The Journalists' Guide to *District of Columbia v. Heller* and *McDonald v. Chicago*

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Introduction: This guide covers the Supreme Court's two major recent cases on the right to keep and bear arms. Excerpts from the Court's opinions are presented block-indented text, with a left-adjusted margin. My commentary, analysis, and explanations are in wider text that is fully-adjusted to the margins of the page. Commentary related to particularly important parts of the opinions is ***in bold****.*

Within an opinion, I sometimes replace a long portion of text with a short summary. To indicate that the words are mine, not the Court's those words are [contained in square brackets.] Throughout the opinions, I have cut various citations, footnote markers, cross-references, parentheticals, and so on. As in law school textbooks, the removal of this material is intended to facilitate easier reading.

This paper concentrates on the majority opinions in Heller *and* McDonald*, because the purpose is to explain what the law is today, rather than to examine the pro/con arguments about what the law should be.*

SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA et al. *v*. HELLER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07–290. Argued March 18, 2008—Decided June 26, 2008

Supreme Court opinions always have a syllabus. This a good way to get the key elements of a Supreme Court opinion.

In a Supreme Court case, the party which lost the case in the lower court is the "petitioner." The party which won the lower court case is the "respondent." In the case caption, the petitioner is listed first. The Supreme Court policy is different from almost all other case captions in other courts; in other courts, the party which originally initiated the case is listed first.

Sources for full text of Supreme Court opinions:

Cornell University Law School, Legal Information Institute, http://www.law.cornell.edu/supct/.

Justia.com. Offers free daily opinion summaries from various courts. http://supreme.justia.com/.

U.S. Supreme Court. Fastest source for new opinions. http://www.supremecourt.gov/opinions/opinions.aspx.

The internal page references in the *Heller* case are to the "slip opinion," the stapled copy of the opinion that is initially released. Later, opinions are compiled into bound books. These books are United States Reports (the official reporter), Supreme Court Reports (published by Thomson/West), and Lawyer's Edition (published by Lexis). In these bound reports, page numbers are consecutive from one case to the next, and so will be different from the slip opinion. For modern cases, the versions of the opinion available on the public Internet are almost always the slip opinions.

Syllabus

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

Held:

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

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

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

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

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

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

(f) None of the Court's precedents forecloses the Court's interpretation. Neither *United States* v. *Cruikshank*, 92 U. S. 542,

So the *Cruikshank* opinion is in volume 92 of U.S. Reports, beginning on page 542.

nor *Presser* v. *Illinois*, 116 U. S. 252, refutes the individual-rights interpretation. *United States* v. *Miller*, 307 U. S. 174, does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, *i.e.*, those in common use for lawful purposes. Pp. 47–54.

Key summary on permissible gun controls:

2. Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *Miller*'s holding that the sorts of weapons protected are those "in common use at the time" finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons. Pp. 54–56.

The handgun ban is void because it outlaws a class of arms that is overwhelmingly chosen by Americans for the lawful purpose of self-defense, which is the core of the Second Amendment. The ban on armed self-defense

in the home (trigger lock law, and with no allowance to remove the trigger lock for self-defense) is void because it interferes with self-defense:

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

The official opinion of the Court begins here:

> Justice Scalia delivered the opinion of the Court.
>
> We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

I

> The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. See D. C. Code §§7–2501.01(12), 7–2502.01(a), 7–2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. See §§22–4504(a), 22–4506.

D.C. law required a permit even to carry a handgun within one's own home (e.g., from the bedroom to the kitchen); such permits were never issued. (Handguns which had been registered within the District before 1976 could still be owned; registration of new handguns was forbidden.)

> District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and dissembled or bound by a trigger lock or similar device" unless they are located in a place of business or are bpeing used for lawful recreational activities. See §7–2507.02.
>
> [Procedural history of the case.]

II

> We turn first to the meaning of the Second Amendment.

A

> The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." . . .
>
> The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." . . . . Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-

> rights provisions of state constitutions, commonly included a prefatory statement of purpose. See generally Volokh, The Commonplace Second Amendment, 73 N. Y. U. L. Rev. 793, 814–821 (1998).

UCLA Law Professor Eugene Volokh is an outstanding source for journalists on constitutional law issues. He is particularly expert on First Amendment issues.

> Logic demands that there be a link between the stated purpose and the command. . . . But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. . . . Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.[4]

1. Operative Clause.

As in other parts of the Constitution, "right of people" refers a right that belongs to individual people. The right belongs individuals not in general, not solely to individuals who are members of the militia.

> a. "Right of the People." The first salient feature of the operative clause is that it codifies a "right of the people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment 's Assembly-and-Petition Clause and in the Fourth Amendment 's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body. . . .

"Keep" = "possess." "Bear" = "carry." "Arms" = "tools useful for offense or defense"

> b. "Keep and bear Arms." We move now from the holder of the right—"the people"—to the substance of the right: "to keep and bear Arms."
>
> Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. . . . Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his

> defence, or takes into his hands, or useth in wrath to cast at or strike another." . . .
>
> The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. . . .

As with anything else in the Constitution, the scope of the right is not limited to the technology that existed in 1791.

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment . We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo* v. *United States*, 533 U. S. 27,35–36 (2001), the Second Amendment extends, prima facie,to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.
>
> We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Johnson 1095. Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons."
>
> . . .
>
> At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In Muscarello v. *United States*, 524 U. S. 125 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice Ginsburg wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment … indicate[s]: 'wear, bear, or carry … upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person.' " *Id.*, at 143 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1998)). We think that Justice

Ginsburg accurately captured the natural meaning of "bear arms." Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

. . .

[Long discussion of why "bear arms" does not mean "bearing arms only while engaged in militia service."]

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

Key philosophical point: the right to keep and bear arms is a pre-existing right, recognized in English common law, and deriving from natural law. Similarly, the First Amendment does not "grant" Americans the freedom of speech; the First and Second Amendment instead aims to ensure that the federal government will respect these inherent, pre-existing rights.

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

[History of right to arms in England, with the 1689 English Bill of Rights resulting from previous attempts by the Stuart Kings to disarm their political opponents, and the public in general.]

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.

[Although Scalia does not provide a full history of the American Revolution, the way the British accidentally turned their political

dispute with the Americans with a war was via gun control: the Fall 1774 embargo on import of arms and ammunition to the colonies; the Redcoats' pre-dawn seizures of public stores of arms and gunpowder in Massachusetts and Virginia; and then on April 19, 1775, house-to-house searches and seizures of arms in Lexington and Concord started a shooting war.]

Like other rights, the Second Amendment right is not unlimited. Just as the First Amendment does not protect the right to free speech for every possible purpose (e.g., obscenity, libel), the Second Amendment does not protect a right to own and carry arms for every possible purpose.

> There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, *e.g.*, *United States* v. *Williams*, 553 U. S. ___ (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.
>
> 2. Prefatory Clause.
>
> The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State … ."
>
> a. "Well-Regulated Militia." In *United States* v. *Miller*, 307 U. S. 174, 179 (1939), we explained that "the Militia comprised all males physically capable of acting in concert for the common defense." That definition comports with founding-era sources. . . .
>
> [detailed history of the militia.]
>
> Finally, the adjective "well-regulated" implies nothing more than the imposition of proper discipline and training. See Johnson 1619 ("Regulate": "To adjust by rule or method"); Rawle 121–122; cf. Va. Declaration of Rights §13 (1776), in 7 Thorpe 3812, 3814 (referring to "a well-regulated militia, composed of the body of the people, trained to arms").

> b. "Security of a Free State." The phrase "security of a free state" meant "security of a free polity" . . .
>
> [Founding era example of "a free state" used in the above sense.]

Militias were considered "necessary" because

1. They defend against invasions and insurrections.
2. They reduce the need for a professional standing army (which experience in other nations, from the Roman Republic to the present, had often shown could be misused to create a military dictatorship).
3. The militia could resist a domestic tyrant.

> There are many reasons why the militia was thought to be "necessary to the security of a free state." See 3 Story §1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. The Federalist No. 29, pp. 226,227 (B. Wright ed. 1961) (A. Hamilton). Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.
>
> 3. Relationship between Prefatory Clause and Operative Clause
>
> We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.
>
> . . . It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.
>
> It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason

Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. . . .

B

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. . . . [Pennsylvania, Vermont, North Carolina, Massachusetts]

Between 1789 and 1820, nine States adopted Second Amendment analogues. Four of them—Kentucky, Ohio, Indiana, and Missouri—referred to the right of the people to "bear arms in defence of themselves and the State." Another three States—Mississippi, Connecticut, and Alabama—used the even more individualistic phrasing that each citizen has the "right to bear arms in defence of himself and the State." Finally, two States—Tennessee and Maine—used the "common defence" language of Massachusetts. . . .That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right. . . .

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

C

[Madison and Congress rejected proposals to make State powers over the militia concurrent with congressional powers over the militia.]

D

We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century.

All 19th century legal commentators, with the exception of one obscure author, treated the Second Amendment as an individual right which included the right to arms for personal defense.

1. Post-ratification Commentary

St. George Tucker's version of Blackstone's Commentaries, . . .

In 1825, William Rawle, a prominent lawyer who had been a member of the Pennsylvania Assembly that ratified the Bill of Rights, published an influential treatise, . . .

[Supreme Court Justice] Joseph Story published his famous Commentaries on the Constitution of the United States in 1833. . . .

Antislavery advocates routinely invoked the right to bear arms for self-defense. [Joel Tiffany, Lysander Spooner.] In his famous Senate speech about the 1856 "Bleeding Kansas" conflict, [Massachusetts U.S. Rep.] Charles Sumner [argued that the pro-slavery territorial government's disarmament of anti-slavery settlers violated the Second Amendment.]

We have found only one early 19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary. [Benjamin Oliver, 1832.]

2. Pre-Civil War Case Law

The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service. *Houston* v. *Moore* [1820 Supreme Court case on the overlap between State and Federal powers over the militia.]

In the famous fugitive-slave case of *Johnson* v. *Tompkins*, 13 F. Cas. 840, 850, 852 (CC Pa. 1833), Baldwin, sitting as a circuit judge, cited both the Second Amendment and the Pennsylvania analogue for his conclusion that a citizen has "a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either."

In the 18th and 19th centuries, Supreme Court Justices also served part-time as judges on lower federal courts. The above case is one which Justice Henry Baldwin served on a federal circuit court of appeals panel.

> Many early 19th-century state cases indicated that the Second Amendment right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions. [For example, Virginia 1824; Maryland 1843; Michigan 1829.]

The next two state cases are presented as models of correct interpretation of the Second Amendment. The cases strike down bans on the open carry of handguns, while upholding bans on concealed carry.

> In *Nunn* v. *State*, 1Ga. 243, 251 (1846), the Georgia Supreme Court construed the Second Amendment as protecting the "*natural* right of self-defence" and therefore struck down a ban on carrying pistols openly. Its opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right:
>
> "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia,* shall not be *infringed,* curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right,* originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta!"
>
> Likewise, in *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."

[Discussion of why the Court rejects an 1840 Tennessee case which held that individuals have the right to possess arms, but not to carry them.]

3. Post-Civil War Legislation.

[Discussion of how immediately after the Civil War, the former Confederate states enacted Black Codes, which forbade the freedmen to possess arms. Congress saw this as a violation of the Second Amendment, attempted to stop the disarmament by passing the Freedmen's Bureau Bill, the Civil Rights Act, and the Fourteenth Amendment. This history will be discussed in much greater depth in *McDonald v. Chicago*.]

4. Post-Civil War Commentators.

Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service. The most famous was the judge and professor Thomas Cooley . . .

In a section entitled "The Right in General," he continued:

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

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

"… . The clause is analogous to the one securing the freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libellous abuse, is protected." J. Pomeroy, An Introduction to the Constitutional Law of the United States 152–153 (1868) (hereinafter Pomeroy).

[Oliver Wendell Holmes; B. Abbott; John Ordronaux]

E

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

United States v. *Cruikshank*, 92 U. S. 542 [1876], in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government.. . .

Presser v. *Illinois*, 116 U. S. 252 (1886), held that the right to keep and bear arms was not violated by a law that forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law." . . . *Presser* said nothing about the Second Amendment 's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.

United States v. Miller, 1939, upheld the strict system of taxation and registration for short-barreled shotguns, which had been enacted by the National Firearms Act of 1934. (With similar rules for machine guns.) The *Miller* opinion, by the notoriously indolent Justice James Clark McReynolds, was terse and opaque, and scholars subsequently spent decades arguing about what it means. After a detailed analysis of the history and text of *Miller*, the *Heller* opinion provides the modern interpretation of *Miller*'s meaning:

We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as

short-barreled shotguns. That accords with the historical understanding of the scope of the right, see Part III, infra.

The above text suggests that the Second Amendment protects arms which *are* "typically possessed by law-abiding purposes." Precisely which arms fall within this protection can be debated. What we can say for certain, from *Heller* itself, is that handguns are within scope of the Second Amendment—even though handguns are used in half of all U.S. homicides, and are used in other violent crimes vastly far more often than are rifles or shotguns. Thus, *Heller* seems to say that even if a type of arms is frequently misused by criminals (as handguns definitely are) it may not be banned if the "typical" use of that arm is for law-abiding purposes (since the vast majority of handgun owners are law-abiding).

[It is not surprising that it has taken the Court until 2008 to provide a definitive case on the Second Amendment. Not until 1931 did the Court hold that a law violated the First Amendment freedom of speech. Not until 1948 did the Court hold that a law violated the First Amendment clause against the establishment of religion. First Amendment limitations on libel law were not articulated until 1964.]

III

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See,*e.g.*, *State* v. *Chandler*, 5 La. Ann., at 489–490; *Nunn* v. *State*, 1 Ga., at 251; see generally 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[26]

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

The above paragraph is a very important guide to the scope of permissible gun controls. Each of the particular types of controls identified as permissible by the Court is an exception which proves a general rule about the Second Amendment:

1. **Guns may be banned for convicted felons and the mentally ill. This is the exception to the general rule that individuals have a right to arms. Post-*Heller*, lower courts have mostly upheld bans on other categories of prohibited persons (e.g., domestic violence misdemeanants; illegal aliens). Some courts have ruled that lifetime disarmament is impermissible in certain cases (e.g., a person who was convicted of a marijuana crime in 1972, and has stayed out of trouble ever since then).**

2. **Gun carrying may be banned in "sensitive places." Likewise, a legislature may prohibit *concealed* carry. These are exceptions to the general rule that Americans have a right to carry guns. Lower courts are spending lots of time arguing over what constitutes a "sensitive place." The concealed carry exception is well-supported by 19th century case law, although somewhat at odds with modern practice, in which the normal mode of carry is via a concealed carry permit which is issued pursuant to objective criteria, so that adults who pass a fingerprint-based background check, and a safety training class, can obtain a permit.**

3. **The approval of "conditions and qualifications on the commercial sale of arms" seems to validate the National Instant Criminal Background Check System for sales by gun stores, and the requirement that gun stores have Federal Firearms License. The reference to "commercial sale" casts some doubt on laws which impose special restrictions on non-commercial temporary transfers (not sales) of firearms. E.g., in New Jersey, you can't bring you gun to a friend's house, and let him examine it for a few minutes, without advance permission from the police. Many 2013 proposals about "universal background checks" would also apply to temporary non-sale transfers (e.g., letting your spouse borrow your gun for two weeks).**

Next, the Court outlines another major part of the Second Amendment boundary: the Amendment protects arms which are "in common use," and this does not include military weapons, such as automatic rifles:

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U. S., at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."….

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

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

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

So the core of the Second Amendment is self-defense, and the core of the core is defense of the home. Because handguns are the type of arm that is "overwhelmingly" chosen by Americans for home defense, they may not be banned.

"Standards of scrutiny" is a reference to the Court's multi-tier system of scrutiny for many constitutional cases. To simplify:

1. The "rational basis" test is used when no enumerated constitutional right is involved. (E.g., the City Council says that pool halls must close by midnight.) To pass the test, government must have a "legitimate" purpose, and the law must have a "rational" relation to that purpose. The vast majority of laws can pass this test, but a few do not (e.g., a law against oral and anal sex by consenting same-sex adults, stricken in *Lawrence v. Texas*, for lack of a legitimate government purpose).

2. Under "intermediate scrutiny," there must be an "important" government interest, and the law must have a "substantial" relation to that interest. Among the situations for judicial use of intermediate scrutiny are laws which discriminate based on gender, and or laws which set time, place, and manner restrictions on speech in public places.

3. In "strict scrutiny," there must be a "compelling" government interest, and the law must be "narrowly tailored" to further that interest. Strict scrutiny is applied to laws which discriminate based on race, and to most laws which restrict speech based on the content of the speech.

Intermediate and strict scrutiny have a variety of subtests, which can vary based on the particular sub-type of right that is involved. Intermediate and strict scrutiny are both forms of "heightened scrutiny."

Heller says that a handgun ban fails intermediate scrutiny and also fails strict scrutiny. Post-*Heller*, lower courts have been trying to figure out what types of scrutiny to apply in gun cases. For example, in *Ezell v. Chicago*, the 7th Circuit applied "not quite strict scrutiny" to strike down the city council's ban on all shooting ranges; shooting ranges were not the core right (self-defense), but were close to core (practice for self-defense). This has been the general approach to First Amendment cases; the closer to the core of the right, the more vigorous the judicial scrutiny.

> Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. . . .

Generally speaking, the Court is more comfortable in ruling against outliers than in ruling that something which most states do is unconstitutional.

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

Next, the Court rules against the D.C. trigger lock law, which did not allow a gun to be unlocked for use for home defense. The Court rejected D.C.'s claim in its Supreme Court brief (which contradicted D.C.'s position earlier in the case) that the trigger lock law had an implicit exception for self-defense.

> We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. . . .

Finally, the Court rules against D.C.'s law requiring a license to carry a handgun even within the home, and simultaneous refusal to issue such licenses.

> Apart from his challenge to the handgun ban and the trigger-lock requirement respondent asked the District Court to enjoin petitioners from enforcing the separate licensing requirement "in such a manner as to forbid the carrying of a firearm within one's home or possessed land without a license." App. 59a. . . .

After case, D.C. repealed the carry license law entirely. No license is required for intra-home carry. No license is available for carry in public places.

The remainder of the opinion addresses Justice Breyer's dissent. The majority rejects Breyer's view that certain colonial era laws (such as safe storage laws for large quantities of gunpowder) can be analogized to uphold the D.C. handgun ban. More broadly, the Court rejects Justice Breyer's "interest-balancing" approach:

> After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-

balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) *(per curiam)*. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

. . .

* * *

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra,* at 54–55, and n. 26. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute

prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

We affirm the judgment of the Court of Appeals.

It is so ordered.

McDonald v. Chicago

Introduction:

The Second Amendment by its own terms applies directly to the federal government. (And, therefore, to entities such as the D.C. Council, whose powers derive solely from a grant by Congress.) Does the Second Amendment also apply to the States (and therefore also to local governments, which are subdivisions of a state)? *McDonald* answered in the affirmative.

Today, we are very used to the idea that the Bill of Rights applies to the States. But this was not always true. Before the Civil War, most courts (with the exception of some state Supreme Courts) considered the Bill of Rights to only be a limit on the federal government. To remedy the problem, the Fourteenth Amendment was passed by Congress in 1866, and ratified by the States in 1868. Although legal scholars have long debated the issue, the view of most experts is that the "Privileges or Immunities" clause of the Fourteenth Amendment was intended to make all of Amendments I through VIII applicable to the States.

However, the Supreme Court in *The Slaughter-House Cases* (1873) and *U.S. v. Cruikshank* (1876) essentially nullified the Privileges or Immunities clause.

Beginning in the late 19th century, the Court began using the "Due Process" clause of the Fourteenth Amendment to selectively "incorporate" particular portions of the Bill of Rights, to make them enforceable against the States. By the early 1970s, there were only a few remaining items in the Bill of Rights which had not been incorporated. These unincorporated items included the Second Amendment, the Third Amendment (quartering of soldiers in homes), part of the Fifth Amendment (requirement for grand jury indictment in felony cases), the Seventh Amendment (jury trial right in civil cases), and part of the Eighth Amendment (prohibition on excessive fines).

The modern approach to incorporating a right asks whether the right is "fundamental" to the American system of ordered liberty. In particular, the right must be deeply rooted in America's history and tradition. Justice Alito's opinion for the Court in *McDonald* had an easy time applying the Court's modern test, and concluding that the Second Amendment is incorporated.

Justice Thomas, in a concurring opinion, got to the same result, but favored doing so via the Privileges or Immunities clause. Historically speaking, he was right, but the other four Justices in the majority were unwilling to call into question many decades of precedent. The Thomas opinion is a Black Power manifesto, citing Frederick Douglass and other luminaries for the necessity of Black people to have arms in order to protect themselves from white mobs and other oppressors.

Justice Stevens, in a lone dissent, preferred the approach that was sometimes used by the Court in the 1930s through the 1950s: making the States obey only a lesser version of the right, rather than the full right which applies to the federal government. Notably, Justice Stevens also harkens back to an older view (common in the 1920s) which does not look primarily at whether a right is contained in the Bill of Rights, but at whether the right itself is fundamental.

Thus, according to the Stevens view, *even if the Second Amendment had never been written*, the Fourteenth Amendment's guarantee of "liberty" would encompass the right to have a gun in the home for self-defense. However, Stevens' deference to local conditions would still allow for some cities to ban handguns, except for people (such as an elderly woman) who might be able to show that they really needed a handgun rather than a long gun for self-defense.

Justice Breyer, in an opinion joined by Justices Sotomayor and Ginsburg, argued for over-ruling *Heller*, and also argued that the Second Amendment is not really fundamental. Most of his arguments about what the Second Amendment is not fundamental (e.g., the right is controversial; over the course of American history, one can find some jurisdictions which have imposed severe restrictions on the right) could equally well have been used against incorporation of all other rights.

Syllabus

SUPREME COURT OF THE UNITED STATES

McDONALD et al. *v* . CITY OF CHICAGO, ILLINOIS, et al.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 08–1521. Argued March 2, 2010—Decided June 28, 2010

Two years ago, in *District of Columbia* v. *Heller,* 554 U. S. ___, this Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense and struck down a District of Columbia law that banned the possession of handguns in the home. Chicago (hereinafter City) and the village of Oak Park, a Chicago suburb, have laws effectively banning handgun possession by almost all private citizens. After *Heller,* petitioners filed this federal suit against the City, which was consolidated with two related actions, alleging that the City's handgun ban has left them vulnerable to criminals. They sought a declaration that the ban and several related City ordinances violate the Second and Fourteenth Amendments. Rejecting petitioners' argument that the ordinances are unconstitutional, the court noted that the Seventh Circuit previously had upheld the constitutionality of a handgun ban, that *Heller* had explicitly refrained from opining on whether the Second Amendment applied to the States, and that the court had a duty to follow established Circuit precedent. The Seventh Circuit affirmed, relying on three 19th-century cases— *United States* v. *Cruikshank,* 92 U. S. 542, *Presser* v. *Illinois,* 116 U. S. 252, and *Miller* v. *Texas,* 153 U. S. 535 —which were decided in the wake of this Court's interpretation of the Fourteenth Amendment's Privileges or Immunities Clause in the *Slaughter-House Cases,* 16 Wall. 36.

Held: The judgment is reversed, and the case is remanded.

567 F. 3d 856, reversed and remanded.

Justice Alito delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, III–A, and III–B, concluding that the Fourteenth Amendment incorporates the Second

Amendment right, recognized in *Heller,* to keep and bear arms for the purpose of self-defense. Pp. 5–9, 11–19, 19–33.

(a) Petitioners base their case on two submissions. Primarily, they argue that the right to keep and bear arms is protected by the Privileges or Immunities Clause of the Fourteenth Amendment and that the *Slaughter-House Cases'* narrow interpretation of the Clause should now be rejected. As a secondary argument, they contend that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right. Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only when it is an indispensable attribute of *any* "'civilized'" legal system. If it is possible to imagine a civilized country that does not recognize the right, municipal respondents assert, that right is not protected by due process. And since there are civilized countries that ban or strictly regulate the private possession of handguns, they maintain that due process does not preclude such measures. Pp. 4–5.

(b) The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government, not to the States, see, *e.g., Barron ex rel. Tiernan* v. *Mayor of Baltimore,* 7 Pet. 243, 247, but the constitutional Amendments adopted in the Civil War's aftermath fundamentally altered the federal system. Four years after the adoption of the Fourteenth Amendment, this Court held in the *Slaughter-House Cases,* that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws," 16 Wall., at 79, and that the fundamental rights predating the creation of the Federal Government were not protected by the Clause, *id.,* at 76. Under this narrow reading, the Court held that the Privileges or Immunities Clause protects only very limited rights. *Id.,* at 79–80. Subsequently, the Court held that the Second Amendment applies only to the Federal Government in *Cruikshank,* 92 U. S. 542, *Presser,* 116 U. S. 252, and *Miller,* 153 U. S. 535, the decisions on which the Seventh Circuit relied in this case. Pp. 5–9.

(c) Whether the Second Amendment right to keep and bear arms applies to the States is considered in light of the Court's precedents applying the Bill of Rights' protections to the States. Pp. 11–19.

(1) In the late 19th century, the Court began to hold that the Due Process Clause prohibits the States from infringing Bill of Rights

protections. See, *e.g., Hurtado* v. *California,* 110 U. S. 516. Five features of the approach taken during the ensuing era are noted. First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining* v. *New Jersey,* 211 U. S. 78 . Second, the Court explained that the only rights due process protected against state infringement were those "of such a nature that they are included in the conception of due process of law." *Ibid* . Third, some cases during this era "can be seen as having asked … if a civilized system could be imagined that would not accord the particular protection" asserted therein. *Duncan* v. *Louisiana*, 391 U. S. 145, n. 14. Fourth, the Court did not hesitate to hold that a Bill of Rights guarantee failed to meet the test for Due Process Clause protection, finding, *e.g.,* that freedom of speech and press qualified, *Gitlow* v. *New York,* 268 U. S. 652; *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, but the grand jury indictment requirement did not, *Hurtado, supra.* Finally, even when such a right was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from those provided against abridgment by the Federal Government. Pp. 11–13.

(2) Justice Black championed the alternative theory that §1 of the Fourteenth Amendment totally incorporated all of the Bill of Rights' provisions, see, *e.g.*, *Adamson* v. *California,* 332 U. S. 46 (Black, J., dissenting), but the Court never has embraced that theory. Pp. 13–15.

(3) The Court eventually moved in the direction advocated by Justice Black, by adopting a theory of selective incorporation by which the Due Process Clause incorporates particular rights contained in the first eight Amendments. See, *e.g., Gideon* v.*Wainright,* 372 U. S. 335 . These decisions abandoned three of the characteristics of the earlier period. The Court clarified that the governing standard is whether a particular Bill of Rights protection is fundamental to our Nation's particular scheme of ordered liberty and system of justice. *Duncan, supra,* at 149, n. 14. The Court eventually held that almost all of the Bill of Rights' guarantees met the requirements for protection under the Due Process Clause. The Court also held that Bill of Rights protections must "all … be enforced against the States under theFourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy* v. *Hogan,* 378 U. S. 1 . Under this approach, the Court

overruled earlier decisions holding that particular Bill of Rights guarantees or remedies did not apply to the States. See, *e.g.*, *Gideon, supra,* which overruled *Betts* v. *Brady,* 316 U. S. 455 . Pp. 15–19.

(d) The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States. Pp. 19–33.

(1) The Court must decide whether that right is fundamental to the Nation's scheme of ordered liberty, *Duncan* v. *Louisiana,* 391 U. S. 145, or, as the Court has said in a related context, whether it is "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg,* 521 U. S. 702 . *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the *Heller* Court held that individual self-defense is "the central component" of the Second Amendment right. 554 U. S., at ___, ___. Explaining that "the need for defense of self, family, and property is most acute" in the home, *ibid* ., the Court found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *id* ., at ___, ___–___. It thus concluded that citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." *Id* ., at ___. *Heller* also clarifies that this right is "deeply rooted in this Nation's history and traditions, *" Glucksberg, supra,* at 721. *Heller* explored the right's origins in English law and noted the esteem with which the right was regarded during the colonial era and at the time of the ratification of the Bill of Rights. This is powerful evidence that the right was regarded as fundamental in the sense relevant here. That understanding persisted in the years immediately following the Bill of Rights' ratification and is confirmed by the state constitutions of that era, which protected the right to keep and bear arms. Pp. 19–22.

(2) A survey of the contemporaneous history also demonstrates clearly that the Fourteenth Amendment's Framers and ratifiers counted the right to keep and bear arms among those fundamental rights necessary to the Nation's system of ordered liberty. Pp. 22–33.

(i) By the 1850's, the fear that the National Government would disarm the universal militia had largely faded, but the right to keep and bear arms was highly valued for self-defense.

Abolitionist authors wrote in support of the right, and attempts to disarm "Free-Soilers" in "Bloody Kansas," met with outrage that the constitutional right to keep and bear arms had been taken from the people. After the Civil War, the Southern States engaged in systematic efforts to disarm and injure African Americans, see *Heller, supra,* at ___. These injustices prompted the 39th Congress to pass the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866 to protect the right to keep and bear arms. Congress, however, ultimately deemed these legislative remedies insufficient, and approved the Fourteenth Amendment. Today, it is generally accepted that that Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act. See *General Building Contractors Assn., Inc.* v. *Pennsylvania,* 458 U. S. 375 . In Congressional debates on the proposed Amendment, its legislative proponents in the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Evidence from the period immediately following the Amendment's ratification confirms that that right was considered fundamental. Pp. 22–31.

(ii) Despite all this evidence, municipal respondents argue that Members of Congress overwhelmingly viewed §1 of the Fourteenth Amendment as purely an antidiscrimination rule. But while §1 does contain an antidiscrimination rule, *i.e.,* the Equal Protection Clause, it can hardly be said that the section does no more than prohibit discrimination. If what municipal respondents mean is that the Second Amendment should be singled out for special—and specially unfavorable—treatment, the Court rejects the suggestion. The right to keep and bear arms must be regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner. Pp. 30–33.

Justice Alito, joined by The Chief Justice, Justice Scalia, and Justice Kennedy, concluded, in Parts II–C, IV, and V, that the Fourteenth Amendment 's Due Process Clause incorporates the Second Amendment right recognized in *Heller* . Pp. 10–11, 33–44.

(a) Petitioners argue that that the Second Amendment right is one of the "privileges or immunities of citizens of the United States." There is no need to reconsider the Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* because, for many decades, the Court has analyzed the question whether particular rights are protected against state infringement under the Fourteenth Amendment 's Due Process Clause. Pp. 10–11.

(b) Municipal respondents' remaining arguments are rejected because they are at war with *Heller* 's central holding. In effect, they ask the Court to hold the right to keep and bear arms as subject to a different body of rules for incorporation than the other Bill of Rights guarantees. Pp. 33–40.

(c) The dissents' objections are addressed and rejected. Pp. 41–44.

Justice Thomas agreed that the Fourteenth Amendment makes the Second Amendment right to keep and bear arms that was recognized in *District of Columbia* v. *Heller,* 554 U. S. ___, fully applicable to the States. However, he asserted, there is a path to this conclusion that is more straightforward and more faithful to the Second Amendment 's text and history. The Court is correct in describing the Second Amendment right as "fundamental" to the American scheme of ordered liberty, *Duncan* v. *Louisiana,* 391 U. S. 145, and "deeply rooted in this Nation's history and traditions," *Washington* v. *Glucksberg*, 521 U. S. 702. But the Fourteenth Amendment's Due Process Clause, which speaks only to "process," cannot impose the type of substantive restraint on state legislation that the Court asserts. Rather, the right to keep and bear arms is enforceable against the States because it is a privilege of American citizenship recognized by §1 of the Fourteenth Amendment, which provides, *inter alia:* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In interpreting this language, it is important to recall that constitutional provisions are "'written to be understood by the voters.'" *Heller,* 554 U. S., at ___. The objective of this inquiry is to discern what "ordinary citizens" at the time of the Fourteenth Amendment's ratification would have understood that Amendment's Privileges or Immunities Clause to mean. *Ibid.* A survey of contemporary legal authorities plainly shows that, at that time, the ratifying public understood the Clause to protect constitutionally enumerated rights, including the right to keep and bear arms. Pp. 1–34.

Alito, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, III–A, and III–B, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined, and an opinion with respect to Parts II–C, IV, and V, in which Roberts, C. J., and Scalia and Kennedy, JJ., join. Scalia, J., filed a concurring opinion. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Stevens, J., filed a dissenting opinion. Breyer, J., filed a dissenting opinion, in which Ginsburg and Sotomayor, JJ., joined.

SUPREME COURT OF THE UNITED STATES

OTIS M c DONALD, et al ., PETITIONERS *v.* CITY OF CHICAGO, ILLINOIS, et al .

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 28, 2010]

Justice Alito announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, III–A, and III–B, in which The Chief Justice, Justice Scalia, Justice Kennedy, and Justice Thomas join, and an opinion with respect to Parts II–C, IV, and V, in which The Chief Justice, Justice Scalia, and Justice Kennedy join.

Two years ago, in *District of Columbia* v. *Heller,* 554 U. S. ___ (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

I

[Chicago and Oak Park, Illinois, ban handguns.]

Chicago enacted its handgun ban to protect its residents "from the loss of property and injury or death from firearms." See Chicago, Ill., Journal of Proceedings of the City Council, p. 10049 (Mar. 19, 1982). The Chicago petitioners and their *amici*, however, argue that the handgun ban has left them vulnerable to criminals. Chicago Police Department statistics, we are told, reveal that the City's handgun murder rate has actually increased since the ban

> was enacted and that Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities. [Citation to my brief, providing data showing that Chicago's violent crime ranking relative to other large cities, deteriorated immediately and drastically after the 1982 handgun ban, and that odds that this change was merely due to chance were less than 1 in 10,000.]
>
> Several of the Chicago petitioners have been the targets of threats and violence. For instance, Otis McDonald, who is in his late seventies, lives in a high-crime neighborhood. He is a community activist involved with alternative policing strategies, and his efforts to improve his neighborhood have subjected him to violent threats from drug dealers. . . .
>
> [Procedural history of the case.]

II

A

> [Summary of Chicago's argument that a right is incorporated only if every "civilized" country recognizes it.]

B

History of the application of the Bill of Rights to the states before the Civil War, and the early cases on 14th Amendment Privileges or Immunities:

> The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan* v. *Mayor of Baltimore,* 7 Pet. 243 (1833), the Court. . . firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government. . .
>
> The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. The provision at issue in this case, §1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law."

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

. . .

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

. . . Four Justices dissented. Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, criticized the majority for reducing the Fourteenth Amendment's Privileges or Immunities Clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." . . . Justice Swayne described the majority's narrow reading of the Privileges or Immunities Clause as "turn[ing] … what was meant for bread into a stone." *Id* ., at 129 (dissenting opinion).

Today, many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation. . . . Amar, Substance and Method in the Year 2000, 28 Pepperdine L. Rev. 601, 631, n. 178 (2001) ("Virtually no serious modern scholar—left, right, and center—thinks that this [interpretation] is a plausible reading of the Amendment") . . .

> Three years after the decision in the *Slaughter-House Cases,* the Court decided *Cruikshank,* the first of the three 19th-century cases on which the Seventh Circuit relied. 92 U. S. 542 . In that case, the Court reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on Easter Sunday 1873. Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men. Cruikshank himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed. Ninety-seven men were indicted for participating in the massacre, but only nine went to trial. Six of the nine were acquitted of all charges; the remaining three were acquitted of murder but convicted under the Enforcement Act of 1870, 16 Stat. 140, for banding and conspiring together to deprive their victims of various constitutional rights, including the right to bear arms.
>
> The Court reversed all of the convictions, including those relating to the deprivation of the victims' right to bear arms. *Cruikshank,* 92 U. S., at 553, 559. The Court wrote that the right of bearing arms for a lawful purpose "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence." *Id.,* at 553. "The second amendment," the Court continued, "declares that it shall not be infringed; but this … means no more than that it shall not be infringed by Congress." *Ibid.* "Our later decisions in *Presser* v. *Illinois,* 116 U. S. 252, 265 (1886), and *Miller* v. *Texas,* 153 U. S. 535, 538 (1894),

Miller v. Texas, above, is not the same case a *U.S. v. Miller*, 1939. The Texas case involved a police attack on a white man because he was living with a black woman.

> reaffirmed that the Second Amendment applies only to the Federal Government." *Heller,* 554 U. S., at ___, n. 23 (slip op., at 48, n. 23).

C

The Alito Four decline to reexamine the old precedents on Privileges or Immunities:

> . . .
>
> We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the

> Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.
>
> At the same time, however, this Court's decisions in *Cruikshank*, *Presser*, and *Miller* do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States. See *Heller,* 554 U. S., at ___, n. 23 (slip op., at 48, n. 23). None of those cases "engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases." *Ibid.* As explained more fully below, *Cruikshank, Presser,* and *Miller* all preceded the era in which the Court began the process of "selective incorporation" under the Due Process Clause, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.
>
> . . .

D

1

History of use of the Due Process clause to enforce the Bill of Rights against the States:

> In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. See *Hurtado* v. *California,* 110 U. S. 516 (1884) (due process does not require grand jury indictment); *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226 (1897) (due process prohibits States from taking of private property for public use without just compensation). Five features of the approach taken during the ensuing era should be noted.
>
> First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining* v. *New Jersey,* 211 U. S. 78, 99 (1908).
>
> Second, the Court explained that the only rights protected against state infringement by the Due Process Clause were those rights "of such a nature that they are included in the conception of due process of law." *Ibid.* See also, *e.g., Adamson* v. *California,* 332 U. S. 46 (1947); *Betts* v. *Brady,* 316 U. S. 455 (1942); *Palko* v. *Connecticut,* 302 U. S. 319 (1937); *Grosjean* v. *American Press*

Co., 297 U. S. 233 (1936); *Powell* v. *Alabama,* 287 U. S. 45(1932). While it was "possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action," the Court stated, this was "not because those rights are enumerated in the first eight Amendments." *Twining, supra,* at 99.

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

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

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

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

2

Justice Hugo Black favored total incorporation of Amendments I-VIII, via the Due Process clause. But his view did not prevail:

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

3

The modern rules for selective incorporation:

> While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," *i.e* ., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See,

e.g., *Gideon v. Wainright*, 372 U. S. 335, 341 (1963); *Malloy v.Hogan*, 378 U. S. 1, 5–6 1964); *Pointer v. Texas*, 380 U. S. 400,403–404 (1965); *Washington v. Texas*, 388 U. S. 14, 18 (1967); *Duncan*, 391 U. S., at 147–148; *Benton v. Maryland*, 395 U. S. 784, 794 (1969).

The decisions during this time abandoned three of the previously noted characteristics of the earlier period. The Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection." *Duncan,* 391 U. S., at 149, n. 14. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice. *Id* ., at 149, and n. 14; see also *id.,* at 148 (referring to those "fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions" (emphasis added; internal quotation marks omitted)).

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

[Footnote 13: In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict, see n. 14, infra), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment 's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment 's prohibition on excessive fines. We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause...]

Finally, the Court abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." . . . Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect

III

Application of the modern test to the Second Amendment:

> With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncan,* 391 U. S., at 149, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg,* 521 U. S. 702, 721 (1997) (internal quotation marks omitted).

A

The *Heller* opinion itself detailed how the right of armed self-defense is deeply rooted in American history and tradition:

> Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller,* we held that individual self-defense is "the *central component* " of the Second Amendment right. (stating that the "inherent right of self-defense has been central to the Second Amendment right"). Explaining that "the need for defense of self, family, and property is most acute" in the home, we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," (noting that handguns are "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense) ("[T]he American people have considered the handgun to be the quintessential self-defense weapon"). Thus, we concluded, citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense."
>
> *Heller* makes it clear that this right is "deeply rooted in this Nation's history and tradition. *" Glucksberg, supra,* at 721 (internal quotation marks omitted). *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen."
>
> Blackstone's assessment was shared by the American colonists. [More early American history.]

B

1

[Antebellum history.]

History of attempts by the unreconstructed ex-confederate states to disarm the freedmen, and the congressional efforts to protect the freedmen's Second Amendment rights, including by enactment of the Fourteenth Amendment:

> After the Civil War, many of the over 180,000 African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks. See *Heller,* 554 U. S., at ___ (slip op., at 42); E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 8 (1988) (hereinafter Foner). The laws of some States formally prohibited African Americans from possessing firearms. For example, a Mississippi law provided that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife." Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, §1, in 1 Documentary History of Reconstruction 289 (W. Fleming ed. 1950); see also Regulations for Freedmen in Louisiana, in *id* ., at 279–280; H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866) (describing a Kentucky law); E. McPherson, The Political History of the United States of America During the Period of Reconstruction 40 (1871) (describing a Florida law); *id* ., at 33 (describing an Alabama law).
>
> Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves. In the first session of the 39th Congress, Senator Wilson told his colleagues: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country." 39th Cong. Globe 40 (1865). The Report of the Joint Committee on Reconstruction—which was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents shortly after Congress approved the Fourteenth Amendment—contained numerous examples of such abuses. See, *e.g.,* Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, pp. 219, 229, 272, pt. 3, pp. 46, 140, pt. 4, pp. 49–50 (1866); see also S.

Exec. Doc. No. 2, 39th Cong., 1st Sess., 23–24, 26, 36 (1865). In one town, the "marshal [took] all arms from returned colored soldiers, and [was] very prompt in shooting the blacks whenever an opportunity occur[red]." H. R. Exec. Doc. No. 70, at 238 (internal quotation marks omitted). As Senator Wilson put it during the debate on a failed proposal to disband Southern militias: "There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description." 39th Cong. Globe 915 (1866).

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

The most explicit evidence of Congress' aim appears in §14 of the Freedmen's Bureau Act of 1866, which provided that "the right … to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms,* shall be secured to and enjoyed by all the citizens … without respect to race or color, or previous condition of slavery." 14 Stat. 176–177 (emphasis added). Section 14 thus explicitly guaranteed that "all the citizens," black and white, would have "the constitutional right to bear arms."

The Civil Rights Act of 1866, 14 Stat. 27, which was considered at the same time as the Freedmen's Bureau Act, similarly sought to protect the right of all citizens to keep and bear arms. Section 1 of the Civil Rights Act guaranteed the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." *Ibid* . This language was virtually identical to language in §14 of the Freedmen's Bureau Act, 14 Stat. 176–177 ("the right … to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal"). And as noted, the latter provision went on to explain that one of the "laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal" was "the constitutional right to bear arms." *Ibid.* Representative Bingham believed that the Civil Rights Act protected the same rights as enumerated in

the Freedmen's Bureau bill, which of course explicitly mentioned the right to keep and bear arms. 39th Cong. Globe 1292. The unavoidable conclusion is that the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect "the constitutional right to bear arms" and not simply to prohibit discrimination. See also Amar, Bill of Rights 264–265 (noting that one of the "core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of freedmen who had been stripped of their arms and to "affirm the full and equal right of every citizen to self-defense").

Congress, however, ultimately deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks. Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866. . . .

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

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

. . .

Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental. In an 1868 speech addressing the disarmament of freedmen, Representative Stevens emphasized the necessity of the right: "Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty." "The fourteenth amendment, now so happily

adopted, settles the whole question." Cong. Globe, 40th Cong., 2d Sess., 1967. And in debating the Civil Rights Act of 1871, Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South. See Halbrook, Freedmen 120–131. Finally, legal commentators from the period emphasized the fundamental nature of the right. See, *e.g.,* T. Farrar, Manual of the Constitution of the United States of America §118, p. 145 (1867) (reprint 1993); J. Pomeroy, An Introduction to the Constitutional Law of the United States §239, pp. 152–153 (3d ed. 1875).

The right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms. . . .Quite a few of these state constitutional guarantees, moreover, explicitly protected the right to keep and bear arms as an individual right to self-defense. . . . What is more, state constitutions adopted during the Reconstruction era by former Confederate States included a right to keep and bear arms. . . . A clear majority of the States in 1868, therefore, recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government.

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

2

[Rejects Chicago's argument that the 14th Amendment allows states do deprive citizens of fundamental rights, as long as states do not discriminate racially.]

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

. . .

IV

Rejecting Chicago and Oak Park's request that the Court abandon its modern rules for incorporation, and return to the 1930s rules:

> Municipal respondents' remaining arguments are at war with our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.
>
> Municipal respondents' main argument is nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era. . . . Therefore, the municipal respondents continue, because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment.
>
> This line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases. See *Duncan,* 391 U. S., at 149, and n. 14. And the present-day implications of municipal respondents' argument are stunning. For example, many of the rights that our Bill of Rights provides for persons accused of criminal offenses are virtually unique to this country. If *our* understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of *any* civilized country, it would follow that the United States is the only civilized Nation in the world.
>
> . . . For example, in *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 8 (1947), the Court held that the Fourteenth Amendment incorporates the Establishment Clause of the First Amendment. Yet several of the countries that municipal respondents recognize as civilized have established state churches. If we were to adopt municipal respondents' theory, all of this Court's Establishment Clause precedents involving actions taken by state and local governments would go by the boards.
>
> . . .

> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. See, *e.g* ., *Hudson* v. *Michigan,* 547 U. S. 586, 591 (2006) ("The exclusionary rule generates 'substantial social costs,' *United States* v. *Leon,* 468 U. S. 897,907 (1984), which sometimes include setting the guilty free and the dangerous at large"); *Barker* v. *Wingo,* 407 U. S. 514, 522(1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means "a defendant who may be guilty of a serious crime will go free"); *Miranda* v. *Arizona,* 384 U. S. 436, 517 (1966) (Harlan, J., dissenting); *id.,* at 542 (White, J., dissenting) (objecting that the Court's rule "[i]n some unknown number of cases … will return a killer, a rapist or other criminal to the streets … to repeat his crime"); *Mapp,* 367 U. S., at 659. Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.
>
> . . .
>
> Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." Brief for State of Texas et al. as *Amici Curiae* 23.

The participation of 38 states as amici in favor of incorporation in *McDonald*, and of nearly as many in favor of the individual right in *Heller*, is one marker of widespread support for the right in the American political system. It is very unusual for 38 states to *ask* the Supreme Court to limit the discretion of state legislatures.

> . . .

Only one case in American history has ever upheld a handgun ban. Chicago's worries that incorporating the Second Amendment will wipe out all gun control is overwrought:

As evidence that the Fourteenth Amendment has not historically been understood to restrict the authority of the States to regulate firearms, municipal respondents and supporting *amici* cite a variety of state and local firearms laws that courts have upheld. But what is most striking about their research is the paucity of precedent sustaining bans comparable to those at issue here and in *Heller*. Municipal respondents cite precisely one case (from the late 20th century) in which such a ban was sustained. See Brief for Municipal Respondents 26–27 (citing *Kalodimos* v. *Morton Grove,* 103 Ill. 2d 483, 470 N. E. 2d 266 (1984)); see also Reply Brief for Respondents NRA et al. 23, n. 7 (asserting that no other court has ever upheld a complete ban on the possession of handguns). It is important to keep in mind that *Heller,* while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U. S., at ___ (slip op., at 54). We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id* ., at ___–___ (slip op., at 54–55). We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

. . .

V

A

[Response to Stevens dissent.]

The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle. It is far too late to exhume what Justice Brennan, writing for the Court 46 years ago, derided as "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights."

B

Response to the Breyer dissent:

. . .

Justice Breyer' s conclusion that the Fourteenth Amendment does not incorporate the right to keep and bear arms appears to rest primarily on four factors: First, "there is no popular consensus" that the right is fundamental, *post,* at 9; second, the right does not protect minorities or persons neglected by those holding political power, *post,* at 10; third, incorporation of the Second Amendment right would "amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government" and preventing local variations, *post,* at 11; and fourth, determining the scope of the Second Amendment right in cases involving state and local laws will force judges to answer difficult empirical questions regarding matters that are outside their area of expertise, *post,* at 11–16. Even if we believed that these factors were relevant to the incorporation inquiry, none of these factors undermines the case for incorporation of the right to keep and bear arms for self-defense.

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

Second, petitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout. The plight of Chicagoans living in high-crime areas was recently highlighted when two Illinois legislators representing Chicago districts called on the Governor to deploy the Illinois National Guard to patrol the City's streets. The legislators noted that the number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black. *Amici* supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime. If, as petitioners believe, their safety and the safety

of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

Third, Justice Breyer is correct that incorporation of the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller,* 554 U. S., at __ (slip op., at 64). This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution.

Finally, Justice Breyer is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. See *supr* a, at 38–39. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth*insisting upon." *Heller, supra,* at ___ (slip op., at 62–63).

* * *

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

It is so ordered.

Justice Thomas, concurring in part and concurring in the judgment.

. . .

II B

Dred Scott recognized that if Blacks were citizens, they would have the right to carry guns:

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

. . .

2 b (1)

The history of the Fourteenth Amendment in Congress shows specific intent to protect Second Amendment rights as Privileges or Immunities:

> In describing these rights, [the Senate sponsor of the 14th Amendment, Ohio Senator Jacob] Howard explained that they included "the privileges and immunities spoken of" in Article IV, §2. *Id.,* at 2765. Although he did not catalogue the precise "nature" or "extent" of those rights, he thought "Corfield *v.* Coryell" provided a useful description. Howard then submitted that

> "[t]o these privileges and immunities, whatever they may be— . . . should be added *the personal rights guarantied and secured by the first eight amendments of the Constitution;* such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, [and] . . . *the right to keep and to bear arms*." *Ibid.* (emphasis added).
>
> News of Howard's speech was carried in major newspapers across the country . . .

(2)

The Civil Rights Act and the Freedmen's Bureau Act were also intended to safeguard Second Amendment rights:

> When read against this backdrop, the civil rights legislation adopted by the 39th Congress in 1866 further supports this view. Between passing the Thirteenth Amendment —which outlawed slavery alone—and the Fourteenth Amendment, Congress passed two significant pieces of legislation. The first was the Civil Rights Act of 1866, which provided that "all persons born in the United States" were "citizens of the United States" and that "such citizens, of every race and color, . . . shall have the same right" to, among other things, "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Ch. 31, §1, 14 Stat. 27.
>
> Both proponents and opponents of this Act described it as providing the "privileges" of citizenship to freedmen, and defined those privileges to include constitutional rights, such as the right to keep and bear arms. See 39th Cong. Globe 474 (remarks of Sen. Trumbull) (stating that the "the late slaveholding States" had enacted laws "depriving persons of African descent of privileges which are essential to freemen," including "prohibit[ing] any negro or mulatto from having fire-arms" and stating that "[t]he purpose of the bill under consideration is to destroy all these discriminations"); *id.,* at 1266–1267 (remarks of Rep. Raymond) (opposing the Act, but recognizing that to "[m]ake a colored man a citizen of the United States" would guarantee to him, *inter alia,* "a defined *status* . . . a right to defend himself and his wife and children; a right to bear arms").
>
> Three months later, Congress passed the Freedmen's Bureau Act, which also entitled all citizens to the "full and equal benefit of all

> laws and proceedings concerning personal liberty" and "personal security." Act of July 16, 1866, ch. 200, §14, 14 Stat.176. The Act stated expressly that the rights of personal liberty and security protected by the Act "includ[ed] the constitutional right to bear arms." Ibid.
>
> . . .
>
> 3

After the Fourteenth Amendment was ratified, it was recognized by the public as protecting Second Amendment rights:

> Interpretations of the Fourteenth Amendment in the period immediately following its ratification help to establish the public understanding of the text at the time of its adoption.
>
> . . .
>
> Another example of public understanding comes from United States Attorney Daniel Corbin's statement in an 1871 Ku Klux Klan prosecution. Corbin cited *Barron* and declared:
>
> "[T]he fourteenth amendment changes all that theory, and lays the same restriction upon the States that before lay upon the Congress of the United States—that, as Congress heretofore could not interfere with the right of the citizen to keep and bear arms, now, after the adoption of the fourteenth amendment, the State cannot interfere with the right of the citizen to keep and bear arms. The right to keep and bear arms is included in the fourteenth amendment, under 'privileges and immunities.' " Proceedings in the Ku Klux Trials at Columbia, S. C., in the United States Circuit Court, November Term, 1871, p. 147 (1872).
>
> * * *
>
> This evidence plainly shows that the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms. As the Court demonstrates, there can be no doubt that §1 was understood to enforce the Second Amendment against the States. See *ante,* at 22–33. In my view, this is because the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause.

C

The Privileges or Immunities clause is not merely a ban on discrimination, which would allow for deprivation of rights on a non-racial basis:

> The next question is whether the Privileges or Immunities Clause merely prohibits States from discriminating among citizens if they recognize the Second Amendment's right to keep and bear arms, or whether the Clause requires States to recognize the right. The municipal respondents, Chicago and Oak Park, argue for the former interpretation. They contend that the Second Amendment, as applied to the States through the Fourteenth, authorizes a State to impose an outright ban on handgun possession such as the ones at issue here so long as a State applies it to all citizens equally. The Court explains why this antidiscrimination-only reading of §1 as a whole is "implausible." *Ante,* at 31 (citing Brief for Municipal Respondents 64). I agree, but because I think it is the Privileges or Immunities Clause that applies this right to the States, I must explain why this Clause in particular protects against more than just state discrimination, and in fact establishes a minimum baseline of rights for all American citizens.
>
> 1
>
> I begin, again, with the text. The Privileges or Immunities Clause opens with the command that "*No State shall* " abridge the privileges or immunities of citizens of the United States. Amdt. 14, §1 (emphasis added). The very same phrase opens Article I, §10 of the Constitution, which prohibits the States from "pass[ing] any Bill of Attainder" or "ex post facto Law," among other things. . . .
>
> This interpretation is strengthened when one considers that the Privileges or Immunities Clause uses the verb "abridge," rather than "discriminate," to describe the limit it imposes on state authority. The Webster's dictionary in use at the time of Reconstruction defines the word "abridge" to mean "[t]o deprive; to cut off; . . . as, to *abridge* one of his rights." Webster, An American Dictionary of the English Language, at 6. The Clause is thus best understood to impose a limitation on state power to infringe upon pre-existing substantive rights. It raises no indication that the Framers of the Clause used the word "abridge" to prohibit only discrimination.
>
> . . .

. . .

Antebellum views that the Bill of Rights does apply to the States:

> Third, while Barron made plain that the Bill of Rights was not legally enforceable against the States, see *supra,* at 2, the significance of that holding should not be overstated. Like the Framers, see *supra,* at 14–15, many 19th-century Americans understood the Bill of Rights to declare inalienable rights that pre-existed all government. Thus, even though the Bill of Rights technically applied only to the Federal Government, many believed that it declared rights that no legitimate government could abridge.
>
> Chief Justice Henry Lumpkin's decision for the Georgia Supreme Court in *Nunn* v. *State,* 1 Ga. 243 (1846), illustrates this view. In assessing state power to regulate firearm possession, Lumpkin wrote that he was "aware that it has been decided, that [the Second Amendment], like other amendments adopted at the same time, is a restriction upon the government of the United States, and does not extend to the individual States." *Id.,* at 250. But he still considered the right to keep and bear arms as "an unalienable right, which lies at the bottom of every free government,*"* and thus found the States bound to honor it. *Ibid* . Other state courts adopted similar positions with respect to the right to keep and bear arms and other enumerated rights. Some courts even suggested that the protections in the Bill of Rights were legally enforceable against the States, *Barron* notwithstanding. A prominent treatise of the era took the same position. W. Rawle, A View of the Constitution of the United States of America 124–125 (2d ed. 1829) (reprint 2009) (arguing that certain of the first eight Amendments "appl[y] to the state legislatures" because those Amendments "form parts of the declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them"); *id.,* at 125–126 (describing the Second Amendment "right of the people to keep and bear arms" as "a restraint on both" Congress and the States); see also *Heller,* 554 U. S., at __ (slip op., at 34) (describing Rawle's treatise as "influential"). Certain abolitionist leaders adhered to this view as well. Lysander Spooner championed the popular abolitionist argument that slavery was inconsistent with constitutional principles, citing as evidence the fact that it deprived black Americans of the "natural right of all men 'to keep

and bear arms' for their personal defence," which he believed the Constitution "prohibit[ed] both Congress and the State governments from infringing." L. Spooner, The Unconstitutionality of Slavery 98 (1860).

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

B

Slave state suppression of freedom of speech and the right to arms:

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

. . .

The Southern fear of slave rebellion was not unfounded. Although there were others, two particularly notable slave uprisings heavily influenced slaveholders in the South. In 1822, a group of free blacks and slaves led by Denmark Vesey planned a rebellion in which they would slay their masters and flee to Haiti. H. Aptheker, American Negro Slave Revolts 268–270 (1983). The plan

was foiled, leading to the swift arrest of 130 blacks, and the execution of 37, including Vesey. *Id.,* at 271. Still, slaveowners took notice—it was reportedly feared that as many as 6,600 to 9,000 slaves and free blacks were involved in the plot. *Id.,* at 272. A few years later, the fear of rebellion was realized. An uprising led by Nat Turner took the lives of at least 57 whites before it was suppressed. *Id.,* at 300–302.

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

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

Southern blacks were not alone in facing threats to their personal liberty and security during the antebellum era. Mob violence in

many Northern cities presented dangers as well. Cottrol & Diamond, The Second Amendment : Toward an Afro-Americanist Reconsideration, 80 Geo. L. J. 309, 340 (1991) (hereinafter Cottrol) (recounting a July 1834 mob attack against "churches, homes, and businesses of white abolitionists and blacks" in New York that involved "upwards of twenty thousand people and required the intervention of the militia to suppress"); ibid. (noting an uprising in Boston nine years later in which a confrontation between a group of white sailors and four blacks led "a mob of several hundred whites " to "attac[k] and severely beat every black they could find").

c

Post-Civil War white racist anxieties about armed Blacks. Congressional efforts to protect arms rights of the freedmen. Great quote from Thaddeus Stevens (House sponsor of the 13th Amendment):

> After the Civil War, Southern anxiety about an uprising among the newly freed slaves peaked. As Representative Thaddeus Stevens is reported to have said, **"[w]hen it was first proposed to free the slaves, and arm the blacks, did not half the nation tremble? The prim conservatives, the snobs, and the male waiting-maids in Congress, were in hysterics."** K. Stampp, The Era of Reconstruction, 1865–1877, p. 104 (1965) (hereinafter Era of Reconstruction).
>
> As the Court explains, this fear led to "systematic efforts" in the "old Confederacy" to disarm the more than 180,000 freedmen who had served in the Union Army, as well as other free blacks. See *ante,* at 23. Some States formally prohibited blacks from possessing firearms. *Ante,* at 23–24 (quoting 1865 Miss. Laws p. 165, §1, reprinted in 1 Fleming 289). Others enacted legislation prohibiting blacks from carrying firearms without a license, a restriction not imposed on whites. See, *e.g.,* La. Statute of 1865, reprinted in *id.,* at 280. Additionally, "[t]hroughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves." *Ante,* at 24.
>
> As the Court makes crystal clear, if the Fourteenth Amendment "had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African-Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers."

Ante, at 32. In the years following the Civil War, a law banning firearm possession outright "would have been nondiscriminatory only in the formal sense," for it would have "left firearms in the hands of the militia and local peace officers." Ibid.

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

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

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

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

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

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

. . . . .

". . . Article II, of the amendments to the Constitution of the United States, gives the people the right to bear arms and states that this right shall not be infringed. . . . All men, without distinction of color, have the right to keep arms to defend their homes, families or themselves." Letter to the Editor, Loyal Georgian (Augusta), Feb. 3, 1866, p. 3.

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

Frederick Douglass:

Section 1 guaranteed the rights of citizenship in the United States and in the several States without regard to race. But it was understood that liberty would be assured little protection if §1 left each State to decide which privileges or immunities of United States citizenship it would protect. As Frederick Douglass explained before §1's adoption, "the Legislatures of the South can take from him the right to keep and bear arms, as they can—they

> would not allow a negro to walk with a cane where I came from, they would not allow five of them to assemble together." In What New Skin Will the Old Snake Come Forth? An Address Delivered in New York, New York, May 10, 1865, reprinted in 4 The Frederick Douglass Papers 79, 83–84 (J. Blassingame & J. McKivigan eds., 1991) (footnote omitted). "Notwithstanding the provision in the Constitution of the United States, that the right to keep and bear arms shall not be abridged," Douglass explained that "the black man has never had the right either to keep or bear arms." *Id.*, at 84. Absent a constitutional amendment to enforce that right against the States, he insisted that "the work of the Abolitionists [wa]s not finished." Ibid.
>
> This history confirms what the text of the Privileges or Immunities Clause most naturally suggests: Consistent with its command that "[n]o State shall … abridge" the rights of United States citizens, the Clause establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them.

III

[Discussion of *stare decisis*.]

B

Cruikshank deserves no respect as precedent. It was the cornerstone of white mob violence against freedmen:

> Three years after *Slaughter-House,* the Court in *Cruikshank* squarely held that the right to keep and bear arms was not a privilege of American citizenship, thereby overturning the convictions of militia members responsible for the brutal Colfax Massacre. See *supra,* at 4–5. *Cruikshank* is not a precedent entitled to any respect. The flaws in its interpretation of the Privileges or Immunities Clause are made evident by the preceding evidence of its original meaning, and I would reject the holding on that basis alone. But, the consequences of *Cruikshank* warrant mention as well.
>
> *Cruikshank*'s holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive

> blacks from the voting booth and force them into peonage, an effective return to slavery. Without federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were tragically successful in waging a campaign of terror against the very people the Fourteenth Amendment had just made citizens.
>
> Take, for example, the Hamburg Massacre of 1876. There, a white citizen militia sought out and murdered a troop of black militiamen for no other reason than that they had dared to conduct a celebratory Fourth of July parade through their mostly black town. The white militia commander, "Pitchfork" Ben Tillman,

Tillman was a vicious racist, even by the standards of the time. He later was elected Governor and Senator from South Carolina. Today, he is best known for the 1907 Tillman Act, the first federal statute restricting campaign contributions.

> later described this massacre with pride: "[T]he leading white men of Edgefield" had decided "to seize the first opportunity that the negroes might offer them to provoke a riot and teach the negroes a lesson by having the whites demonstrate their superiority by killing as many of them as was justifiable." S. Kantrowitz, Ben Tillman & the Reconstruction of White Supremacy 67 (2000) (ellipsis, brackets, and internal quotation marks omitted). None of the perpetrators of the Hamburg murders was ever brought to justice.
>
> Organized terrorism like that perpetuated by Tillman and his cohorts proliferated in the absence of federal enforcement of constitutional rights. Militias such as the Ku Klux Klan, the Knights of the White Camellia, the White Brotherhood, the Pale Faces, and the '76 Association spread terror among blacks and white Republicans by breaking up Republican meetings, threatening political leaders, and whipping black militiamen. Era of Reconstruction, 199–200; Curtis 156. These groups raped, murdered, lynched, and robbed as a means of intimidating, and instilling pervasive fear in, those whom they despised. A. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction 28–46 (1995).
>
> Although Congress enacted legislation to suppress these activities, Klan tactics remained a constant presence in the lives of Southern blacks for decades. Between 1882 and 1968, there were at least 3,446 reported lynchings of blacks in the South. Cottrol

351–352. They were tortured and killed for a wide array of alleged crimes, without even the slightest hint of due process. Emmit Till, for example, was killed in 1955 for allegedly whistling at a white woman. S. Whitfield, A Death in the Delta: The Story of Emmett Till 15–31 (1988). The fates of other targets of mob violence were equally depraved. See, *e.g.,* Lynched Negro and Wife Were First Mutilated, Vicksburg (Miss.) Evening Post, Feb. 8, 1904, reprinted in R. Ginzburg, 100 Years of Lynchings 63 (1988); Negro Shot Dead for Kissing His White Girlfriend, Chi. Defender, Feb. 31, 1915, in *id.,* at 95 (reporting incident in Florida); La. Negro Is Burned Alive Screaming "I Didn't Do It," Cleveland Gazette, Dec. 13, 1914, in *id.,* at 93 (reporting incident in Louisiana).

Black armed self-defense against racist mobs:

> The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence. As Eli Cooper, one target of such violence, is said to have explained, "'[t]he Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.' " Church Burnings Follow Negro Agitator's Lynching, Chicago Defender, Sept. 6, 1919, in *id.,* at 124. Sometimes, as in Cooper's case, self-defense did not succeed. He was dragged from his home by a mob and killed as his wife looked on. *Ibid.* But at other times, the use of firearms allowed targets of mob violence to survive. One man recalled the night during his childhood when his father stood armed at a jail until morning to ward off lynchers. See Cottrol, 354. The experience left him with a sense, "not 'of powerlessness, but of the "possibilities of salvation" ' " that came from standing up to intimidation. Ibid.
>
> In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery. There is nothing about Cruikshank's contrary holding that warrants its retention.
>
> * * *
>
> I agree with the Court that the Second Amendment is fully applicable to the States. I do so because the right to keep and bear

arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship.
