No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

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

BRIEF FOR RESPONDENTS CITY OF CHICAGO AND VILLAGE OF OAK PARK

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QUESTION PRESENTED

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

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STATEMENT

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. J.A. 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

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[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.

'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 stringent 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

U.S. 643, 650 (1961) (quoting *Wolf v. Colorado*, 338 U.S. 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]

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[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*).

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

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[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*.

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 fede-

ralism . . . 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 coun-

try. 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 ICD-10 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 social 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

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[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.

(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

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[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.

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

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[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 § 4-203; 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).

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] Irrespec-

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[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

tive 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.

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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*.

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/HO-Firearms-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

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[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.

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

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[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.

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.").

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[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)).

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, 512-16 (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-

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[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.

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).

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[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.

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

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[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.

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 decisionmaking.[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]

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[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 impor-

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 codi-

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tant 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.

fying 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

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[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.

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 decisionmaker 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 factfinder 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 prohibi-

tion 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 U.S. 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 v. 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

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[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.

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 justification 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

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[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.

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 68-92), 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 52-53), 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 re-examine 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 non-committal 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 U.S. at 247; see also *Lessee of Livingston v. Moore*, 32 U.S. (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 non-discrimination 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,

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 U.S. 429 (1895). See *Brushaber v. Union Pac. R.*, 240 U.S. 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 constitutional 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 incor-

porationist 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

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

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 *Slaughter-*

House 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 "discriminating 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 congres-

sional 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 Constitution*, 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 newpapers 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 understood 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 Emberton, *supra*, at 620. Fresh from the battlefields of a devastating civil war, Reconstruction-era Republi-

cans 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 non-discrimination 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]

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[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

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]

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-

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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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.