal, *supra*, at 1595; see *Close of Session of Congress–the General Result*, N.Y. Times, July 30, 1866 (characterizing Section 1 as "embodying . . . an equality of civil rights"). Nor is there evidence about how widely these newspapers were read by the ratifying public across the nation. Moreover, it is telling that numerous laws of the ratifying States fell short of the standards in the Bill of Rights—providing, for example, for indictment by information, rather than grand jury as required by the Fifth Amendment—yet there was no effort to bring those laws into conformity. See Fairman, *supra*, at 82-84 (citing constitutional provisions). To the contrary, soon after ratification, California, Colorado, Georgia, Kansas, Illinois, and Wisconsin modified their grand jury requirements in ways inconsistent with the Grand Jury Clause. See Thomas, *Riddle*, *supra*, at 1654-55; Donald Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. Contemp. Legal Issues (forthcoming 2009) (available at http://ssrn.com/abstract=1478716, at 12-13). It is unlikely that the States would have flouted the Fourteenth Amendment in this way if they understood they had just agreed to comply with the Bill of Rights.

e. *Treatises*. Reconstruction-era treatises also provide weak evidence of a public understanding that the Bill of Rights would be imposed upon the States. Thomas Cooley's "massively popular" treatise (*Heller*, 128 S. Ct. at 2812) failed to reflect that the Bill of Rights applied to States in the wake of Fourteenth Amendment ratification. Even leading advocates of incorporation acknowledge that both the 1868 and 1871 editions of Cooley's treatise (Thomas W. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 19 (1868); Cooley, *Constitutional Limitations* 20 (1871)) restated the rule of *Barron*, and Cooley's writings after that even "more clearly rejected the incorporation doctrine" (Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholar ship*

and Commentary on the Fourteenth Amendment in 1867-73, 18 J. Contemp. Legal Issues (forthcoming 2009) (available at http://ssrn.com/abstract=1354404, at 25). Cooley's 1873 revision of Story's treatise described the Privileges or Immunities Clause as a non-discrimination obligation, explaining that "privileges and immunities" are "to be protected in life and liberty, and in the acquisition and enjoyment of property, under equal and impartial laws which govern the whole community." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1936 (4th ed. Cooley rev. 1873).

Some scholars did embrace the notion that the Fourteenth Amendment made the Bill of Rights applicable to the States (see Pet. Br. 40-41 (discussing Pomeroy, Farrar, and Paschal)), but still others besides Cooley including two leading criminal law treatises, plainly did not. See 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* §§ 99, 145, 891-92 (2d ed. 1872) (neither the Fifth Amendment Grand Jury Clause nor the Sixth Amendment right to trial by jury applied in state criminal proceedings); 1 Francis Wharton, *A Treatise on the Criminal Law of the United States: Principles, Pleading and Evidence* §§ 213, 573 (7th ed. 1874) (Grand Jury and Double Jeopardy Clauses do not apply to States); 3 *id.* § 3405 (Eighth Amendment provision against cruel and unusual punishment does not apply to States). Another prominent legal figure, John Forrest Dillon, edited an article that cited *Barron* and said the Second Amendment does not apply to the States. See *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cent. L. J. 295 (John F. Dillon ed. 1874). The divided views of the 19th-century legal scholars add greater uncertainty, not clarity, to the public understanding of the reach of the Privileges or Immunities Clause. They do not support petitioners' argument that the Privileges or Immunities Clause was understood by the public to incorporate the Bill of Rights.

2. Concerns about discriminatory disarmament do not show public understanding that the Fourteenth Amendment incorporates the Second Amendment.

Nor is there evidence that the public understood any of the words in Section 1 to mean that the Second Amendment was specially singled out to be imposed upon the States. See NRA Br. 10. The text does not say this; congressional and ratification debates do not support it; and judicial decisions—including, notably, *Cruikshank*—reject the idea that the Fourteenth Amendment was designed to carve out an exception to the rule of *Barron* for the Second Amendment. NRA argues that "[m]ore evidence exists that the

right to keep and bear arms referenced in the Second Amendment was intended or commonly understood to be protected by the Fourteenth Amendment than exists for any other element of the Bill of Rights." *Ibid.* Yet aside from Sen. Howard, who listed Bill of Rights guarantees, NRA points to no one who clearly believed the Second Amendment would be substantively imposed on the States—either as a privilege or immunity of national citizenship or as an aspect of due process.

In the separate debates over civil rights legislation, Members of Congress who raised concerns about disarmament mostly stressed the need to give freedmen equal treatment with respect to arms. Sen. Sumner urged "constitutional protection in keeping arms" in response to concerns about South Carolina's discriminatory arms laws, with no hint that an equality requirement would not suffice. Cong. Globe, 39th Cong., 1st Sess. 337 (1866). And while Sen. Wilson stressed that rebel forces in Mississippi were "visiting the freedmen, disarming them," and called attention to oppressive labor laws that discriminated against freedmen (*id.* at 40), he urged support for a civil rights bill that would declare null and void laws in which "any inequality of civil rights and immunities among the inhabitants of said States is recognized" based on "color, race, or descent" or "previous condition or status of slavery" (*id.* at 39). Sen. Trumball also endorsed legislation that would prohibit "discrimination in civil rights or immunities . . . on account of race, color, or previous condition of slavery" to address, among other facially discriminatory laws, statutes that prohibited "any negro or mulatto from having fire-arms." *Id.* at 474.

NRA cites congressional debates surrounding post-ratification Fourteenth Amendment enforcement legislation (NRA Br. 18-21), but those comments, too, referred to discriminatory disarmament. See, *e.g.*, Cong. Globe, 41st Cong., 2d Sess. 2719 (1870) (Sen. Pool) ("one of their operations in my State has been . . . to order the colored men to give up their arms"); *id.* at app. 322 (Sen. Thayer) ("[t]he rights of . . . self-defense . . . were denied to the colored race"). And as even NRA recognizes, the only post-ratification civil rights bill that specifically mentioned enforcement of a right to keep and bear arms other than in terms of equal rights was amended to delete that specific protection before passage. NRA Br. 19-21 (citing H.R. 189, 42d Cong. (1st Sess. 1871); H.R. 320, 42d Cong. (1st Sess. 1871); and Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13). At most, NRA shows that some in Congress were concerned with the denial of arms rights, at least if discriminatory, but not that the public un-

derstood those rights were considered privileges or immunities of national citizenship or an aspect of due process.

Moreover, the manner in which firearms were regulated during Reconstruction shows the absence of a public understanding that States would be subjected to a more stringent nationalized standard. History shows that "nineteenth-century Americans, even the most conservative among them, were not opposed to the idea that the state should be able to control the use of firearms." Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 621-22 (2006). For example, even while General Daniel Sickles issued an order protecting the right to bear arms by those under his jurisdiction, he made clear that the policy "shall not be construed to sanction the unlawful practice of carrying concealed weapons." Order of Gen. Sickles, Disregarding the Code, Jan. 17, 1866, in *The Political History of the United States of America During the Period of Reconstruction* 37 (Edward McPherson, ed., 2d ed. 1969). Army prohibitions in certain locations included the sale of knives and guns and even the carrying of "guns, pistols, or other weapons of war." Emberton, *supra*, at 621 (citation omitted). Congress itself completely disbanded the militia in southern States, and prohibited any further arming of those militias. See Act of Mar. 2, 1867, ch. 170, § 6, 14 Stat. 485, 487. That statute was repealed a year later, in response to concerns that state militias were needed to stabilize a disorderly South, but stringent control of civilian gun use was prevalent. See Ember-ton, *supra*, at 620. Fresh from the battlefields of a devastating civil war, Reconstruction-era Republicans were certainly not promoting any sort of right to armed revolution, and they were not opposed to heavily restricting arms use. To be sure, many state governments sought to arm more freedmen who would serve in state militias, and the federal government took steps to put an end to discriminatory disarmament; but at the same time, neutral and generally applicable regulation of arms among the civilian populace was substantial. See *id.* at 622.

State regulations and judicial decisions post-ratification also fail to reflect a public understanding that the Amendment had now imposed on the States a new national norm protecting, for example, the same sort of weapons in common use that *Heller* holds the Second Amendment protects. In the years following ratification, several States banned the carrying of certain guns, including pistols, and even the carrying of firearms altogether. See, *e.g.*, Ark. Act of Apr. 1, 1881, ch. 96, § 1 (prohibiting the "wear[ing] or carry[ing]" of "any

pistol . . . except such pistols as are used in the army or navy"); 1879 Tenn. Pub. Acts ch. 186, § 1 (prohibiting the carrying "publicly or privately, [of] any . . . belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol usually used in warfare"); Tex. Act of Apr. 12, 1871, ch. 34 (prohibiting the carrying of pistols unless there are "immediate and pressing" reasonable grounds to fear attack or for militia service); 1876 Wyo. Comp. Laws ch. 52, § 1 (forbidding "concealed or ope[n]" bearing of "any fire arm or other deadly weapon, within the limits of any city, town or village"). And state courts routinely upheld restrictions on the carrying of pistols and revolvers. See, *e.g.*, *Andrews*, 50 Tenn. at 186; *English*, 35 Tex. at 478; *Hill v. State*, 53 Ga. 472, 475 (1874); *Fife v. State*, 31 Ark. 455, 461 (1876); *State v. Workman*, 35 W. Va. 367, 373 (1891).

Federal and state governments alike recognized that stringent firearms regulations could continue, and that the Fourteenth Amendment required only the repeal or amendment of discriminatory arms provisions, not neutral laws. Thus, during or shortly after the Fourteenth Amendment ratification process, three States that had limited arms rights to "the free white men" amended their constitutions to remove that limitation. See Volokh, *supra*, at 193 (Ark.), 195 (Fla.), 203 (Tenn.). In short, the Fourteenth Amendment required nondiscrimination tailored to discriminatory disarmament.

D. Petitioners Fail To Carry Their Burden Of Showing That This Court Should Abandon Its Traditional Due Process Approach To Incorporation.

Overruling *Slaughter-House* and its progeny, and overturning the settled law governing the application of the first eight amendments to the States, should require an overwhelming justification. Petitioners' position was rejected by the post-Civil War Justices, who were in the best position to understand the meaning of the Privileges or Immunities Clause. Far from showing that the Court that decided *Slaughter-House* and its progeny was mistaken, the historical record demonstrates a wide array of views, from within the halls of Congress and beyond, on the meaning of the Clause. The current scholarship on the subject reveals an equally wide divide.[26]

Under similar circumstances, the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), expressly refused to "turn the clock back to 1868" when reassessing *Plessy v. Ferguson*, 163 U.S. 537 (1896) (*Brown*, 347 U.S. at 492), stressing that, while some congressional members believed that the Amendment removed "all legal distinctions" based on race, others read it to have "the most limited effect"

(*id.* at 489). With such varying views, "[w]hat others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty." *Ibid.* And recently, in *Boumedienne v. United States*, 128 S. Ct. 2229 (2008), this Court declined to rest its decision about the scope of the protection of the writ of habeas corpus upon a historical understanding because the historical evidence "reveals no certain conclusions." *Id.* at 2248. Likewise here, petitioners' only argument for upsetting longstanding precedent is based upon a historical record that simply fails to reveal a unified public understanding that the Privileges or Immunities Clause would incorporate the Second Amendment. Petitioners' argument should be rejected.[27]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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NOTES

1. Oak Park's firearms ordinance makes it "unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm . . . ." Municipal Code of Oak Park, Ill. § 27-2-1 (1995). "Firearms" include "pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." Id. § 27-1-1.

2. Since *Duncan*, the Court has also applied this standard to determine whether unenumerated substantive rights are components of due process. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (whether right to assisted suicide is "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed'") (quoting *Palko*).

3. As *Duncan* suggests, the incorporation of Fifth and Sixth Amendment procedural rights has involved somewhat different considerations. Such cases considered rights in the context of actual "state criminal processes" with particular characteristics, such as an accusatorial, not inquisitorial, setting. 391 U.S. at 149 n.14. In such cases, "[t]he question thus is whether *given this kind of system* a particular procedure is fundamental." *Ibid.* (emphasis added). For a substantive right, by contrast, the inquiry does not turn on its place in the context of a particular procedural system, but whether it is more generally implicit in the concept of ordered liberty. That was the standard that governed the incorporation of the great substantive rights of the First, Fourth, and Fifth Amendments, for example. See *ibid.*

4. The Chicago ordinance at issue in this case was adopted by the City Council. See p. 1, *supra*. The Oak Park ordinance was first adopted by the town council. The following year, the citizens of Oak Park voted in an advisory referendum. See Brief of Oak Park Citizens' Committee for Handgun Control as *Amicus Curiae* in Support of Respondents.

5. As the Court noted in *Heller*, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 128 S. Ct. at 2816. The Court expressly declined 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." *Id.* at 2816-17. The Court also recognized that "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." *Id.* at 2816.

6. See Cal. Penal Code § 12031(a)(1), (b)(6); Haw. Rev. Stat. § 134-9(c); Iowa Code § 724.4(1), (4)(i); Md. Code, Crim. Law § 4203; Mass. Gen. Laws ch. 269, § 10(a); N.J. Stat. § 2C:39-5(b); N.Y. Penal Law §§ 265.03(3) & 265.20(a)(3); R.I. Gen. Laws § 11-47-8(a).

7. Five States require at least a general showing of good cause or justification (see Cal. Penal Code § 12050(a)(1); Iowa Code § 724.7; Md. Code, Pub. Safety § 5-306(a)(5)(ii); N.J. Stat. § 2C:58-4(c); N.Y. Penal Law § 400.00(2)(f)); two require a showing of good reason to fear an injury to person or property, or another proper reason (see Mass. Gen. Laws ch. 140, § 131(d); R.I. Gen. Laws § 11-47-11(a)); and Hawaii requires "an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property" (see Haw. Rev. Stat. § 134-9(a)).

8. See, *e.g.*, *Gifford v. City of Los Angeles*, 106 Cal. Rptr. 2d 164, 167 (Ct. App. 2001) (sheriff has "extremely broad discretion"); *Kaplan v. Bratton*, 673 N.Y.S.2d 66, 68 (N.Y. App. Div. 1998) (applicant must show "a special need for self-protection" arising from an "extraordinary personal danger,

documented by proof of recurrent threats to life or safety"); *In re Preis*, 573 A.2d 148, 152 (N.J. 1990) (applicant must show "specific threats or previous attacks demonstrating special danger to the applicant's life that cannot be avoided by other means"); *Ruggiero v. Police Commissioner of Boston*, 464 N.E.2d 104, 108 (Mass. App. Ct. 1984) (fear of becoming a "potential victim of crim[e]" no basis for permit).

9. For example, application of the Second Amendment's protection for weapons in common use (see pp. 23, 26, 36, *infra*) would raise questions whether a weapon generally in common use for lawful purposes in one locale (such as a high-powered hunting rifle with precision sighting equipment popular in rural Illinois) must be allowed elsewhere, precluding a ban on use by Chicago gangs seeking to assassinate rivals.

10. For example, one survey shows 27 States impose criminal or civil liability for improperly storing firearms or allowing children to access or use them. See Legal Community Against Violence, *Child Access Prevention* (available at http://www.lcav. org/content/child_access_prevention. pdf). Some require firearms to be secured with a trigger lock, placed in a locked container, or stored in a secure, inaccessible location. See, *e.g.*, Fla. Stat. ch. 790.174(1); Iowa Code § 724.22(7). These laws could be attacked under an incorporated Second Amendment right to keep firearms "in the home operable for the purpose of immediate self-defense." *Heller*, 128 S. Ct. at 2822. Laws limiting purchase to one gun a month (see Cal. Penal Code § 12072(a)(9)(A); Md. Code, Pub. Safety § 5-128(b); Va. Code § 18.2-308.2:2(P); N.J. Stat. § 2C:58-3(i)); requiring handguns to be capable of microstamping the make, model, and serial number of the firearm on each cartridge case when the handgun is fired (see Cal. Penal Code § 12126(b)(7)); and requiring firearm owners to complete safety training and carry insurance could be challenged on other grounds.

11. As this brief is filed, Second Amendment challenges to arms regulations have been raised in at least 156 cases since *Heller*.

12. Today, 44 States have firearms rights in their constitutions. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Politics 191, 194-200 (2006) (California, Iowa, Maryland, Minnesota, New Jersey, New York do not). Two of these protect only a militia-linked right (see *Commonwealth v. Davis*, 343 N.E.2d 847, 848-50 (Mass. 1976); *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905)).

13. At least twelve States expressly recognize in constitutional text that the right is subject to regulation. See Volokh, *supra*, at 194-203 (Florida, Georgia, Illinois, Idaho, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Utah). Only Hawaii uses the phrasing of the Second Amendment. See *id.* at 195.

14. The Brief of the States of Texas, *et al.*, as *Amici Curiae* in Support

of Petitioners asserts that "the legislatures of all 50 States are united in their rejection of bans on the possession of handguns." *Id.* at 9. That is incorrect. In Illinois, at least, local governments retain the prerogative to ban handguns. See Brief for the States of Illinois, *et al.*, as *Amici Curiae* in Support of Respondents; *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 273-77 (Ill. 1984). Indeed, under present law, the States retain the ability—if their people so desire—to permit as much or as little firearms possession and use (consistent with federal law) as they choose. In urging incorporation of the Second Amendment, whose effect could only be to restrict state legislative authority, Texas, *et al.*, apparently seek to override the considered judgments regarding arms rights reached either by other States or the citizens of their own States.

15. And although not turning on the availability of alternative arms, courts in numerous other modern cases have upheld firearm bans on other grounds. See, *e.g., State v. LaChapelle*, 451 N.W.2d 689 (Neb. 1990) (short shotguns); *State v. Fennell*, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989) (short-barreled shotguns); *Morrison v. State*, 339 S.W.2d 529 (Tex. Crim. App. 1960) (machine gun). Against the great weight of this authority, petitioners muster only one modern case, *State v. Delgado*, 692 P.2d 610 (Or. 1984), striking down a ban on switch-blades. Pet. Br. 69. Petitioners' other cases struck down a license requirement (see *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988)), and required local officials to submit handgun applications to citizens wishing to exercise their state-law firearms right (see *Kellogg v. City of Gary*, 562 N.E.2d 685 (Ind. 1990)).

16. South Carolina banned the sale of handguns within the State for more than 60 years. See Act No. 435, 1901 S.C. Acts 748, repealed by Act No. 330, 1965 S.C. Acts 578.

17. The only incorporation cases extensively discussing the Framing-era history of the right at issue were *Duncan*, 391 U.S. at 151-53, and *Klopfer*, 386 U.S. at 225-26.

18. It does not matter that some Framers might have "sought to address their fear of federal abolition of state militias not through the Second Amendment, but 'in separate structural provisions that would have given the States concurrent and seemingly nonpre-emptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so.'" Brief of Texas, *et al.*, 22 (quoting *Heller*, 128 S. Ct. at 2804). While those structural provisions may have guarded against "aboli[tion]" of the "institution" of the militia, *Heller* is clear that the Second Amendment was motivated not by fear of formal abolition but fear that the federal government would *de facto* eliminate the militia "by taking away the people's arms." 128 S. Ct. at 2801.

19. *Heller* noted that, at the time of the Framing, only Pennsylvania and

Vermont had clearly adopted state constitutional provisions protecting an individual firearms right "unconnected to militia service." 128 S. Ct. at 2802. The constitutions of North Carolina and Massachusetts had provisions that were ambiguous in that respect. See *id.* at 2802-03. In any event, by the 19th century, the public recognized that, rather than protecting a firearms right from the political process, government can and should exercise its police power to balance the interests in weapon possession and the harms that such weapons could cause. See pp. 28-30, *supra* (mid-19th century), 77-79, *infra* (post-Civil War); Brief of Professional Historians and Legal Historians in Support of Respondents.

20. The Framers may have thought that service in the militia and participation in defense of the country was itself an important personal right that they valued highly, apart from the "individual right to possess and carry weapons in case of confrontation." *Heller*, 128 S. Ct. at 2797. As *Heller* notes, however, "modern developments have limited the degree of fit between the prefatory clause [recognizing the need to maintain the militia] and the protected right." *Id.* at 2817. Few would maintain that a right to participate in the national defense in the way that the Second Amendment protects—as a member of the unorganized militia possessing small arms in common use—is implicit in ordered liberty or essential to a present-day free society.

21. At most, an unenumerated right to self-defense could invalidate laws that place an "undue burden" on it. See, *e.g., Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). Such a right would not support incorporation of the Second Amendment, which invalidates any prohibition of weapons in common use, regardless of the justifications for the restriction.

22. Chicago's ordinance differs from the one at issue in *Heller*. Although the District permitted long guns in the home, they had to be "unloaded and disassembled or bound by a trigger lock or similar device." *Heller*, 128 S. Ct. at 2818 (citation omitted). Those restrictions limited the utility of long guns as an alternative to handguns.

23. Two of petitioners' *amici* embrace the Privileges or Immunities Clause precisely *because* it excludes aliens. See Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Petitioners 5, 25-28; Brief of American Civil Rights Union, *et al.*, in Support of Petitioners 5, 7-8, 30-34.

24. See, *e.g.*, *Beck v. Washington*, 369 U.S. 541, 545 (1962) (noting that State of Washington had eliminated mandatory grand jury practice in 1909 and convened grand juries only on special occasions). Today, most States use procedures other than grand jury indictment to initiate prosecutions; only fifteen require grand juries to return felony charges, and two require it only for capital or life imprisonment cases. See Bureau of Justice Statistics, U.S. Department of Justice, *State Court Organization 2004* at 215-17 tbl. 38. See

also Brief for Illinois, *et al.*, as *Amici Curiae* in Support of Respondents.

25. Justice Swayne filed a separate dissent but did not address incorporation. See 83 U.S. at 124-30.

26. While petitioners emphasize the work of scholars who argue that the Framers and the public intended the privileges or immunities of national citizenship to include the Bill of Rights, many other scholars have reached contrary conclusions. The claim of a "near unanimous" agreement on "the history and meaning of the Clause" (Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners 3) simply disregards a vast amount of scholarship finding a lack of evidence that Bill of Rights guarantees were considered privileges or immunities of national citizenship. See, *e.g.,* Berger, *supra*, at 133-56; Currie, supra, at 406; Fairman, supra, at 139; Nelson, *supra*, at 123; Rosenthal, New Originalism, supra, at 27; Thomas, Riddle, *supra*, at 1628; see also Brief of Legal Scholars as *Amici Curiae* in Support of Respondents.

27. Petitioners and NRA both limit their argument in this Court to handgun bans. In the courts below, both raised other issues. Petitioners challenged Chicago's annual and pre-acquisition registration requirements and the penalty of unregisterability for failure to comply with those requirements. J.A. 27-30 .NRA's separate suits against Chicago and Oak Park, which are not before the Court, challenged Chicago's exceptions for handguns registered before the ban; owned by detective agencies and security personnel; and possessed by non-residents participating in or traveling to lawful firearm-related recreation, and Oak Park's exceptions for licensed firearm collectors and theater organizations. If the judgment is reversed, the lower courts should be directed to address those claims in the first instance.

INTEREST OF AMICI CURIAE[1]

Each of the *amici curiae* is a law professor who has published a book or law review article on the Fourteenth Amendment and the Bill of Rights. *Amici* teach courses on constitutional law and have devoted significant attention—in some cases, for several decades—to studying the Fourteenth Amendment.

Amici submit this brief to bring to the foreground of this case a remarkable scholarly consensus and well-documented history that shows that the Privileges or Immunities Clause of the Fourteenth Amendment was intended to protect substantive, fundamental rights, including the individual right to keep and bear arms at issue in this case.

Amici do not, in this brief, take a position on whether the particular regulation challenged in this case is constitutional in light of the individual privilege to bear arms, which, as the Court noted in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008), may be regulated to a certain extent.

Amici are:

Prof. Richard L. Aynes, University of Akron Law School

Prof. Jack M. Balkin, Yale Law School

Prof. Randy E. Barnett, Georgetown University Law Center

Prof. Steven G. Calabresi, Northwestern University

Prof. Michael Kent Curtis, Wake Forest University Law School

Prof. Michael A. Lawrence, Michigan State University College of Law

Prof. William Van Alstyne, William and Mary Law School

Prof. Adam Winkler, UCLA School of Law

SUMMARY OF ARGUMENT

The question in this case is whether the individual right to keep and bear arms recently recognized in *District of Columbia v. Heller*, and held applicable to the federal government, must also be protected

against state infringement. The textually and historically accurate way to determine if the states must respect an individual right to keep and bear arms is to examine the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.

Amici submit to the Court that the original meaning of the Privileges or Immunities Clause protected substantive, fundamental rights against state infringement, including the constitutional right of an individual to keep and bear arms. Indeed, the framers of this Clause specifically desired to protect the right to bear arms so that newly freed slaves and unionists would have the means to protect themselves, their families and their property against well-armed former rebels and chose language whose meaning would accomplish this end.

Precedent does not preclude the Court from adopting this faithful interpretation. The *Slaughter-House Cases* and its progeny, which held that the Fourteenth Amendment does not apply the Bill of Rights to the states, have been completely undermined by subsequent Supreme Court decisions.

Reviving the Privileges or Immunities Clause and limiting *Slaughter-House* and its progeny would bring this Court's jurisprudence in line with constitutional text and a near-unanimous scholarly consensus on the history and meaning of the Clause. *Slaughter-House* read the Privileges or Immunities Clause so narrowly as to essentially read it out of the Amendment, but "[v]irtually no serious modern scholar—left, right, and center— thinks that this is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).

ARGUMENT

I. THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS SUBSTANTIVE FUNDAMENTAL RIGHTS AGAINST STATE INFRINGEMENT.

The Privileges or Immunities Clause was written and ratified to secure the substantive liberties protected by the Bill of Rights, as well as other fundamental rights. By 1866, the words "privileges" and "immunities" were commonly used to refer to core, inalienable rights, including those set out in the Bill of Rights. History shows that leading proponents and opponents alike of the Fourteenth

Amendment understood the words of the Clause to protect substantive fundamental rights, including the rights enumerated in the Constitution and Bill of Rights.

A. Crafted Against A Backdrop Of Rights-Suppression In The South, The Privileges Or Immunities Clause Was Written To Protect Substantive Fundamental Rights.

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment was designed to make former slaves into full and equal citizens in the new republic and secure for the nation the "new birth of freedom" President Lincoln promised at Gettysburg. THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed. 1953). The opening words of the Fourteenth Amendment marked a dramatic shift from pre-war conceptions of federalism, declaring federal citizenship paramount rather than derivative of state citizenship, and overruled the Supreme Court's decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), which held that a former slave was not a U.S citizen under the Constitution because of his race.

In addition to declaring equal, birthright citizenship, the Amendment guaranteed federal protection of substantive fundamental rights. The framers of the Fourteenth Amendment were keenly aware that southern states had been suppressing some of the most precious constitutional rights of both slaves and their allies. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 160 (1998) ("The structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill—not just the rights and freedoms of slaves, but of free men and women too.").

Starting around 1830, southern states enacted laws restricting freedom of speech and press to suppress anti-slavery speech, even criminalizing such expression; in at least one state, writing or publishing abolitionist literature was punishable by death. These laws applied broadly, forbidding any person—whether slave or free—from engaging in expression critical of slavery. *Id.* at 160-61; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 30, 40 (1986); MICHAEL KENT CURTIS, FREE SPEECH: THE PEOPLE'S DARLING PRIVILEGE 295-96 (2000). Political speech was repressed as well, and Republicans could not campaign for their

candidates in the South. CURTIS, NO STATE SHALL ABRIDGE, at 31.

Flagrant denials of freedom of speech were most often cited, but they were hardly the only violations of fundamental rights that the Fourteenth Amendment was designed to prevent. Slaves could not freely practice their chosen religion, possess arms, or own property. Fundamental aspects of personal liberty and personal security were denied to the slaves on a daily basis. Whippings, forced separation of husbands and wives and of parents and children, rape and compulsory childbearing, were all a central part of the lives the slaves led. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 504 (1866) ("He had not the right to become a husband or father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend.") (Sen. Howard); RANDALL KENNEDY, RACE, CRIME AND THE LAW 77 (1998) ("Long after maiming, branding, ear cropping, whipping, [and] castration…had waned as an approved method of chastising whites, they remained available for the correction of slaves.").

To prevent these sorts of abuses, and new ones arising after the Civil War, the framers of Section One of the Fourteenth Amendment chose language specifically intended to protect the full panoply of fundamental rights:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[2]

The "privileges or immunities" language was chosen after an exhaustive investigation of abuses of freedmen and Unionists by the Joint Committee on Reconstruction, composed of members of both the House and Senate (including Sen. Howard and Rep. Bingham). The Committee issued their findings in a June 1866 report, 150,000 copies of which were distributed widely throughout the country. *See* KENDRICK, at 265. The report confirmed the systematic violation of fundamental rights by southern states, demanding "changes of the organic law" to secure the "civil rights and privileges of all citizens in all parts of the republic." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xxi (1866).

The problems motivating the framers of the Privileges or Immunities Clause—for example, deprivations of the right to free speech, the right to bear arms, and other denials of liberty and personal security in the southern states—are strong evidence that the Clause was drafted to protect fundamental rights against state infringement. As discussed in the next sections, the public meaning of the words "privileges" and "immunities" and the floor debates over the Amendment confirm the intent to use the Clause to protect substantive rights in the States.

B. By 1866, The Public Meaning Of "Privileges" And "Immunities" Included Fundamental Rights.

The words Bingham chose—"privileges or immunities"—to protect fundamental rights against state infringement carried established public meaning. By 1866, the privileges or immunities of citizenship were understood to include the rights and liberties already protected by the Constitution, such as the right to keep and bear arms, as well as other rights inherent in full and equal citizenship. In addition to providing the textual basis for protection of the liberties in the Bill of Rights, the Clause is "the natural textual home for…unenumerated fundamental rights." Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 449 (1990). It mimics the Ninth Amendment, which provides that there are individual rights protected by the Constitution not spelled out in the text. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

From our very beginnings, Americans used the words "privileges" and "immunities" interchangeably with words like "rights" or "liberties." *See* AMAR, at 166-69; Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1094-1136 (2000). The earliest charters of the American colonies referred to "Liberties, Franchises, and Immunities," as in Virginia's 1606 charter, or "[L]iberties Immunities and priveledges," as in Massachusetts' 1641 charter.[3] When James Madison proposed the Bill of Rights in Congress, he spoke of the "freedom of the press" and "rights of conscience" as the "choicest privileges of the people," and included in his proposed Bill a provision restraining the States from violating freedom of expression and the right to jury trial because "State governments are as liable to attack these invaluable privileges as the General Government is…." 1 Annals of Congress 453, 458 (1789); *see also id.* at

766 (discussing the proposed Bill of Rights as "securing the rights and privileges of the people of America").

The phrase "privileges and immunities" appears in the original Constitution in Article IV, § 2: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), Justice Bushrod Washington— a nephew of George Washington who advocated for ratification of the Constitution in Virginia before serving for several decades on the Supreme Court— explained the meaning of this phrase in a passage that would repeatedly be quoted in its entirety by members of the Thirty-ninth Congress: What these fundamental principles are it would, perhaps, be more tedious than difficult to enumerate.

> They may, however, be all comprehended under the following general heads: *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.

6 F. Cas. at 551-52 (emphasis added). *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 62-65 (2004) (describing the repeated reliance on *Corfield*).

Justice Washington's canonical definition of the Constitution's term "privileges and immunities" drew on the framing-era understanding that the words "privileges" or "immunities" were associated with broad protection of substantive liberty

Indeed, Washington's formulation was little more than a restatement of the Declaration of Independence's recognition that "all men are created equal" and "endowed by their Creator with certain unalienable rights," and that "among these are life, liberty, and the pursuit of happiness." *See* CHARLES L. BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 50 (1997) ("It was natural…that the famous words of the Declaration should be taken as supremely suitable to fill out and explain the words 'privileges and immunities of citizens'.").

Corfield was not alone in looking to the words of the Declaration of Independence for guidance. By 1868, when the Fourteenth Amendment was ratified, twenty-seven states (of the thirty-seven states then in the Union) had inserted into their own state constitutions provisions that guaranteed the protection of fundamental,

inalienable rights, many tracking the words of the Declaration. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in History and Tradition?*, 87 TEX. L. REV. 7, 88 (2008). The Indiana, New York, and Wisconsin constitutions, for example, hewed to the wording of the Declaration,[5] while many others used a formulation virtually identical to *Corfield*'s.[6]

Thus, when Justice Washington in *Corfield* described some of the privileges and immunities of Article IV, § 2, as "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," he was describing what were commonly understood to be core fundamental rights. Justice Washington's interpretation informed the public meaning of the text of the Privileges or Immunities Clause in the Fourteenth Amendment

> C. The Congressional Debates Over The Fourteenth Amendment Show That The Privileges Or Immunities Clause Encompassed Substantive Fundamental Rights, Including The Personal Rights In The Bill Of Rights

In line with the public meaning identifying "privileges" or "immunities" with broad protections for substantive liberty, the debates in Congress over the adoption of the Fourteenth Amendment affirm that the Privileges or Immunities Clause was understood and described to the ratifying public as securing substantive fundamental rights, including the right to keep and bear arms and other fundamental rights enumerated in the Bill of Rights.

Indeed, it was precisely because the words "privileges" and "immunities" were so closely associated with the Declaration of Independence's protection of fundamental rights that the Fourteenth Amendment's framers turned to these 15 words in drafting the Privileges or Immunities Clause. The Declaration's promises—invoked by Lincoln at Gettysburg in his call for a "new birth of freedom"—were at the heart of the Fourteenth Amendment's constitutional design. In the words of Rep. Schuyler Colfax, Speaker of the House in 1866, the Fourteenth Amendment would be "the gem of the Constitution…because it is the Declaration of Independence placed immutably and forever in our Constitution." *See* CINCINNATI COMMERCIAL, Aug. 9, 1866, at p.2, col. 3.

In the Senate debates on the Amendment, the clearest description of the Privileges or Immunities Clause was provided by Sen.

Jacob Howard, who spoke on behalf of the Joint Committee. Sen. Howard distinguished between two categories of "privileges or immunities of citizens of the United States as such." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). The first were those "privileges and immunities of the citizens of each State in the several states," *id.*, to which Article IV, § 2, refers. Sen. Howard quoted in its entirety the relevant passage of the "very learned and excellent," *id.*, Justice Washington's opinion in *Corfield*, including its invocation of the canonical formulation of fundamental, inalienable rights drawn from the Declaration: "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." *Id.* (quoting *Corfield*, 6 F. Cas. at 551-52). 16 Second, after observing that the "privileges and immunities spoken of in the second section of the fourth article...are not and cannot be fully defined in their entire extent and precise nature," Sen. Howard offered another source of privileges or immunities:

> [T]o these 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, a right pertaining to each and all of the people; *the right to keep and bear arms*; the right to be exempted from the quartering of soldiers in a house without consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (emphases added). *See also* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509, 17 1562-63 (2007) (discussing Sen. Howard's speech and noting that it refutes any claim that the privileges or immunities of Section One were unrelated to the protections in the Bill of Rights).[7] Sen. Howard omitted from his list the "due process of law," which was expressly extended to all "persons" in Section One.

With respect to this "mass of privileges, immunities, and rights, some of them secured by" Article IV, § 2, and "some by the first eight amendments," Sen. Howard noted judicial decisions holding that neither set of rights "operate in the slightest degree as a restraint or prohibition upon State legislation" infringing the rights of the state's own citizens. Cong. Globe, 39th Cong., 1st Sess. at 2765. For example, "it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress." *Id.* Nor are such rights enforceable under "the sweeping clause of the Constitution…." *Id.* at 2766. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.*

In the House, Thaddeus Stevens, a member of the Joint Committee, made it abundantly clear that the substantive privileges and immunities of citizens encompassed the liberties set forth in the Bill of Rights. He explained that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect…." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). James Wilson, Chairman of the House Judiciary Committee, similarly stated, prior to the drafting of the Amendment, that "the people of the free States should insist on ample protection to their rights, privileges and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike." Cong. Globe, 38th Cong., 1st Sess. 1203 (1864).

Rep. Bingham, too, emphasized that the Privileges or Immunities Clause protected the fundamental rights of citizens, noting that the Clause provided a remedy against "State injustice and oppression…in the State legislation of the Union, of flagrant violations of the guarantied privileges of citizens of the United States…." Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). Rep. Bingham saw in the words "privileges" or "immunities" a broad constitutional mandate for protection of "life, liberty, and property," *id.*, a view dating back at least to 1859, when Bingham had objected that a provision of the Oregon Constitution that denied free blacks the right to reside or hold property in the State violated Article IV's Privileges and Immunities Clause.[8]

Rep. Bingham reiterated his long-held view that Congress should have the power to enforce the Bill of Rights against the States. Be-

fore the Fourteenth Amendment was introduced, he had explained to the House that a constitutional amendment was needed to empower Congress to protect the privileges or immunities of citizens because of the Supreme Court's opinions in *Barron v. Baltimore*, 32 U.S. 243 (1833), and *Livingston v. Moore*, 32 U.S. 469 (1833), both of which held that the Bill of Rights did not apply to the states. Cong. Globe, 39th Cong., 1st Sess. 1089-90 (1866). Rep. Bingham viewed the Fourteenth Amendment as correcting this "want," and ensuring national protection of "the privileges and immunities of all the citizens of the Republic and all the inborn rights of every person… whenever the same shall be abridged or denied by the unconstitutional acts of any State." Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).[9]

Accordingly, the most influential and knowledgeable members of the Reconstruction Congress went on record with their express belief that Section One of the Fourteenth Amendment— and, in most instances, the Privileges or Immunities Clause specifically— protected against state infringement of fundamental rights, including the liberties secured by the first eight articles of the Bill of Rights. Not a single senator or representative disputed this understanding of the privileges and immunities of citizenship or Section One. *See, e.g.*, AMAR, at 187; CURTIS, NO STATE SHALL ABRIDGE, at 91; Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 932 (1986). To the contrary, whether in debates over the Fourteenth Amendment or its statutory analogue, the Civil Rights Act of 1866, Republicans in Congress affirmed two central points: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the Bill of Rights, and that, in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship.

D. The Wording Of The Privileges Or Immunities Clause Is Broader Than The Privileges And Immunities Clause Of Article IV

While the Privileges or Immunities Clause in the Fourteenth Amendment draws on the public meaning of "privileges" and "immunities" in Article IV, discussed, *supra*, in Section I.B, its wording is more expansive in at least two respects.

First, unlike Article IV, which forbids a state from discriminating against outsiders by denying them the "Privileges And Immunities"

protected by the Clause, *see* THE FEDERALIST No. 80 (Alexander Hamilton) 476-77 (Clinton Rossiter ed. 1999) (describing Article IV as the "basis of the Union" because it demands "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled"), the Privileges or Immunities Clause is not limited to discrimination. Instead, it prohibits the making or enforcement of any state law that "abridges the privileges or immunities" of any or all citizens of the United States. It concerns the substantive fundamental rights that all states must respect. To make out a violation of the Privileges or Immunities Clause, a citizen need not show that she has been subject to discrimination, only that governmental action has violated her fundamental rights

Second, unlike Article IV's reference to "citizens *of each state*," Section One of the Fourteenth Amendment protects all the "privileges or immunities of citizens *of the United States*." Citizens of the United States not only possessed the privileges and immunities identified in *Corfield*, they also possessed the privileges and immunities enumerated in the Bill of Rights and elsewhere in the Constitution. By enforcing all such rights against the states, Section One thereby reversed *Barron v. Baltimore*, 32 U.S. 243 (1833). In addition, Section Five of the Fourteenth Amendment expressly empowered Congress to enforce Section One's restriction on the lawmaking power of states, unlike Article IV, § 2.

That the public meaning of the Privileges or Immunities Clause in Section One was broader than the Privileges and Immunities Clause in Article IV is evidenced by an alternative to the Fourteenth Amendment, then pending ratification in the states, that was drafted in consultation with President Johnson by a group of Southerners, including the governors of Mississippi, South Carolina, Alabama, Florida, and North Carolina.[10] Their aim was "to agree on some measure as a basis of reconstruction, which will be adopted by the Southern people, meet the views of the President, and at the same time receive approval of the majority in Congress."[11] Their efforts culminated in a proposed amendment that eliminated the congressional enforcement power in Section Five, and made a revealing change to Section One. The third section of their proposal was worded as follows:

> 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 immuni-*

> *ties of citizens in the several States*. No State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[12]

Significantly, the only deviation from Section One was the substitution of the wording of Article IV, § 2—with that provision's focus on rights of state citizenship and non-discrimination—for the wording of the Privileges or Immunities Clause.

This alternative formulation is powerful evidence that the public meaning of the Privileges or Immunities Clause of Section One was broader than the Privileges and Immunities Clause of Article IV. When combined with the elimination of Section Five, this alteration would have sharply curtailed, if not eliminated, the power of the federal courts and Congress to protect fundamental rights of blacks, Unionists and Republicans in the South. Arguably, neither the courts nor Congress could have enforced the substantive protections of the Bill of Rights against the states, and whatever protection might have been afforded U.S. citizens would have been limited to discrimination against U.S. citizens from other states

II. THE FOURTEENTH AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE INCLUDED AN INDIVIDUAL RIGHT TO BEAR ARMS

As was shown in Section I, *supra*, the public meaning of "privileges or immunities of citizens of the United States" included the "personal rights guarantied and secured by the first eight amendments of the Constitution," such as the individual "right to keep and bear arms." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard)

The Reconstruction Congress was particularly concerned that the right to arms be protected in order to enable the freedmen to protect themselves from violence, including violence by southern militias. "Confederate veterans still wearing their gray uniforms… frequently terrorized the black population, ransacking their homes to seize shotguns and other property and abusing those who refused to sign plantation labor contracts." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 203 (1988). *See also* Cong. Globe, 39th Cong., 1st Sess. 40 (1866) (Sen. Wilson) ("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."); *id.*

at 914, 941 (Letter from Colonel Samuel Thomas to Major General O.O. Howard, quoted by Sens. Wilson and Trumbull) ("Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of [the state] militia."). *See generally* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 346 (1991) (arguing that efforts to disarm freed slaves "played an important part in convincing the 39th Congress that traditional notions concerning federalism and individual rights needed to change").

Of central concern to the Joint Committee on Reconstruction and Congress were the Black Codes.[13] The Black Codes undermined the ability of the freedmen to defend themselves by prohibiting former slaves from having their own firearms. *See* FONER, at 199-201; CURTIS, NO STATE SHALL ABRIDGE, at 35. *See also Heller*, 128 S.Ct. at 2810 (noting that "[b]lacks were routinely disarmed by Southern States after the Civil War" and that opponents of "these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms"). Members of the Reconstruction Congress condemned these laws. One senator explained that the newly freed slaves should be guaranteed the "essential safeguards of the Constitution," including "the right to bear arms," Cong. Globe, 39th Cong., 1st Sess. at 1183 (Sen. Pomeroy); another member of Congress described how southern states had disarmed blacks. *Id.* at 1838-39 (Rep. Clarke). Rep. Eliot decried a Louisiana ordinance that prevented freedmen not in the military from possessing firearms within town limits without special written permission from an employer. *Id.* at 516-17.

Because state statutes disarming freedmen— as well as legislative restrictions on other fundamental rights—were considered to be the South's post-war attempt to re-institutionalize the system of slavery in a different guise, Congress initially thought itself justified in exercising its Thirteenth Amendment powers to enact the Civil Rights Act of 1866. If slavery is the opposite of liberty, then the Thirteenth Amendment empowered Congress to police restrictions on fundamental liberties that amounted to a partial imposition of slavery.14 However, as Frederick Douglass explained in 1865, the Thirteenth Amendment was not adequate protection for these liberties:

> [W]hile 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—the work of the Abolitionists is not finished. Notwithstanding the provision in the Constitution of the United States, that the right to keep and bear arms shall not be abridged, the black man has never had the right either to keep [or] bear arms; and the Legislatures of the States will still have the power to forbid it, under this Amendment.

Speech of Frederick Douglass to the Anti-Slavery Society, May 10, 1865 *in* THE CIVIL WAR ARCHIVE: THE HISTORY OF THE CIVIL WAR IN DOCUMENTS 584 (Henry Steele Commager & Erik Bruun eds. 2000).

The Joint Committee investigated the disarmament of African Americans, raising concerns about the deprivation of the right to arms. It reported testimony that the Southerners "are extremely reluctant to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property," and noted that "[t]he planters are disposed…to insert into their contracts tyrannical provisions,…to prevent the negroes from leaving the plantation…or to have fire-arms in their possession." REPORT OF THE JOINT COMMITTEE Pt. II, 4 and Pt. II, 240. *See* Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995) (presenting chronologically testimony heard by the Joint Committee on southern efforts to disarm freedmen and Unionists).

In this way, "Reconstruction Republicans recast arms bearing as a core *civil* right….Arms were needed not as part of political and politicized militia service but to protect one's individual homestead." AMAR, at 258-59. *See also* William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1251- 53 & n.55 (1994) (noting that the "personal protection" aspect of the right to keep and bear arms was even more clear at the time the Fourteenth Amendment was passed than in the original Second Amendment). Sen. Pomeroy listed as one of the constitutional "safeguards of liberty" the "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866); *see also id.* ("And if the cabin door of the freedmen is broken open… then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world….."). There is no record of any member of Congress ever denying this claim.

The Reconstruction Congress acted to explicitly protect the right of the freedmen to keep and bear arms in the re-enacted Freedman's Bureau Bill, which provided that African Americans should have "the full and equal benefit of all laws and proceedings for the security of person and property, *including the constitutional right of bearing arms*." 14 Stat. 173 (39th Cong. 1866) (emphasis added). *See also* Cong. Globe, 39th Cong., 1st Sess. 654 (Rep. Eliot) (proposing the addition of the words "including the constitutional right to bear arms"); *id.* at 585 (Rep. Banks) (stating his intent to modify the bill so that it explicitly protected "the constitutional right to bear arms").

By employing the phrase "privileges or immunities of citizens of the United States," the Joint Committee on Reconstruction worded Section One broadly enough to protect substantive fundamental rights enumerated in the Bill of Rights, including the right to keep and bear arms.

III. PRECEDENT DOES NOT PREVENT THE COURT FROM RECOGNIZING THAT THE PRIVILEGES OR IMMUNITIES CLAUSE PROTECTS AN INDIVIDUAL RIGHT TO BEAR ARMS AGAINST STATE INFRINGEMENT.

This Court should follow the text, history, and original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment to protect an individual right to bear arms. Previous decisions notwithstanding, it is never too late to adhere to the text of the Constitution.

A. *Slaughter-House* And Its Progeny Were Wrong As A Matter Of Text And History And Have Been Completely Undermined By This Court's Subsequent Application Of Most Of The Bill Of Rights To The States

In explaining to the House the need for a constitutional amendment to secure fundamental rights, Rep. Bingham complained of the absurdity that "[w]e have the power to vindicate the personal liberty and all the personal rights of the citizen in the remotest sea...while we have not the power in time of peace to enforce the citizens' right to life, liberty, and property within the limits of South Carolina…." Cong. Globe, 39th Cong., 1st Sess. 1090 (1866). Ironically, when the Supreme Court later limited the scope of the Privileges or Immunities Clause to rights of a purely federal nature, it gave as an example the right to "the care and protection of the Federal government over his life, liberty, and property when on the high seas or within

the jurisdiction of a foreign government," *Slaughter- House Cases*, 83 U.S. 36, 79 (1873), despite the fact that the authors of the Clause clearly saw the protection of life, liberty, and property in the states as requiring more immediate federal protection.

Further stalling the project of rights-protection in the states, three years later, the Court held that the protections of the Bill of Rights limited only the federal government. *United States v. Cruikshank*, 92 U.S. 542 (1876) (finding that the First and Second Amendments secure rights only against federal infringement). *Cruikshank* essentially reinstated *Barron v. Baltimore*, which the framers of the Fourteenth Amendment thought they had superseded. *See supra* Section I.C. Both *Slaughter-House* and *Cruikshank* reflected a national mood that had grown weary of Reconstruction. *See* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 38 (2007) (arguing that "there can be no doubt that *Slaughter-House* and *Cruikshank* reflected America's loss of will to memorialize the reforms begun in the late-1860s").

The reasoning employed by Justice Miller to reach the result in *Slaughter-House* directly contradicted the original meaning of the Privileges or Immunities Clause and eviscerated its intended effect from that day to this. While Justice Miller did cite *Corfield*, it was only to reject the proposition that the framers of the Fourteenth Amendment intended to protect the fundamental rights recognized by Justice Washington. Justice Miller's principal support for this claim was that the consequences of providing federal protection of these civil rights would be too radical to have been intended by Congress. *Slaughter-House*, 83 U.S. at 75-78. He offered no evidence for this speculation— and ignored overwhelming evidence to the contrary. Justice Miller effectively wrote the Privileges or Immunities Clause out of the Constitution, bringing the Amendment in line with President Johnson's alternative Fourteenth Amendment that Miller had supported. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 660 n. 228 (1994).

In contrast, the dissents in *Slaughter-House* summarized the original meaning of the Privileges or Immunities Clause described in Section I, *supra*, and powerfully rebutted Justice Miller's opinion. Justice Swayne observed that the majority's cramped reading of the Clause "turns...what was meant for bread into stone. By the Constitution, as it stood before the war, ample protection was given against oppres-

sion by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment." *Slaughter-House*, 83 U.S. at 129 (Swayne, J., dissenting). Similarly, Justice Field accused the majority of reducing the Clause to "a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage." *Id.* at 96 (Field, J., dissenting). Following a lengthy quote from *Corfield,* Field declared: "This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those *which of right belong to the citizens of all free governments*." *Id.* at 97.

The decision in *Slaughter-House* was immediately condemned by former members of the Thirty-ninth Congress as a "great mistake," Cong. Rec., 43rd Cong., 1st Sess. 4116 (1874) (Sen. Boutwell), which had perverted the Constitution by "assert[ing] a principle of constitutional law which I do not believe will ever be accepted by the profession or the people of the United States." *Id.* at 4148 (Sen. Howe). Senator George Franklin Edmunds said that the *Slaughter-House* Court's view of the Privileges or Immunities Clause "radically differed" from the framers' intent. CURTIS, NO STATE SHALL ABRIDGE, at 177; s*ee also* Lawrence, 72 MO. L. REV. at 29-35.

The reading given to the Privileges or Immunities Clause in *Slaughter-House* and its progeny is contrary to an overwhelming consensus among leading constitutional scholars today, who agree that the opinion is egregiously wrong.15 "Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the Amendment." Amar, 28 PEPP. L. REV. at 631 n.178.[16]

Indeed, the principle for which *Slaughter- House* and *Cruikshank* stand—that the personal liberties in the Bill of Rights and other fundamental rights do not limit the states—has been repudiated by the Supreme Court's subsequent "incorporation" of most of the Bill of Rights as a limit on the states, and its protection of unenumerated fundamental rights. In overruling cases such as *Maxwell v. Dow*, 176 U.S. 581 (1900), *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947),[17] the Court has rejected the foundation upon which *Slaughter-House* was built: the idea that the Fourteenth Amendment did not fundamentally change the balance of federal/state power and that Americans should look solely to state government for the protection of their most basic rights.[18]

With the reasoning of *Slaughter-House* superseded by modern Supreme Court doctrine, *amici* urge the Court to take this oppor-

tunity to restore the Privileges or Immunities Clause to its rightful and intended place at the heart of the Fourteenth Amendment. As professors of constitutional law, we look forward to the day when we can teach our students how the Supreme Court corrected this grievous error.

B. Reviving The Privileges Or Immunities Clause Will Not Prejudice The Constitutional Rights And Liberties Of Noncitizens

The Thirty-ninth Congress was particularly concerned with extending citizenship to the freedmen and protecting their rights as citizens, which had been denied in *Dred Scott*, as well as the rights of Unionists and Republicans in the South. However, it also took care to ensure that the fundamental rights of all "persons" would be protected by the Due Process and Equal Protection Clauses.

As was explained by Rep. Bingham as early as 1859, the Due Process Clause of the Fifth Amendment protected the fundamental rights of life, liberty, and property of all persons, citizen and noncitizen alike, from arbitrary restrictions.

> [N]atural and inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word "person," as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race….

Cong. Globe, 35th Cong., 2nd Sess. 983 (1859). According to Rep. Bingham, the the Fourteenth Amendment's Due Process Clause protected the "natural rights" of life, liberty and property of "all persons, whether citizens or strangers," *id.*, from infringement by states.

Later discussing a precursor of the Fourteenth Amendment, Rep. Bingham explained that "no man, no matter what his color, no matter beneath what sky he may have been born…shall be deprived of life or liberty or property without due process of law…." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866). He also demanded that "all persons, whether citizens or strangers, within this the land…have equal protection in every State of this Union in the rights of life and liberty and property." *Id.* at 1090. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1224 (1992) ("Bingham, Howard, and company wanted to go even further [than

protecting citizens] by extending the benefits of state due process to aliens."). *See also* AMAR, at 182 (explaining that the "privileges-or-immunities clause would protect citizen rights, and the due process and equal-protection principles (which Bingham saw as paired, if not synonymous) would protect the wider category of persons"); Aynes, 103 YALE L.J. at 68 ("An examination of the language of the proposed Amendment shows that its 'privileges and immunities' clause would apply only to citizens, whereas its 'life, liberty, and property' clause would apply more expansively to 'all persons.'").

Additionally, Sen. Howard explained how the Equal Protection Clause in the Fourteenth Amendment bars caste legislation and protects all persons from arbitrary classifications. The Equal Protection Clause "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). *See also id.* at 2459 (Rep. Stevens) ("This amendment…allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.")

Indeed, the very first statute passed to enforce the Fourteenth Amendment protected the rights of aliens to equality under the law. In 1870, Congress used its newly granted power to enforce the Fourteenth Amendment to pass the Enforcement Act of 1870, 16 Stat. 140, 144 (codified at 42 U.S.C. § 1981), which protected the rights of resident aliens, primarily Chinese immigrants in California, against pervasive racial discrimination. *See* Neal K. Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1368-70 (2007) (discussing statute). As one senator explained, "we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws and the same laws that other men are." Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870). During the debates over the Enforcement Act, Rep. Bingham emphasized that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws." *Id.* at 3871.

Amici believe the existing rights of noncitizens are fully protected by the Due Process and Equal Protection Clauses. State governments are required to provide noncitizens with a full range of procedural protections and need a constitutionally permissible reason for either restricting the liberties of noncitizens or discriminating against any "person" with regard to the fundamental rights accorded to citizens.

CONCLUSION

The text, history, and original public meaning of the Privileges or Immunities Clause show that the Clause protects substantive fundamental rights—including the personal liberties enumerated in the Bill of Rights—against state infringement. Accordingly, *amici* urge the Court to find that the Privileges or Immunities Clause 39 protects an individual right to keep and bear arms against state infringement, reverse the decision of the Seventh Circuit, and remand for further proceedings.

Respectfully submitted,
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NOTES

1. Counsel for all parties received notice of *amici*'s intent to file this brief at least ten days prior to the due date; all parties have consented to this filing. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

2. U.S. CONST. amend. XIV, § 1. This sentence of Section One was the brainchild of Ohio congressman John Bingham, who served on the Joint Committee on Reconstruction. On April 21, 1866, fellow committee member Thaddeus Stevens proposed an amendment with the following as its first section: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 83-84 (1914). The fifth section of Rep. Stevens' proposal empowered Congress to enforce the amendment. Later the same day, Rep. Bingham successfully moved that the language that would eventually become the second sentence of Section One be added. *Id.* at 87. Thus, for a time, Rep. Bingham's language coexisted with Rep. Stevens' exclusively nondiscrimination provision, suggesting that their meanings were not identical. Eventually, on April 28,

the Committee approved and sent to the full Congress the amendment with Rep. Bingham's Section One, *id.* at 106-07; the Citizenship Clause was added later in the Senate.

3. The First Charter of Virginia (1606), *reprinted in* SOURCES OF OUR LIBERTIES 39, 44 (Richard L. Perry ed. 1978) [hereinafter SOURCES], and Massachusetts Body of Liberties, pmbl. (1641), *reprinted in* SOURCES, at 148; *see also* The Charter of Maryland, art. XVI (1632), *reprinted in* SOURCES, at 105, 111 ("Rights, Jurisdictions, Liberties, and Privileges...."); The Charter of Massachusetts Bay (1629), *reprinted in* SOURCES, at 82, 93 ("[L]iberties and Immunities...."); Pennsylvania Charter of Privileges (1701) ("Liberties, Franchises and Privileges...."), *reprinted in* SOURCES, at 255–56; Concessions and Agreements of West New Jersey (1677) ("[T]he common law or fundamental rights and privileges...."), *reprinted in* SOURCES, at 184. For further discussion, see Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1296 & n.6 (2009).

4. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull) (invoking *Corfield*); *id.* at 1117-18 (Rep. Wilson) (same); *id.* at 1835 (Rep. Lawrence) (same); *id.* at 2765 (Sen. Howard).

5. IND. CONST. art. I, § 1 ("WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."); N.Y. CONST. of 1777 pmbl. ("We hold these Truths to be self-evident, that all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the Pursuit of Happiness."); WISC. CONST. art. I, § 1 (amended 1982) ("All men are born equally free andindependent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness....").

6. *E.g.*, ILL. CONST. of 1818 art. VIII, § 1 ("[A]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness."); IOWA CONST. art. I, § 1 (amended 1998) ("All men are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursing and obtaining safety and happiness."); MASS. CONST. pt. I, art. I (amended 1976) ("All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."); N.H. CONST. pt. 1, art. II (amended 1974) ("All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and ...seeking and obtaining happiness."); OHIO CONST. art. I, § 1 ("All men

are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety...."); PA. CONST. art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."); VT. CONST. ch. 1, art. I (amended 1924) ("[A]ll men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety....").

7. This speech by Sen. Howard, explaining that the Privileges or Immunities Clause included at least the rights guaranteed by the first eight amendments in the Bill of Rights, "was reprinted as front page news the next day in the New York Times." Wildenthal, 68 OHIO ST. L.J. at 1564. In addition, "[a]t least four other major papers apparently covered the relevant parts of Sen. Howard's speech: the Philadelphia Inquirer, the Washington, D.C. National Intelligencer, the front page of the New York Herald, and, with only slight ambiguity, the front page of the Boston Daily Advertiser." *Id.* The coverage of the debates—in particular, speeches by Rep. Bingham and Sen. Howard—"provides substantial evidence that the national body politic, during 1866-68, was placed on fair notice about the incorporationist design of the Amendment." *Id.* at 1590.

8. As in the 1866 debates, in 1859, Rep. Bingham had argued that constitutionally-protected privileges and immunities included "rights of life and liberty and property, and their due protection in the enjoyment thereof," specifically including freedoms such as "the right to know; to argue and to utter according to…conscience; [and] to work and enjoy the product of [one's] toil." Cong. Globe, 35th Cong., 2nd Sess. 984, 985 (1859).

9. After ratification, Rep. Bingham maintained that "the privileges or immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871). After reading the first eight amendments word for word, he continued: "These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment." *Id. See generally* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment,* 103 YALE L.J. 57, 74 (1993).

10. *See* N.Y. TIMES, Feb. 5, 1867, at 5 ("During the past two weeks a large number of prominent Southern men, who may be taken as representative men of their States, have been [in Washington] and have daily consultations with the President upon this important subject.").

11. *Id. See also* WALTER FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 238-40 (1906) (reprinting draft with President Johnson's annotations).

12. N.Y. TIMES, *supra*, at 5 (emphasis added).

13. For discussions of the Black Codes in Congress, see Cong. Globe, 39th Cong., 1st Sess. 93-94 (1865); *id.* at 340 (1866); *id.* at 474-75; *id.* at 516-17; *id.* at 588-89; *id.* at 632; *id.* at 651; *id.* at 783; *id.* at 1123-24; *id.* at 1160; *id.* at 1617; *id.* at 1621; *id.* at 1838.

14. *See id.* at 474 (Sen. Trumbull) ("Liberty and slavery are opposite terms; one is opposed to the other."); *id.* at 475 ("[I]t is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law... that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.").

15. *E.g.*, AMAR, at 163-230; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22-30 (1980); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 7-6, at 1320-31 (2000); BARNETT, at 195-203; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313-15, 317-18 (2007); Aynes, 11 U. PA. J. CONST. L. at 1310. *See generally* DAVID H. GANS & DOUGLAS T. KENDALL, THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT (2008).

16. Undoubtedly, there are a handful of modern scholars willing to come to the defense of Justice Miller's interpretation of the Privileges or Immunities Clause, but the contrary consensus of preeminent constitutional scholars and authoritative historians of otherwise disparate viewpoints is truly remarkable.

17. *E.g.*, *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964) (overruling *Twining* and *Adamson*); *Duncan v. Louisiana*, 391 U.S. 145, 154-55 (1968) (rejecting dicta in *Maxwell*).

18. Recognizing at long last the original meaning of the Privileges or Immunities Clause would not prevent the states from exercising their police power to regulate the rights to which it refers. As was explained by Justice Bradley, "[t]he right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves." *Slaughter-House*, 83 U.S. at 114 (Bradley, J., dissenting). Since *Slaughter-House* was decided, the Court has gained much experience in policing this type of line in a variety of contexts where fundamental rights are at stake.

INTEREST OF AMICI CURIAE[1]

BRIEF OF THE STATES OF
TEXAS, OHIO, ARKANSAS, GEORGIA, ALABAMA,
ALASKA, ARIZONA, COLORADO, FLORIDA, IDAHO,
INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE,
MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE,
NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA,
OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH
CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH,
VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN,
AND WYOMING
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Texas, Ohio, Arkansas, Georgia, and the other *amici* States have a profound interest in this case as guardians of their citizens' constitutional rights. As our Founding Fathers recognized, and as this Court reaffirmed in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Second Amendment right to keep and bear arms is a critical liberty interest, essential to preserving individual security and the right to self- defense. But uncertainty remains as to whether this right fully extends to the vast majority of citizens who live not in a federal enclave, but in one of the several States. Unless the ruling of the court of appeals below is reversed, millions of Americans will be deprived of their Second Amendment right to keep and bear arms as a result of actions by local governments, such as the ordinances challenged in this case.

Enforcement of the Second Amendment right to keep and bear arms against state and local governments is especially important in an era of robust interstate travel and commerce. As the Court has observed, "the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). Indeed, the Court has described the right to interstate travel as "so important that it is 'assertable against private interference as

well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.'" *Id.* (quoting

Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)). Accordingly, the States have an interest in ensuring that citizens who must travel in the course of their personal or professional lives remain free from unconstitutional arrest and prosecution for engaging in their right to self-defense by carrying properly-licensed weapons. If local governments may completely ban possession of handguns—"the most popular weapon chosen by Americans for self-defense," *Heller*, 128 S. Ct. at 2818—citizens of all the States may find that they are unable to travel to certain jurisdictions unless they are willing to forego their Second Amendment rights.

Finally, the States have an interest in the proper interpretation of the Second Amendment in order to facilitate the development of similar protections under state law. Interpretive guidance from this Court, and from other federal courts, would help the States as they construe and enforce their own, analogous state- law protections—including the 44 state constitutions that guarantee a right to keep and bear arms. *See*, e.g., Robert F. Williams, State Constitutional Law Processes, 24 WM. & MARY L. REV. 169, 194 n.113 (1983) ("'In a community that perceives the Supreme Court to be the primary interpreter of constitutional rights, reliance on Supreme Court reasoning can help to legitimate state constitutional decisions that build on the federal base.'") (citation omitted).

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INTRODUCTION

Over the last century, the Court has held that "virtually all" of the individual rights found in the Bill of Rights apply to state and local government through the Due Process Clause of the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring in judgment). Under the doctrine of selective incorporation, these rights have been applied to state and local government because they are considered "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

The right to keep and bear arms under the Second Amendment is a "fundamental" liberty interest subject to incorporation against the States. Indeed, in the Anglo-American tradition, it is among the most fundamental of rights because it is essential to securing all our other liberties. The Founders well understood that, without the protections afforded by the Second Amendment, all of the other rights and privileges ordinarily enjoyed by citizens would be vulnerable to governmental acts of oppression. As St. George Tucker wrote, the right protected by the Second Amendment "may be considered as the true palladium of liberty" because "[t]he right to self-defence is the first law of nature," and wherever "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." St. George Tucker, View of the Constitution of the United States, in WILLIAM BLACKSTONE, 1 COMMENTARIES app., at 300 (Philadelphia, Birch & Small 1803) (1765).

Two familiar events in our Nation's history are particularly instructive in illustrating the fundamental nature of the right to bear arms. The very first battle of the Revolutionary War was sparked by British efforts to disarm American colonists. As news spread of these efforts, colonists formed militias to secure their arms. ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD 59 (1976). These tensions culminated in April 1775, when British General Sir Thomas Gage sent a column of Redcoats to destroy arms and ammunition stored by colonists in Lexington and Concord, triggering the first battle of the Revolutionary War. *See* JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 145-46 (1994). Notably, in forming their militias, the colonists were keenly aware that the right to bear arms was critical to the protection of their other liberties. When George Mason (in conjunction with George Washington and others)

began organizing a militia in Fairfax County, Virginia, he noted that the colonists were being "threat'ned with the Destruction of our Civil-rights, & Liberty, and all that is dear to British Subjects & Freemen." 1 THE PAPERS OF GEORGE MASON 1725- 1792, at 210-11 (Robert A. Rutland ed., 1970). After raising the militia company, Mason praised it as necessary "for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors." *Id.* at 229.

Nearly one hundred years later, in the aftermath of the Civil War, the Southern States engaged in a brutal campaign to disarm and thereby oppress the recently freed slaves. Those efforts included enactment of the so-called "Black Codes" prohibiting the possession of firearms by African-Americans. *See Heller*, 128 S. Ct. at 2810. Disarmament was frequently followed by acts of lawlessness perpetrated on defenseless African- Americans. *See*, e.g., Report of the Joint Comm. on Reconstruction, H.R. REP. NO. 39-30, pt. 4, at 49-50 (1866) (testimony that armed patrols in Texas, acting under supposed authority of the Governor, "passed about through settlements where negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed them"); CONG. GLOBE, 39th Cong., 1st Sess. 915 (1866) (statement of Sen. Wilson) ("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."). The Reconstruction Congress attempted to remedy these injustices through the Fourteenth Amendment, the Freedmen's Bureau Acts, and the Civil Rights Act, with the clear understanding that an "indispensable" "safeguard[] of liberty . . . under the Constitution" is a man's "right to bear arms for the defense of himself and family and his homestead." *Heller*, 128 S. Ct. at 2811 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866)).

The common thread in these transformative events in our Nation's history was the fundamental importance of the right to keep and bear arms as the ultimate guarantor of all the other liberties enjoyed by Americans. The source of the threat to liberty shifted from the British Crown during the Founding to oppressive local governments in the post-Civil War era, but the cure remained the same: recognition and enforcement of an individual right to keep and bear arms, as an essential component of the natural right of self-preservation and the right of "resistance . . . to the violence of

oppression." WILLIAM BLACKSTONE, 1 COMMENTARIES 139 (Legal Classics Library 1983) (1765).

As history has proven, the right to bear arms provides the foundational bulwark against the deprivation of all our other rights and privileges as Americans—including rights that have already been incorporated against the States by this Court. Accordingly, the Court should hold that the Second Amendment also secures a "fundamental" right that can no more be abrogated by local government than by the federal government.

SUMMARY OF ARGUMENT

The Second Amendment expressly provides 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." U.S. CONST. amend. II. Accordingly, in *Heller*, the Court held that the Second Amendment protects an individual right to keep and bear arms, 128 S. Ct. at 2816-18, and that a District of Columbia prohibition on possession of handguns violated the Amendment, *Id.* at 2818. *Heller* did not decide whether the Amendment is applicable to the States. But the Court observed that its earlier, nineteenth-century decisions that the Amendment applies only to the federal government "did not engage in the sort of Fourteenth Amendment inquiry required by our later decisions." *Id.* at 2813 n.23. In doing so *Heller* presaged the issue presented here: whether the Second Amendment is a "fundamental right" enforceable against state and local governments under the doctrine of selective incorporation.

The City of Chicago has enacted the same type of handgun ban that the Court determined was invalid in *Heller*. *See* CHICAGO, ILL., MUN. CODE §§ 8-20-040(a) (prohibiting possession of unregistered firearms); 8-20- 050(c) (providing that no registration certificates will be issued for handguns). Chicago also requires that registerable weapons must be re-registered annually, a process that must be initiated at least sixty days prior to the registration's expiration. *Id.* § 8-20-200. This re-registration process requires the payment of additional fees and the resubmission of all initial registration materials. *Id.* And if re-registration is not properly and timely completed, the particular gun becomes "unregisterable" and therefore illegal to possess in Chicago. *Id.* Likewise, if a firearm is acquired prior to its registration, it is also "unregisterable" and illegal in Chicago. *Id.* § 8-20-090.

Petitioners are residents of Chicago who challenged the validity of these ordinances because they, like the *Heller* plaintiffs, wish to own handguns for the lawful and reasonable purpose of self-defense. Petitioner Otis McDonald, for example, is a community activist who lives in a high-crime Chicago neighborhood. His efforts to make his neighborhood a better place to live have subjected him to violent threats from drug dealers, and he wishes to own a handgun for self-protection.2 Similarly, Petitioner Colleen Lawson is a Chicago resident whose home has been targeted by burglars. She too would like to own a handgun for self-defense.3 Like gun owners across the Nation, Petitioners are relying on the Second Amendment to secure among the most basic of rights—the protection of one's home and family.

The district court held that Petitioners' claims were foreclosed by circuit precedent upholding the constitutionality of handgun bans and rejecting the application of the Second Amendment to state and local governments. Pet. App. 13-14, 17-18 (citing *Quilici v. Village of Morton Grove*, 695 F.3d 261 (7th Cir. 1982)). The court of appeals likewise concluded that this Court's precedent and its own precedent precluded enforcement of the Second Amendment against state and local government. *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 857-58 (7th Cir. 2009) (citing *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894); *Quilici*, 695 F.3d 261).

But the decisions relied upon by the court of appeals are the same nineteenth-century cases that *Heller* dismissed as predating the Court's selective incorporation jurisprudence. 128 S. Ct. at 2813 n.23. As such, they do not control this case. Under this Court's selective incorporation jurisprudence, the determination whether the Second Amendment applies to state and local governments turns on whether it secures an individual right that is "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

Given the deeply rooted nature of the individual right to arms in the American experience, there can be little doubt that it meets the selective incorporation test. Grounded in English law and recognized by both our Founders and the drafters of the Fourteenth Amendment as among the most fundamental of rights because it was necessary to preserve all their other liberties, the right to arms has remained central to our Nation's regime of ordered liberty. The right to keep and bear arms also appears in the constitutions of 44

States. And the legislatures of all 50 States are united in their rejection of bans on the possession of handguns, the "quintessential self-defense weapon" in America. *Heller*, 128 S. Ct. at 2818.4

For the vast majority of Americans who do not live in a federal enclave, the stakes involved in this case could not be higher. If Chicago's ban is upheld, it will confirm that local governments, unrestrained by the Second Amendment, may deny American citizens what they could not be denied by the federal government: the right to possess "the most preferred firearm in the nation to 'keep' and use for the protection of one's home and family." *Id.* (internal quotation and citation omitted). For untold numbers of Americans, including the millions of residents of Chicago, such a result will render the Second Amendment—aptly described as the "the palladium of the liberties of the republic," JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 708 (Carolina Academic Press 1987) (1833)—effectively meaningless.

ARGUMENT

I. THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

Under this Court's established Due Process jurisprudence, all "fundamental" rights under the Bill of Rights are enforceable against state and local governments—including the Second Amendment. The fundamental nature of the right to keep and bear arms, as necessary to the protection of all other rights, has been deeply embedded in the American conscience at every stage of our history: It was imported into the colonies from English law, sparked the American Revolution, animated the Founding spirit of this Nation, and drove the adoption of the Fourteenth Amendment and other post-Civil War measures designed to protect recently-freed slaves from both government and private oppression.

A. The Due Process Clause Incorporates "Fundamental" Rights.

The Due Process Clause of the Fourteenth Amendment bars "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court has recognized that this Clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence

of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Rather, due process also encompasses "fundamental" rights. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

The doctrine of selective incorporation is premised on the Court's conclusion that any "fundamental right" listed in the Bill of Rights "is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Applying this doctrine in a series of decisions over the last century, the Court has held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. *See*, e.g., *Schilb v. Kuebel*, 404 U.S. 357 (1971) (Excessive Bail Clause); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Speedy Trial Clause); *Pointer*, 380 U.S. 400 (Confrontation Clause); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (free assembly); *Gitlow v. New York*, 268 U.S. 652 (1925) (free speech).

In the doctrine's initial formulation, as expressed in *Palko v. Connecticut*, 302 U.S. 319 (1937), overruled by *Benton v. Maryland*, 395 U.S. 784 (1969), the Due Process Clause incorporated against the States only those rights "implicit in the concept of ordered liberty." *Palko*, 302 U.S. at 325. The analysis has since been refined to focus on the Anglo-American historical background of the right. The incorporation inquiry now turns on whether a right is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14. Applying this test in Duncan to determine that the Sixth Amendment right to jury trial in criminal cases applied to the States, the Court reviewed the history of the right in English law, as well as its importance in the Founding era. *See Id.* at 151-54. The Court also reviewed the current state systems for criminal trials, noting that every State "uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict." *Id.* at 149 n.14. Because the Second Amendment also secures a fundamental right with a necessary place in the Anglo-American regime of ordered liberty, it too applies to the States.

B. The Right to Keep and Bear Arms Was Considered "Fundamental" Under English Law and During the Founding Era.

As the Court observed in *Heller*, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. In reaching this conclusion, the Court cited Blackstone, "whose works . . . 'constituted the preeminent au-

thority on English law for the founding generation.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). Blackstone explained that "having" arms was among the five basic rights of every Englishman, those rights which secured the "primary rights" of each individual. WILLIAM BLACKSTONE, 1 COMMENTARIES 136, 139 (Legal Classics Library 1983) (1765). Indeed, Blackstone saw the right to bear arms as a natural right because it arose from the natural right of self- preservation, and the right of "resistance . . . to the violence of oppression." *Id.* at 139. And, as *Heller* also noted, Blackstone's view was shared by his contemporaries. 128 S. Ct. at 2798 (citing several eighteenth century authorities). The right to arms recognized by Blackstone was also part of the English Declaration of Right (codified as the English Bill of Rights) of 1689, the relevant portion of which "has long been understood to be the predecessor to our Second Amendment." *Id.*

The American colonists likewise viewed the right to arms as fundamental, derivative of their rights as Englishmen. During the 1760s and 1770s, as relations between the colonists and the British Crown deteriorated, King George III "began to disarm the inhabitants of the most rebellious areas." *Id.* at 2799. This forced disarmament "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Id.* It also led to the formation of independent militias in the colonies, see ROBERT GROSS, THE MINUTEMEN AND THEIR WORLD 59 (1976), which were described by the patriot Josiah Quincy as "a well regulated militia composed of the freeholders, citizens, and husbandmen, who take up arms to preserve their property as individuals, and their rights as freemen." JOSIAH QUINCY, OBSERVATIONS ON THE ACT OF PARLIAMENT COMMONLY CALLED THE BOSTON PORT-BILL 413 (1774).

The colonists associated the growing presence of British regulars in America, and the Crown's policy of disarming the citizenry, as a profound threat to all of their liberties. When stores of gunpowder were seized in Virginia, the House of Burgesses observed that Virginians were well aware of the "many attempts in the northern colonies to disarm the people, and thereby deprive them of the only means of defending their lives and property." VA. GAZETTE (Williamsburg), Aug. 5, 1775, at 2, col. 1. The prospect of disarmament was especially daunting given the well-recognized power and military prowess of the British army and navy. *See* JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 6 (2000) ("Taken together, the British army and navy

constituted the most powerful military force in the world, destined in the course of the succeeding century to defeat all national competitors for its claim as the first hegemonic power of the modern era."). In short, for the Founding Generation, the importance of the right to arms "was not merely speculative theory. It was the lived experience of the [] age." AKHIL REED AMAR, THE BILL OF RIGHTS 47 (1998).

Given the colonists' experience before and during the Revolutionary War, it is unsurprising that "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right [to keep and bear arms] and declares only that it 'shall not be infringed.'" *Heller*, 128 S. Ct. at 2797. The Framers were well aware of the central importance of this right, recognizing "the advantage of being armed, which the Americans possess over the people of almost every other nation." THE FEDERALIST NO. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961).

The Framers also understood that the right to arms was essential to preserving all the other "fundamental" liberties enjoyed by the American people. Alexander Hamilton articulated this understanding in his Federalist No. 29:

> [I]f circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.

THE FEDERALIST NO. 29, at 145 (Alexander Hamilton) (G. Carey & J. McClellan eds., 1990).

Finally, the actions of the States themselves during the Founding era establish that they too viewed the right to keep and bear arms as "fundamental." *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 126-69 (2008) (providing State-by-State analysis). For example, after the adoption of the Declaration of Independence in 1776, several of the colonies adopted written constitutions of their own. The constitutions of Massachusetts, North Carolina, Pennsylvania, and Vermont all included provisions that guaranteed the right to bear arms. MASS. CONST. pt. 1, art. XVII; N.C. CONST. of 1776, DECLARATION OF RIGHTS § XVII; PA. CONST. of 1776, DECLARATION OF RIGHTS, § XIII; VT. CONST. of 1777, ch. 1, art. XV. And when the States voted on the ratification of the Constitution, several of

them recommended amendments securing the right to keep and bear arms. 4 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 912 (1980) (noting that New Hampshire, New York, North Carolina, Rhode Island, and Virginia recommended including a provision on the right to keep and bear arms); see also 1 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 326-28 (Jonathan Elliott ed., 1859).

The States' understanding of the fundamental nature of the right to arms was further demonstrated in the decades after the adoption of the Constitution. As more States were admitted to the Union, the right to keep and bear arms was recognized by a growing number of state constitutions. By 1868, twenty-two state constitutions explicitly guaranteed a right to bear arms. *See* App. The judicial opinions of state courts during this time also consistently recognized the importance of the right to arms. *See*, e.g., *Cockrum v. State*, 24 Tex. 394, 401-02 (1859) ("The right of a citizen to bear arms, in the lawful defence of himself . . . is absolute . . . . A law cannot be passed to infringe upon it or impair it . . . ."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (the right to bear arms 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"); *Nunn v. State*, 1 Ga. 243, 251 (1846) (stating that the right to keep and bear arms protects the "natural right of self-defence," and that the Second Amendment secured a 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!").

In sum, the historical record, much of it detailed by this Court in *Heller*, demonstrates that the right to keep and bear arms was understood as a fundamental right of English subjects at the time of the Founding. Throughout this period the Framers, and Americans generally, considered the right to arms essential to preserving the other "fundamental" liberties enjoyed by our citizens at the birth of the Nation.

C. The Right to Keep and Bear Arms Was Considered "Fundamental" When the Fourteenth Amendment Was Adopted, and It Remains So to This Day.

As it was during the Founding era and in the succeeding decades leading up to the Civil War, the right to keep and bear arms con-

tinued to be considered "fundamental" at the time the Fourteenth Amendment was adopted. The Court described this period in *Heller*, noting that, "[i]n 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 freed slaves." 128 S. Ct. at 2809-10. A significant concern in these debates was the disarming of newly freed African- Americans in the Southern States, by statute as well as by vigilantism. *See Id.* at 2810 (citing STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) (hereinafter HALBROOK, FREEDMEN)).

The Framers of the Fourteenth Amendment acted to end these oppressions by drafting the Amendment itself and by passing the Freedmen's Bureau Acts and the Civil Rights Act of 1866. A prominent constitutional scholar has noted that "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of African-American citizens who had been stripped of their arms and subjected to violent attacks, and to "affirm the full and equal right of every citizen to self- defense." AMAR, *supra*, at 264. Indeed, "more evidence exists that the framers of the Fourteenth Amendment intended to protect the right to keep and bear arms from state infringement than exists for any other Bill ofRightsguarantee." HALBROOK,FREEDMEN,*supra*,at at 188.

The debates of the Thirty-Ninth Congress, which drafted the Fourteenth Amendment, are replete with evidence that the Second Amendment was understood to protect a fundamental right. For example, Senator Pomeroy listed among the "indispensable" "safeguards of liberty" one's "right to bear arms for the defense of himself and family and his homestead." CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866), quoted in *Heller*, 128 S. Ct. at 2811. Similarly, Representative Roswell Hart listed "the right of the people to keep and bear arms" as inherent in a "republican government." CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866). Even the opponents of these Reconstruction measures acknowledged that the right to keep and bear arms was fundamental; they disagreed only as to whom that right extended and whether the federal government should enforce it. *See*, e.g., *Id.* at 371 (statement of Sen. Davis) (objecting to the Freedmen's Bureau bill but agreeing that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense"); cf., *Id.* at 914-15 (Sen. Saulsbury) (objecting to a bill to disband white southern militias,

arguing that such a measure by Congress would violate the Second Amendment).

Other actions by the Thirty-Ninth Congress further confirmed the critical importance of the Second Amendment in the Reconstruction period. The Freedmen's Bureau bill specifically declared that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens." Act of July 16, 1866, ch. 200, sec. 14, 14 Stat. 173, 176 (1866) (emphasis added). "No other guarantee in the Bill of Rights was the subject of this official approval by the same Congress that passed the Fourteenth Amendment." HALBROOK, FREEDMEN, *supra*, at 42.

The state constitutions adopted during the Reconstruction period, including those adopted by States that had previously joined the Confederacy, likewise demonstrate that the right to arms was considered fundamental by the States that ratified the Fourteenth Amendment. *See*, e.g., ARK. CONST. of 1868, art. II, § 5 ("The citizens of this state shall have the right to keep and bear arms for their common defense."); MISS. CONST. of 1868, art. I, § 15 ("All persons shall have a right to keep and bear arms for their defence."); TEX. CONST. of 1869, art. I, § 13 ("Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State.").

In sum, at the time the Fourteenth Amendment was drafted and ratified, as during the Founding era, the right to keep and bear arms remained central to the American conception of liberty. The post-Civil War disarmament of the freed slaves in the Southern States—followed swiftly by the deprivation of other basic liberties—powerfully demonstrated that the Second Amendment preserves a right essential to securing all the other rights and privileges of free citizens. The Fourteenth Amendment, Freedmen's Bureau Acts and Civil Rights Act, designed to remedy these injustices, were predicated on the recognition that the right to arms is "fundamental."

Events since the adoption of the Fourteenth Amendment further confirm that the right to arms remains of central importance to the States. Today 44 state constitutions expressly protect a right to bear arms. *See* App. Three other States protect a right to self-defense and defense of property. *See* CAL. CONST. art. I, § 1 (originally adopted in 1849); IOWA CONST. art. I, § 1 (originally adopted in 1846); N.J. CONST. art. I, ¶ 1 (originally adopted in 1844). As the

Court has noted, "the inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817. Only Maryland, Minnesota, and New York have neither guarantee in their state constitutions. Moreover, the legislatures of all 50 States have rejected bans on private handgun ownership. As a result, every State in the Union permits private handgun ownership. *See* App.

Finally, 32 States submitted an *amicus curiae* brief in *Heller* arguing that the Second Amendment secures a "fundamental" right that is "properly subject to incorporation." Brief for the State of Texas et al. as *Amici Curiae* Supporting Respondent, at 23 n.6, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). In this case, 34 States urged the Court to grant review of the decision below and hold that the Second Amendment is applicable to the States. *See* Brief for the State of Texas et al. as *Amici Curiae* in Support of Petitioners; Brief of the State of California as Amicus Curiae in Support of Petitioners. And the submission of this *amicus* brief provides further evidence of the States' understanding of the fundamental importance of the arms-bearing right guaranteed by the Second Amendment.

II. THE FEDERALISM CONCERNS INVOKED BY THE COURT OF APPEALS ARE MISPLACED.

The decision below was based in part on the belief that incorporation of the Second Amendment would raise federalism concerns. *See Nat'l Rifle Ass'n*, 567 F.3d at 859-60. Those concerns are misplaced.

To begin with, the federalism concerns expressed below are based on the mistaken premise that the Second Amendment protects state militias against federal interference. *Id.* at 859. *Heller* expressly rejected the argument that the Second Amendment addressed any concern about federal control over state militias. As the Court explained, "[t]he Second Amendment right, protecting only individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia." 128 S. Ct. at 2804 (*emphasis added*). The Founders sought to address their fear of federal abolition of state militias not through the Second Amendment, but "in separate structural provisions that would have given the States concurrent and seemingly nonpre-emptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so." *Id.*

The court of appeals further suggests that incorporation may be incorrect because "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *Nat'l Rifle Assoc.,* 567 F.3d at 860. To be sure, amici States agree that "[i]t is one of the happy incidents of the federal system" that each State may "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (cited in *Nat'l Rifle Assoc.*, 567 F.3d at 860). But the discretion of state and local governments to explore legislative and regulatory initiatives does not include "the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights." *Pointer*, 380 U.S. at 413 (Goldberg, J., concurring). As the Court stated in *Heller*, "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is really worth insisting upon." 128 S. Ct. at 2821. Just as local governments cannot constitutionally act as "laboratories" for initiatives to abrogate their citizens' right to free speech or their freedom from unreasonable searches and seizures, nor can they nullify the fundamental right to keep and bear arms secured by the Second Amendment.

State and local experimentation with reasonable firearms regulations will continue under the Second Amendment. As noted in *Heller*, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 2816. Many firearms regulations would plainly survive Second Amendment scrutiny, such as "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." *Id.* at 2816-17. For example, in *Nordyke v. King*, the Ninth Circuit applied the Second Amendment to the States, but nonetheless upheld an Alameda County, California ordinance prohibiting firearms on county property. 563 F.3d 439, 457, 460 (9th Cir. 2009).

As "independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the *amici* States are particularly concerned when the Court engages in constitutional or statutory interpretation that implicates federalism issues. The incorporation of the Second Amendment presents no such concerns. Denying local governments the power to nullify the Amendment will not increase federal power, mandate any state action pursuant to federal direc-

tives, or preclude reasonable state and local regulation of firearms. It will simply prevent local governments, like the federal government, from abrogating the fundamental, individual right to keep and bear arms. *See Pointer*, 380 U.S. at 413-14 (Goldberg, J., concurring) ("[T]o deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual.").

III. THE CITY OF CHICAGO MISREADS *HELLER*.

Because the Second Amendment's right to arms applies to the States through the Due Process Clause, it necessarily follows that Chicago's complete ban on the possession of handguns, like that of the District of Columbia considered in *Heller*, is invalid. In its brief opposing certiorari, Chicago attempts to avoid this result by making three mistaken arguments about the scope of the Second Amendment as construed in *Heller*. None of Chicago's arguments was endorsed by the court of appeals below.

Chicago's first mistake is that it asks the wrong question. According to Chicago, the question is not whether the Second Amendment is incorporated against the States; rather, Chicago asks the Court to determine whether the Second Amendment is incorporated against the States on a case-by-case, weapon-by-weapon basis. *See* Resp. 9. But the Court has never taken such a piecemeal approach to incorporation.

Chicago's approach to incorporation also misunderstands *Heller*. Contrary to Chicago's assertion, the "precise Second Amendment right" recognized in *Heller* was an individual right to keep and bear arms, not merely a "right to handguns." Indeed, *Heller* made clear that the Second Amendment protects an individual right to keep and bear any weapons that are "in common use" by Americans—that is, the "sorts of lawful weapons that they possessed at home," and that they could therefore bring with them if called to militia duty. *Heller*, 128 S. Ct. at 2817. So when the Court invalidated the District of Columbia's handgun ban, it did so because it determined that handguns were weapons "in common use" by Americans and therefore could not be categorically banned. *Id.* at 2817-18. Accordingly, the question in this case is not whether a "right to handguns" is incorporated, as Chicago suggests, but rather whether the Second Amendment in its entirety—securing the individual right to keep and bear any weapon in common use—applies to state and local governments.

Chicago likewise misreads *Heller* when it argues that local governments may ban handguns so long as they allow citizens to have some other type of weapon in the home for self-defense. Resp. 9, 15-16. In fact, the Court has already rejected the contention that handguns may be prohibited consistent with the Second Amendment so long as long guns are permitted:

> "It is no answer to say . . . 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. . . . and a complete prohibition of their use is invalid."

Heller, 128 S. Ct. at 2818.

And in any event, Chicago's apparent belief that there is no tradition upholding a right to handguns is mistaken. As the Court observed in *Heller*, "[f]ew laws in the history of our Nation have come close to the severe restriction" of the type of handgun ban enacted by the District of Columbia and Chicago, and those laws have typically been overturned. *See Id.* (citing *Nunn*, 1 Ga. at 251 (striking down a prohibition on carrying pistols openly); *Andrews v. State*, 50 Tenn. 165, 187 (1871) (holding that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time place, or circumstances," violated the state constitutional provision—which the court equated with the Second Amendment); *State v. Reid*, 1 Ala. 612, 616-17 (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 defense, would be clearly unconstitutional.")).

Second, Chicago argues that "[t]he right recognized in *Heller* to keep and bear arms in common use [like handguns] is not implicit in the concept of ordered liberty," Resp. 11, and therefore is not incorporated. This argument turns on Chicago's belief that, although the Second Amendment "conferred an individual right, as against the federal government, to keep and bear weapons in common use," the "purpose of the common-use rule was to protect, not individual personal liberties, but the militia-related need for militiamen to possess and be familiar with weapons necessary for their militia service." Resp. 12.

Again, Chicago misunderstands *Heller*. Although the Court acknowledged that the individual right to arms secured by the Second Amendment is limited to those weapons that are "'in common use

at the time,'" *Heller*, 128 S. Ct. at 2817 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)), this limitation does not alter the Amendment's purpose to protect a fundamental, individual right to arms. Rather, the Court made clear in *Heller* that the purpose of the Second Amendment is to secure an individual right to arms that is not dependent upon an individual's service in the militia. *Id.* at 2815-17.

And, contrary to Chicago's formulation, wherein the Second Amendment's purpose was driven by the need for militiamen to possess and be familiar with particular weapons "necessary for their militia service," Resp. 12, the Court explained in *Heller* that "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." 128 S. Ct. at 2817 *(emphasis added)*. In short, Chicago fails to recognize that Americans' right to possess lawful weapons in common use has remained implicit in the concept of ordered liberty, even when those weapons could not be "useful against modern-day bombers and tanks" and therefore would be of limited efficacy in modern militia service. *Id.*

Finally, Chicago argues that "the scope of arms rights under state constitutions confirms that the right to keep and bear arms in common use is not so firmly entrenched that it is implicit in the concept of ordered liberty." Resp. 14. This argument is particularly puzzling, because Chicago implicitly acknowledges, as it must, that 44 state constitutions protect an individual right to arms, and all 50 state legislatures have rejected bans on handguns. *See* Resp. 14 & n.6; see also App. Nonetheless, according to Chicago, because state courts have routinely upheld reasonable regulations on the possession of firearms, the right to keep and bear arms has not become "so firmly entrenched" in the States as to be considered "fundamental." *See* Resp. 14-15.

But the enactment by state and local governments of reasonable regulations on firearms, subsequently upheld by state courts, can hardly be equated with a failure on the part of the States to recognize the central importance of their citizens' right to arms. Chicago points to felon-in-possession laws, bans on unusual or military weapons such as sawed off shotguns and assault rifles, and concealed carry regulations, as indicative of the States' rejection of the notion that the right to arms is "implicit in the concept of ordered liberty." *See Id.* (citing Adam Winkler, The Reasonable Right to Bear Arms, 17 STAN. L. & POL'Y REV. 597, 599- 612 (2006)). But none

of these laws comes close to completely prohibiting the possession of an entire category of lawful weapons in common use, nor do any of these regulations reflect that the States do not consider the Second Amendment right to arms to be "fundamental."

Rather, as described herein, see *supra* Part I, the States' commitment to securing their citizens' right to arms in common use was evident at the Founding and continues to this day through state constitutional provisions and through the States' uniform rejection of handgun bans. As the submission of this brief further demonstrates, Chicago's position that the right to arms is of little importance, and may be abrogated at will by local government, is directly contrary to the view of the majority of the States.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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NOTES

1. Pursuant to Rule 37.4, the consent of the parties is not required for the States to file this brief.

2. See Petitioners' Complaint, at 1-2, available at http:// www.chicagogun-case.com/wp-content/uploads/2008/06/complaint.pdf (last visited Nov. 23, 2009).

3. See *Id.*

4. The relevant state constitutional and statutory provisions concerning firearms are attached in the Appendix to this brief.

APPENDIX

STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS:[1] AT THE FOUNDING (1776–1790s)

1. See Eugene Volokh, State Constitutional Rights to Keep and Bear Arms, 11 TEX. REV. L. & POL. 191, 192- 217 (2006) (further detailing the statutory and jurisprudential history of these provisions).

Kentucky: KY. CONST. of 1792, art. XII, § 23

Massachusetts: MASS. CONST. pt. I, art. XVII

North Carolina: N.C. CONST. of 1776, DECLARATION OF RIGHTS § XVII

Pennsylvania: PA. CONST. of 1790, art. IX, § 21; PA. CONST. of 1776, DECLARATION OF RIGHTS § XIII

Tennessee: TENN. CONST. of 1796, art. XI, § 26

Vermont: VT. CONST. ch. I, art. 16; VT. CONST. of 1786, ch. I, art. XVIII; VT. CONST. of 1777, ch. I, art. XV

STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS: AT THE ADOPTION OF THE FOURTEENTH AMENDMENT (1868)

Alabama: ALA. CONST. of 1868, art. I, § 28

Arkansas: ARK. CONST. of 1868, art. II, § 5

Connecticut: CONN. CONST. of 1818, art. I, § 15

Florida: FLA. CONST. of 1868, DECLARATION OF RIGHTS § 22

Georgia: GA. CONST. of 1868, art. I, § 14

Indiana: IND. CONST. art. I, § 32

Kansas: KAN. CONST., Bill of Rights § 4

Kentucky: KY. CONST. of 1850, art. XIII, § 25

Maine: ME. CONST. of 1819, art. I, § 16

Massachusetts: MASS. CONST. pt. I, art. XVII

Michigan: MICH. CONST. of 1850, art. XVIII, §7

Mississippi: MISS. CONST. of 1868, art. I, § 15

Missouri: MO. CONST. of 1865, art. I, § 8

North Carolina: N.C. CONST. of 1868, art. I, § 24

Ohio: OHIO CONST. art. I, § 4

Oregon: OR. CONST. art. I, § 27

Pennsylvania: PA. CONST. of 1838, art. IX, § 21

Rhode Island: R.I. CONST. of 1843, art. I, § 22

South Carolina: S.C. CONST. of 1868, art. I, § 28

Tennessee: TENN. CONST. of 1835, art. I, § 26

Texas: TEX. CONST. of 1866, art. I, § 13

Vermont: VT. CONST. ch. I, art. 16

STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS: CURRENTLY GUARANTEED

Alabama: ALA. CONST. art. I, § 26

Alaska: ALASKA CONST. art. I, § 19

Arizona: ARIZ. CONST. art. II, § 26

Arkansas: ARK. CONST. art. II, § 5

California: None

Colorado: COLO. CONST. art. II, § 13

Connecticut: CONN. CONST. art. I, § 15

Delaware: DEL. CONST. art. I, § 20

Florida: FLA. CONST. art. I, § 8

Georgia: GA. CONST. art. I, § 1, para. VIII

Hawaii: HAW. CONST. art. I, § 17

Idaho: IDAHO CONST. art. I, § 11

Illinois: ILL. CONST. art. I, § 22

Indiana: IND. CONST. art. I, § 32

Iowa: None

Kansas: KAN. CONST., Bill of Rights § 4

Kentucky: KY. CONST. § 1, cl. 7

Louisiana: LA. CONST. art. I, § 11

Maine: ME. CONST. art. I, § 16

Maryland: None

Massachusetts: MASS. CONST. pt. I, art. XVII

Michigan: MICH. CONST. art. I, § 6

Minnesota: None

Mississippi: MISS. CONST. art. III, § 12

Missouri: MO. CONST. art. I, § 23

Montana: MONT. CONST. art. II, § 12

Nebraska: NEB. CONST. art. I, § 1

Nevada: NEV. CONST. art. I, § 11, cl. 1

New Hampshire: N.H. CONST. pt. I, art. 2-a

New Jersey: None

New Mexico: N.M. CONST. art. II, § 6

New York: None

North Carolina: N.C. CONST. art. I, § 30

North Dakota: N.D. CONST. art. I, § 1

Ohio: OHIO CONST. art. I, § 4

Oklahoma: OKLA. CONST. art. II, § 26

Oregon: OR. CONST. art. I, § 27

Pennsylvania: PA. CONST. art. I, § 21

Rhode Island: R.I. CONST. art. I, § 22

South Carolina: S.C. CONST. art. I, § 20

South Dakota: S.D. CONST. art. VI, § 24

Tennessee: TENN. CONST. art. I, § 26

Texas: TEX. CONST. art. I, § 23

Utah: UTAH CONST. art. I, § 6

Vermont: VT. CONST. ch. I, art. 16

Virginia: VA. CONST. art. I, § 13

Washington: WASH. CONST. art. I, § 24

West Virginia: W. VA. CONST. art. III, § 22

Wisconsin: WIS. CONST. art. I, § 25

Wyoming: WYO. CONST. art. I, § 24

HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS

Alabama: ALA. CODE §§ 13A-11-50 to -61.1, 13A-11-70 to -85

Alaska: ALASKA STAT. §§ 18.65.700–.800

Arizona: ARIZ. REV. STAT. ANN. §§ 13-3101 to -3119

Arkansas: ARK. CODE ANN. §§ 5-73-101 to -133, 5-73-301 to -402

California: CAL. PENAL CODE §§ 12000–12040, 12050–12054, 12125–12133

Colorado: COLO. REV. STAT. ANN. §§ 18-12-101 to -111, 18-12-201 to -216

Connecticut: CONN. GEN. STAT. ANN. §§ 29-27 to -36L

Delaware: DEL. CODE ANN. tit. 11, §§ 1441–1459

Florida: FLA. STAT. ANN. §§ 790.001–.335

Georgia: GA. CODE ANN. §§ 16-11-126 to -135

Hawaii: HAW. REV. STAT. §§ 134-1 to -27

Idaho: IDAHO CODE ANN. § 18-3302

Illinois: 430 ILL. COMP. STAT. ANN. 65/1 to /16; 720 ILL. COMP. STAT. ANN. 5/24-1 to -10

Indiana: IND. CODE ANN. §§ 35-47-2-1 to -24

Iowa: IOWA CODE ANN. §§ 724.1–.30

Kansas: KAN. STAT. ANN. §§ 75-7c01 to -7c26

Kentucky: KY. REV. STAT. ANN. §§ 237.020–.106, 237.110–.142

Louisiana: LA. REV. STAT. ANN. §§ 40:1379.3, 40:1781–:1792

Maine: ME. REV. STAT. ANN. tit. 25, §§ 2001-A to 2006

Maryland: MD. CODE ANN., CRIM. LAW §§ 4-201 to -209; MD. CODE ANN., PUB. SAFETY §§ 5-101 to -143, 5-301 to -314

Massachusetts: MASS. GEN. LAWS ANN. ch. 140, §§ 129B, 131–131L

Michigan: MICH. COMP. LAWS ANN. §§ 28.421–.435, 750.222–.239a

Minnesota: MINN. STAT. ANN. §§ 609.66–.667, 624.71–.719

Mississippi: MISS. CODE ANN. § 45-9-101

Missouri: MO. REV. STAT. §§ 571.030, 571.070, 571.101–.121

Montana: MONT. CODE ANN. §§ 45-8-316 to -330

Nebraska: NEB. REV. STAT. §§ 28-1202, 28-1204, 69-2401 to -2448

Nevada: NEV. REV. STAT. ANN. §§ 202.3653–.369

New Hampshire: N.H. REV. STAT. ANN. §§ 159:1 to :22

New Jersey: N.J. STAT. ANN. §§ 2C:39-3, -5, -6, 2C:58-4

New Mexico: N.M. STAT. ANN. §§ 29-19-1 to -14, 30-7-1 to -16

New York: N.Y. PENAL LAW §§ 265.01–.40, 400.00–.10

North Carolina: N.C. GEN. STAT. ANN. §§ 14-402 to -406, 14-415.10 to -415.26

North Dakota: N.D. CENT. CODE §§ 62.1-02-01 to -04-05

Ohio: OHIO REV. CODE ANN. §§ 2923.12–.1213

Oklahoma: OKLA. STAT. ANN. tit. 21, §§ 1272–1290.26

Oregon: OR. REV. STAT. ANN. §§ 166.173–.295

Pennsylvania: 18 PA. CONS. STAT. ANN. §§ 6105–6127

Rhode Island: R.I. GEN. LAWS §§ 11-47-8 to -60

South Carolina: S.C. CODE ANN. §§ 16-23-10 to -60, 23-31-110 to -240

South Dakota: S.D. CODIFIED LAWS §§ 22-14-9 to -11, 23-7-1 to -46

Tennessee: TENN. CODE ANN. §§ 39-17-1301 to -1362

Texas: TEX. GOV'T CODE ANN. §§ 411.171–.208; TEX. PENAL CODE ANN. §§ 46.01–.06

Utah: UTAH CODE ANN. §§ 53-5-701 to -711, 53-5a-102, 76-10-500 to -530

Vermont: VT. STAT. ANN. tit. 13, § 4003

Virginia: VA. CODE ANN. §§ 18.2-308 to -308.2:01

Washington: WASH. REV. CODE ANN. §§ 9.41.010–.810

West Virginia: W. VA. CODE ANN. §§ 61-7-3 to -14

Wisconsin: WIS. STAT. ANN. §§ 941.23–.237, 941.29, 941.296

Wyoming: WYO. STAT. ANN. § 6-8-104