400. It then ordered the District Court to enter summary judgment "consistent with [**681] [respondent's] prayer for relief." *Id., at 401.* Before this Court petitioners have stated that "if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified," by which they apparently mean if he is not a felon and is not insane. Brief for Petitioners 58. Respondent conceded at oral argument that he does not "have a problem with . . . licensing" and that the District's law is permissible so long as it is "not enforced in an arbitrary and capricious manner." Tr. of Oral Arg. 74-75. We therefore assume that petitioners' issuance [***103] of a license will satisfy respondent's prayer for relief and do not address the licensing requirement.

Justice Breyer has devoted most of his separate dissent to the handgun ban. He says that, even assuming the *Second Amendment* is a personal guarantee of the right to bear arms, the District's prohibition is valid. He first tries to establish this by founding-era historical precedent, pointing to various restrictive laws in the colonial period. These demonstrate, in his view, that the District's law "imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the *Second Amendment* was adopted." *Post, at ____, 171 L. Ed. 2d, at 711.* Of the laws he cites, only one offers even marginal support for his assertion. A 1783 Massachusetts law forbade the residents of Boston to "take into" or "receive into" "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building" loaded firearms, and permitted the seizure of any loaded firearms that "shall be found" there. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts p 218. That statute's text and its prologue, which makes clear that the purpose of the prohibition was to eliminate the danger to firefighters [***104] posed by the "depositing of loaded Arms" in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law's application in that case). In any case, we would not stake our interpretation of the *Second Amendment* upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home. The other laws Justice Breyer cites are gunpowder-storage laws that he concedes did not clearly prohibit loaded weapons, but required only that excess gunpowder be kept in a special container or on the top floor of the home. *Post, at ____ - ____, 171 L. Ed. 2d, at 713.* Nothing about those fire-safety laws undermines [*2820] our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.

Justice Breyer points to other founding-era laws that he says "restricted the firing of guns within the city limits to at least some degree" in Boston, Philadelphia, [***105] and New York. *Post, at ____, 171 L. Ed. 2d, at 712* (citing Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America, *25 Law & Hist. Rev. 139, 162 (2007)*). Those laws provide no support for the severe restriction in the present case. The New York law levied a fine of 20 shillings on anyone who fired a gun in certain places (including houses) on [**682] New Year's Eve and the first two days of January, and was aimed at preventing the "great Damages . . . frequently done on [those days] by persons going House to House, with Guns and other Fire Arms and being often intoxicated with Liquor." Ch. 1501, 5 Colonial Laws of New York 244-246 (1894). It is inconceivable that this law would have been enforced against a person exercising his right to self-defense on New Year's Day against such drunken hooligans. The Pennsylvania law to which Justice Breyer refers levied a fine of five shillings on one who fired a gun or set off fireworks in Philadelphia without first obtaining a license from the Governor. See Act of Aug. 26, 1721, ch. CCXLV, §IV, in 3 Stat. at Large of Pa. 253-254 (1896). Given Justice Wilson's explanation that the right to self-defense with arms was protected by the Pennsylvania Constitution, it is unlikely that this [***106] law (which in any event amounted to at most a licensing regime) would have been enforced against a person who used firearms for self-defense. Justice Breyer cites a Rhode Island law that simply levied a five-shilling fine on those who fired guns in *streets* and *taverns*, a law obviously inapplicable to this case. See An Act for preventing Mischief being done in the town of *Newport*, or in any other Town in this Government, 1731 Rhode Island Session Laws pp. 240-241. Finally, Justice Breyer points to a Massachusetts law similar to the Pennsylvania law, prohibiting "discharg[ing] any Gun or Pistol charged with Shot or Ball in the Town of *Boston.*" Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay p. 208. It is again implausible that this would have been enforced against a citizen acting in self-defense, particularly given its preambulatory reference to "the *indiscreet* firing of Guns." *Ibid.* (preamble) (emphasis added).

A broader point about the laws that Justice Breyer cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties.[29] They are akin to modern [***107] penalties for minor public-safety infractions like speeding or jaywalking. And although such public-safety laws may not contain exceptions for

self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a "Do Not Walk" sign in order to flee an attacker, or that the government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a [*2821] gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place. See *D. C. Code § 7-2507.06.*

> 29 The Supreme Court of Pennsylvania described the amount of five shillings in a contract matter in 1792 as "nominal consideration." *Morris's Lessee v. Smith, 4 U.S. 119, 4 Dall. 119, 120, 1 L. Ed. 766 (Pa. 1792).* Many of the laws cited punished violation with fine in a similar amount; the 1783 Massachusetts gunpowder-storage law carried a somewhat larger fine of 10 [***108] (200 shillings) and forfeiture of the weapon.

Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating *Second Amendment* restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict [**683] scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Post, at ____, 171 L. Ed. 2d, at 716.* 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 [***109] 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, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (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 [***110] all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. See *post, at ____ - ____, 171 L. Ed. 2d, at 735.* But since this case represents this Court's first in-depth examination of the *Second Amendment*, one should not expect it to clarify the entire field, any more than *Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1879)*, our first in-depth *Free Exercise Clause* case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

In sum, we hold that the District's ban on handgun possession in the home violates the *Second Amendment*, as [*2822] does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of *Second Amendment* rights, the District must permit him to register [**684] his handgun and must issue [***111] him a license to carry it in the home.

* * *

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. [**LEdHR26] [26] The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra, at ___ - ___, 171 L. Ed. 2d, at 678, and n 26.* But the enshrinement of con-

stitutional 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.

DISSENT BY: STEVENS; BREYER

DISSENT

Justice **Stevens,** with whom Justice **Souter,** Justice **Ginsburg,** and Justice **Breyer** join, dissenting.

The question presented by this case is not whether the [***112] *Second Amendment* protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the *Second Amendment* protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The *Second Amendment* plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)*, provide a clear answer to that question.

The *Second Amendment* was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable [***113] threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major [**685] federal firearms law.[1] Sustaining an indictment under [*2823] the Act, this Court held that, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the *Second Amendment* guarantees the right to keep and bear such an instrument." *Miller, 307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206.* The view of the Amendment we took in *Miller*--that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons--is both the most natural reading of [***114] the Amendment's text and the interpretation most faithful to the history of its adoption.

1 There was some limited congressional activity earlier: A 10% federal excise tax on firearms was passed as part of the Revenue Act of 1918, 40 Stat. 1057, and in 1927 a statute was enacted prohibiting the shipment of handguns, revolvers, and other concealable weapons through the United States mails. Ch. 75, 44 Stat. 1059-1060 (hereinafter 1927 Act).

Since our decision in *Miller,* hundreds of judges have relied on the view of the Amendment we endorsed there;[2] we ourselves affirmed it in 1980. See *Lewis v. United States, 445 U.S. 55, 65-66, n 8, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980).*[3] No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons. Indeed, a review of the drafting history of the Amendment demonstrates that its Framers *rejected* proposals that would have broadened its coverage to include such uses.

2 Until the Fifth Circuit's decision in *United States v. Emerson, 270 F.3d 203 (2001)*, every Court of Appeals to consider the question had understood *Miller* to hold that the *Second Amendment* does not protect the right [***115] to possess and use guns for purely private, civilian purposes. See, *e.g., United States v. Haney, 264 F.3d 1161, 1164-1166 (CA10 2001); United States v. Napier, 233 F.3d 394, 402-404 (CA6 2000); Gillespie v. Indianapolis, 185 F.3d 693, 710-711 (CA7 1999); United States v. Scanio, 165 F.3d 15, 1998 WL 802060, *2 (CA2 1998)* (unpublished opinion); *United States v. Wright, 117 F.3d 1265, 1271-1274 (CA11 1997); United States v. Rybar, 103 F.3d 273, 285-286 (CA3 1996); Hickman v. Block, 81 F.3d 98, 100-103 (CA9 1996); United States v. Hale, 978 F.2d 1016, 1018-1020 (CA8 1992); Thomas v. City*

Council of Portland, 730 F.2d 41, 42 (CA1 1984) (per curiam); *United States v. Johnson, 497 F.2d 548, 550 (CA4 1974) (per curiam)*; *United States v. Johnson, 441 F.2d 1134, 1136 (CA5 1971)*; see also *Sandidge v. United States, 520 A.2d 1057, 1058-1059 (DC App. 1987)*. And a number of courts have remained firm in their prior positions, even after considering *Emerson*. See, *e.g., United States v. Lippman, 369 F.3d 1039, 1043-1045 (CA8 2004)*; *United States v. Parker, 362 F.3d 1279, 1282-1284 (CA10 2004)*; *United States v. Jackubowski, 63 Fed. Appx. 959, 961 (CA7 2003)* (unpublished opinion); *Silveira v. Lockyer, 312 F.3d 1052, 1060-1066 (CA9 2002)*; [***116] *United States v. Milheron, 231 F. Supp. 2d 376, 378 (Me. 2002)*; *Bach v. Pataki, 289 F. Supp. 2d 217, 224-226 (NDNY 2003)*; *United States v. Smith, 56 M. J. 711, 716 (Air Force Ct. Crim. App. 2001)*.

3 Our discussion in *Lewis* was brief but significant. Upholding a conviction for receipt of a firearm by a felon, we wrote: "These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller, 307 U.S. 174, 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)* (the *Second Amendment* guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia')." *445 U.S., at 65-66, n 8, 100 S. Ct. 915, 63 L. Ed. 2d 198*.

The opinion the Court announces today fails to identify any new evidence supporting the view that the [**686] Amendment was intended to limit the power of Congress to regulate civilian uses of weapons. Unable to point to any such evidence, the Court stakes its holding on a strained and unpersuasive reading of the Amendment's text; significantly different provisions in the [*2824] 1689 English *Bill of Rights*, and in various 19th-century State Constitutions; postenactment [***117] commentary that was available to the Court when it decided *Miller;* and, ultimately, a feeble attempt to distinguish *Miller* that places more emphasis on the Court's decisional process than on the reasoning in the opinion itself.

Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, see *Mitchell v. W. T. Grant Co., 416 U.S. 600, 636, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974)* (Stewart, J., dissenting), would prevent most jurists from endorsing such a dramatic upheaval in the law.[4] As Justice Cardozo observed years ago, the "labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." The Nature of the Judicial Process 149 (1921).

4 See *Vasquez v. Hillery, 474 U.S. 254, 265-266, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)* ("*[Stare decisis]* permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system [***118] of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932)* (Brandeis, J., dissenting)"); *Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 652, 15 S. Ct. 673, 39 L. Ed. 759 (1895)* (White, J., dissenting) ("The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people").

In this dissent I shall first explain why our decision in *Miller* [***119] was faithful to the text of the *Second Amendment* and the purposes revealed in its drafting history. I shall then comment on the postratification history of the Amendment, which makes abundantly clear that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes.

I

The text of the *Second Amendment* is brief. It 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."

Three portions of that text merit special focus: the introductory language defining the Amendment's purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects.

"A well regulated Militia, being necessary to the security of a free State"

The preamble to the *Second Amendment* [**687] makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be "well regulated." In all three respects it is comparable to provisions in several State Declarations [***120] of Rights that were adopted roughly contemporaneously [*2825] with the Declaration of Independence.[5] Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies.[6] While the need for state militias has not been a matter of significant public interest for almost two centuries, that fact should not obscure the contemporary concerns that animated the Framers.

5 The *Virginia Declaration of Rights P13 (1776)* provided: "That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power." 1 B. Schwartz, The *Bill of Rights* 235 (1971) (hereinafter Schwartz).

Maryland's Declaration of Rights, Arts. XXV-XXVII (1776), provided: "That a well-regulated militia is the proper and natural defence of a free government"; "That standing armies are dangerous to liberty, and [***121] ought not to be raised or kept up, without consent of the Legislature"; "That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power." 1 Schwartz 282.

Delaware's Declaration of Rights §§ 18-20 (1776) provided: "That a well regulated militia is the proper, natural, and safe defence of a free government"; "That standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the Legislature"; "That in all cases and at all times the military ought to be under strict subordination to and governed by the civil power." 1 Schwartz 278.

Finally, New Hampshire's Bill of Rights, Arts. XXIV-XXVI (1783), read: "A well regulated militia is the proper, natural, and sure defence of a state"; "Standing armies are dangerous to liberty, and ought not to be raised or kept up without consent of the legislature"; "In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power." 1 Schwartz 378. It elsewhere provided: "No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an [***122] equivalent." Id., at 377 (Art. XIII).

6 The language of the Amendment's preamble also closely tracks the language of a number of contemporaneous state militia statutes, many of which began with nearly identical statements. Georgia's 1778 militia statute, for example, began, "[w]hereas a well ordered and disciplined Militia, is essentially necessary, to the Safety, peace and prosperity, of this State." Act of Nov. 15, 1778, 19 Colonial Records of the State of Georgia 103 (Candler ed. 1911 (pt. 2)). North Carolina's 1777 militia statute started with this language: "[w]hereas a well regulated Militia is absolutely necessary for the defending and securing the Liberties of a free State." N. C. Sess. Laws ch. 1, § I, p 1. And Connecticut's 1782 "Acts and Laws Regulating the Militia" began, "[w]hereas the Defence and Security of all free States depends (under God) upon the Exertions of a well regulated Militia, and the Laws heretofore enacted have proved inadequate to the End designed." Conn. Acts and Laws p 585 (hereinafter 1782 Conn. Acts).

These state militia statutes give content to the notion of a "well-regulated militia." They identify those persons who compose the State's militia; they [***123] create regiments, brigades, and divisions; they set forth command structures and provide for the appointment of officers; they describe how the militia will be assembled when necessary and provide for training; and they prescribe penalties for nonappearance, delinquency, and failure to keep the required weapons, ammunition, and other necessary equipment. The obligation of militia members to "keep" certain specified arms is detailed further, *n. 12, infra*, and accompanying text.

The parallels between the *Second Amendment* and these state declarations, and the *Second Amendment's* omission of any statement of purpose related to the right to use firearms for [**688] hunting or personal

self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. Article XIII of Pennsylvania's 1776 Declaration of Rights announced that "the people have a right to bear arms for the [*2826] defence *of themselves* and the state," 1 Schwartz 266 (emphasis added); § 43 of the Declaration assured that "[t]he inhabitants of this state shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on [***124] all other lands therein not inclosed," *id.*, at 274. And Article XV of the 1777 Vermont Declaration of Rights guaranteed "[t]hat the people have a right to bear arms for the defence *of themselves* and the State." *Id.*, at 324 (emphasis added). The contrast between those two declarations and the *Second Amendment* reinforces the clear statement of purpose announced in the Amendment's preamble. It confirms that the Framers' single-minded focus in crafting the constitutional guarantee "to keep and bear Arms" was on military uses of firearms, which they viewed in the context of service in state militias.

The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 174, 2 L. Ed. 60 (1803).*

The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment's operative provision and returning to the preamble merely "to ensure that our reading of the operative clause is consistent with the announced purpose." *Ante, at ____, 171 L. Ed. 2d, at 649* [***125] . That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted. While the Court makes the novel suggestion that it need only find some "logical connection" between the preamble and the operative provision, it does acknowledge that a prefatory clause may resolve an ambiguity in the text. *Ante, at ____, 171 L. Ed. 2d, at 649.*[7] Without identifying any language in the text that even mentions civilian uses of firearms, the Court proceeds to "find" its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court's approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.

> 7 The sources the Court cites simply do not support the proposition that some "logical connection" between the two clauses is all that is required. The Dwarris treatise, for example, merely explains that "[t]he general purview of a statute is not . . . *necessarily* to be restrained by any words introductory to the enacting clauses." F. Dwarris, A General Treatise on Statutes 268 (P. Potter ed. 1871) (emphasis added). The treatise proceeds [***126] to caution that "the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet, if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it." *Id.*, at 269. Sutherland makes the same point. Explaining that "[i]n the United States preambles are not as important as they are in England," the treatise notes that in the United States "the settled principle of law is that the preamble cannot control the enacting part of the statute *in cases where the enacting part is expressed in clear, unambiguous terms.*" 2A N. Singer, Sutherland on Statutory Construction § 47.04, p 146 (rev. 5th ed. 1992) (emphasis added). Surely not even the Court believes that the Amendment's operative provision, which, though only 14 words in length, takes the Court the better part of 18 pages to parse, is perfectly "clear and unambiguous."

[**689] *"[T]he right of the people"*

The centerpiece of the Court's textual argument is its insistence that the words "the people" as used in the *Second Amendment* must have the same meaning, and protect the same class of individuals, as when they are used in the *First* and *Fourth Amendments*. According [***127] to the Court, in all three provisions--as well as [*2827] the Constitution's preamble, § 2 of Article I, and the *Tenth Amendment*--"the term unambiguously refers to all members of the political community, not an unspecified subset." *Ante, at ____, 171 L. Ed. 2d, at 650.* But the Court *itself* reads the *Second Amendment* to protect a "subset" significantly narrower than the class of persons protected by the *First* and *Fourth Amendments*; when it finally drills down on the substantive meaning of the *Second Amendment*, the Court limits the protected class to "law-abiding, responsible citizens," *ante, at ____, 171 L. Ed. 2d, at 683.* But the class of persons protected by the *First* and *Fourth Amendments* is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting pronouncements.

The Court also overlooks the significance of the way the Framers used the phrase "the people" in these constitutional provisions. In the *First Amendment*, no words define the class of individuals entitled to speak, to publish, or to worship; in that Amendment it is only the right peaceably to assemble, and to petition the Government

for [***128] a redress of grievances, that is described as a right of "the people." These rights contemplate collective action. While the right peaceably to assemble protects the individual rights of those persons participating in the assembly, its concern is with action engaged in by members of a group, rather than any single individual. Likewise, although the act of petitioning the Government is a right that can be exercised by individuals, it is primarily collective in nature. For if they are to be effective, petitions must involve groups of individuals acting in concert.

Similarly, the words "the people" in the *Second Amendment* refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.

As used in the *Fourth Amendment*, "the people" describes the class of persons protected from unreasonable searches and seizures by Government officials.

It is true that the *Fourth Amendment* describes a right that need [***129] not be exercised in any collective sense. But that observation does not settle the meaning of the phrase "the people" when used in the *Second Amendment*. For, as we have seen, the phrase means something quite different in the Petition and Assembly Clauses of the *First Amendment*. Although the abstract definition of the phrase "the people" could carry the same meaning in the *Second Amendment* as in the *Fourth Amendment*, the preamble of the *Second Amendment* suggests that the uses of the phrase in the *First* and *Second Amendments* are the same in referring [**690] to a collective activity. By way of contrast, the *Fourth Amendment* describes a right *against* governmental interference rather than an affirmative right *to* engage in protected conduct, and so refers to a right to protect a purely individual interest. As used in the *Second Amendment*, the words "the people" do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.

"[T]o keep and bear Arms"

Although the Court's discussion of these words treats them as two "phrases"--as if they read "to keep" and "to bear"--they describe a unitary right: to possess arms if needed [***130] for military purposes and to use them in conjunction with military activities.

[*2828] As a threshold matter, it is worth pausing to note an oddity in the Court's interpretation of "to keep and bear Arms." Unlike the Court of Appeals, the Court does not read that phrase to create a right to possess arms for "lawful, private purposes." *Parker v. District of Columbia, 375 U.S. App. D.C. 140, 478 F.3d 370, 382 (CADC 2007)*. Instead, the Court limits the Amendment's protection to the right "to possess and carry weapons in case of confrontation." *Ante, at ____, 171 L. Ed. 2d, at 657*. No party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth. But although this novel limitation lacks support in the text of the Amendment, the Amendment's text *does* justify a different limitation: the "right to keep and bear Arms" protects only a right to possess and use firearms in connection with service in a state-organized militia.

The term "bear arms" is a familiar idiom; when used unadorned by any additional words, its meaning is "to serve as a soldier, do military service, fight." 1 Oxford English Dictionary 634 (2d ed. 1989). It is derived from the Latin *arma ferre,* which, translated literally, means "to bear *[ferre]* [***131] war equipment *[arma]*." Brief for Professors of Linguistics and English as *Amici Curiae* 19. One 18th-century dictionary defined "arms" as "[w]eapons of offence, or armour of defence," 1 S. Johnson, A Dictionary of the English Language (1755), and another contemporaneous source explained that "[b]y *arms*, we understand those instruments of offence generally made use of in war; such as firearms, swords, &c. By *weapons,* we more particularly mean instruments of other kinds (exclusive of fire-arms), made use of as offensive, on special occasions." 1 J. Trusler, The Distinction Between Words Esteemed Synonymous in the English Language 37 (3d ed. 1794).[8] Had the Framers wished to expand the meaning of the phrase "bear arms" to encompass civilian possession and use, they could have done so by the addition of phrases such as "for the defense of themselves," as was done in the Pennsylvania and Vermont Declarations of Rights. The *unmodified* use of "bear [**691] arms," by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts.[9] The absence of any reference [*2829] to civilian uses of weapons tailors the text of the Amendment to the purpose identified in [***132] its preamble. [10] But when discussing these words, the Court simply ignores the preamble.

8 The Court's repeated citation to the dissenting opinion in *Muscarello v. United States, 524 U.S. 125, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998)*, *ante, at ____, ____, 171 L. Ed. 2d, at 652, 654*, as illuminating the meaning of "bear arms," borders on the risible. At issue in *Muscarello* was the proper construction of the word "carries" in *18 U.S.C. § 924(c) (1994 ed.)*; the dissent in that case made passing reference to the *Second Amendment* only in the course of observ-

ing that both the Constitution and Black's Law Dictionary suggested that something more active than placement of a gun in a glove compartment might be meant by the phrase "'carries a firearm.'" *524 U.S., at 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111.*

9 *Amici* professors of Linguistics and English reviewed uses of the term "bear arms" in a compilation of books, pamphlets, and other sources disseminated in the period between the Declaration of Independence and the adoption of the *Second Amendment.* See Brief for Professors of Linguistics and English as *Amici Curiae* 23-25. *Amici* determined that of 115 texts that employed the term, all but five usages were in a clearly military context, and in four of the remaining five instances, further [***133] qualifying language conveyed a different meaning.

The Court allows that the phrase "bear Arms" did have as an idiomatic meaning, "'to serve as a soldier, do military service, fight,'" *ante, at ____, 171 L. Ed. 2d, at 654*, but asserts that it "unequivocally bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities," *ante, at ____ - ____, 171 L. Ed. 2d, at 654.* But contemporary sources make clear that the phrase "bear arms" was often used to convey a military meaning without those additional words. See, e.g., To The Printer, Providence Gazette (May 27, 1775) ("By the common estimate of three millions of people in America, allowing one in five to bear arms, there will be found 600,000 fighting men"); Letter of Henry Laurens to the Mass. Council (Jan. 21, 1778), in Letters of Delegates to Congress 1774-1789, p 622 (P. Smith ed. 1981) ("Congress were yesterday informed . . . that those Canadians who returned from Saratoga . . . had been compelled by Sir Guy Carleton to bear Arms"); Of the Manner of Making War among the Indians of North-America, Connecticut Courant (May 23, 1785) ("The Indians begin to bear arms at the age of fifteen, and lay them aside when they [***134] arrive at the age of sixty. Some nations to the southward, I have been informed, do not continue their military exercises after they are fifty"); 28 Journals of the Continental Congress 1030 (G. Hunt ed. 1910) ("That hostages be mutually given as a security that the Convention troops and those received in exchange for them do not bear arms prior to the first day of May next"); H. R. J., 9th Cong., 1st Sess., 217 (Feb. 12, 1806) ("Whereas the commanders of British armed vessels have impressed many American seamen, and compelled them to bear arms on board said vessels, and assist in fighting their battles with nations in amity and peace with the United States"); H. R. J., 15th Cong., 2d Sess., 182-183 (Jan. 14, 1819) ("[The petitioners] state that they were residing in the British province of Canada, at the commencement of the late war, and that owing to their attachment to the United States, they refused to bear arms, when called upon by the British authorities . . .").

10 *Aymette v. State, 21 Tenn. 154, 156 (1840)*, a case we cited in *Miller,* further confirms this reading of the phrase. In *Aymette*, the Tennessee Supreme Court construed the guarantee in Tennessee's 1834 Constitution that [***135] "'the free white men of this State, have a right to keep and bear arms for their common defence.'" Explaining that the provision was adopted with the same goals as the *Federal Constitution's Second Amendment*, the court wrote: "The words 'bear arms' . . . have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms,* the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." *21 Tenn., at 158.* The court elaborated: "[W]e may remark, that the phrase, *'bear arms,'* is used in the Kentucky Constitution as well as our own, and implies, as has already been suggested, their military use. . . . A man in the pursuit of deer, elk, and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms,* much less could it be said, that a private citizen *bears arms,* because he has a dirk or pistol concealed under his clothes, [***136] or a spear in a cane." *Id., at 161.*

The Court argues that a "qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass." *Ante, at ____, 171 L. Ed. 2d, at 655.* But this fundamentally fails to grasp the point. The stand-alone phrase "bear arms" most naturally conveys a military meaning *unless* the addition of a qualifying phrase signals that a different meaning is intended. When, as in this case, there is no such qualifier, [**692] the most natural meaning is the military one; and, in the absence of any qualifier, it is all the more appropriate to look to the preamble to confirm the natural meaning of the text.[11] The Court's [*2830] objection is particularly puzzling in light of its own contention that the addition of the modifier "against" changes the meaning of "bear

arms." Compare *ante, at ____, 171 L. Ed. 2d, at 652* (defining "bear arms" to mean "carrying [a weapon] for a particular purpose--confrontation"), with *ante, at ____, 171 L. Ed. 2d, at 654* ("The phrase 'bear Arms' also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: to serve as a soldier, do military service, fight or to wage war. But it unequivocally bore that idiomatic meaning only when followed [***137] by the preposition 'against'" (emphasis deleted; citations and some internal quotation marks omitted)).

> 11 As lucidly explained in the context of a statute mandating a sentencing enhancement for any person who "uses" a firearm during a crime of violence or drug trafficking crime:
>
> > "To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of 'using a firearm' is to speak of using it for its distinctive purpose, i.e., as a weapon. To be sure, one can use a firearm in a number of ways, including as an article of exchange, just as one can 'use' a cane as a hall decoration--but that is not the ordinary meaning of 'using' the one or the other. The Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used." *Smith v. United States, 508 U.S. 223, 242, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993)* (Scalia, J., dissenting) (some internal quotation marks, footnotes, and citations omitted).

The Amendment's use of the term "keep" in no way contradicts the military meaning conveyed by [***138] the phrase "bear arms" and the Amendment's preamble. To the contrary, a number of state militia laws in effect at the time of the *Second Amendment's* drafting used the term "keep" to describe the requirement that militia members store their arms at their homes, ready to be used for service when necessary. The Virginia military law, for example, ordered that "every one of the said officers, non-commissioned officers, and privates, shall constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer." Act . . . for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § III, p 2 (emphasis added).[12] "[K]eep and bear arms" thus perfectly describes the responsibilities of a framing-era militia member.

> 12 See also Act for the regulating, training, and arraying of the Militia, . . . of the State, 1781 N. J. Laws, ch. XIII, § 12, p 43 ("And be it Enacted, That each Person enrolled as aforesaid, shall also *keep* at his Place of Abode one Pound of good merchantable Gunpowder and three Pounds of Ball sized to his Musket or Rifle" (emphasis added)); An Act for establishing a Militia, 1785 Del. Laws § 7, p 59 ("*And* [***139] *be it enacted,* That every person between the ages of eighteen and fifty . . . shall at his own expence, provide himself . . . with a musket or firelock, with a bayonet, a cartouch box to contain twenty three cartridges, a priming wire, a brush and six flints, all in good order, on or before the first day of April next, under the penalty of forty shillings, and shall *keep* the same by him at all times, ready and fit for service, under the penalty of two shillings and six pence for each neglect or default thereof on every muster day" (second emphasis added)); 1782 Conn. Acts p. 590 ("And it shall be the duty of the Regional Quarter-Master to provide and *keep* a sufficient quantity of Ammunition and warlike stores for the use of their respective Regiments, to be *kept* in such Place or Places as shall be ordered by the Field Officers" (emphasis added)).

This reading is confirmed by the fact that the clause protects only one right, rather than two. It does not describe a right "to keep . . . Arms" and a [**693] separate right "to bear . . . Arms." Rather, the single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when [***140] necessary. [13] Different language surely would have been used to protect nonmilitary use and possession of weapons from regulation if such an intent had played any role in the drafting of the Amendment.

> 13 The Court notes that the *First Amendment* protects two separate rights with the phrase "the 'right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances.'" *Ante, at ____, 171 L. Ed. 2d, at 657.* But this only proves the point: In contrast to the language quoted by the Court, the

Second Amendment does not protect a "right to keep *and to* bear Arms," but rather a "right to keep and bear arms." The State Constitutions cited by the Court are distinguishable on the same ground.

* [*2831] * *

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms. Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble [***141] and from settled law to come forward with persuasive new arguments or evidence. The textual analysis offered by respondent and embraced by the Court falls far short of sustaining that heavy burden.[14] And the Court's emphatic reliance on the claim "that the *Second Amendment* . . . codified a *pre-existing* right," *ante, at ____, 171 L. Ed. 2d, at 657*, is of course beside the point because the right to keep and bear arms for service in a state militia was also a pre-existing right.

14 The Court's atomistic, word-by-word approach to construing the Amendment calls to mind the parable of the six blind men and the elephant, famously set in verse by John Godfrey Saxe. The Poems of John Godfrey Saxe 135-136 (1873). In the parable, each blind man approaches a single elephant; touching a different part of the elephant's body in isolation, each concludes that he has learned its true nature. One touches the animal's leg, and concludes that the elephant is like a tree; another touches the trunk and decides that the elephant is like a snake; and so on. Each of them, of course, has fundamentally failed to grasp the nature of the creature.

Indeed, not a word in the constitutional text even arguably supports the Court's overwrought [***142] and novel description of the *Second Amendment* as "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Ante, at ____, 171 L. Ed. 2d, at 683.*

II

The proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached, reflected in Article I's Militia Clauses and the *Second Amendment*, represent quintessential examples of the Framers' "split[ting] the atom of sovereignty."[15]

15 By "'split[ting] the atom of sovereignty,'" the Framers created "'two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Saenz v. Roe, 526 U.S. 489, 504, n 17, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999)* (quoting *U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995)* (Kennedy, J., concurring)).

Two themes relevant to our current interpretive task ran through the debates on the original Constitution. [**694] "On the [***143] one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States." *Perpich v. Department of Defense, 496 U.S. 334, 340, 110 S. Ct. 2418, 110 L. Ed. 2d 312 (1990).*[16] Governor Edmund Randolph, reporting on the Constitutional Convention to the Virginia Ratification Convention, explained: "With respect to a standing army, I believe there was not a member in the federal Convention, who did not feel indignation at such an institution." 3 J. Elliot, [*2832] Debates in the Several State Conventions on the Adoption of the Federal Constitution 401 (2d ed. 1863) (hereinafter Elliot). On the other hand, the Framers recognized the dangers inherent in relying on inadequately trained militia members "as the primary means of providing for the common defense," *Perpich, 496 U.S., at 340, 110 S. Ct. 2418, 110 L. Ed. 2d 312*; during the Revolutionary War, "[t]his force, though armed, was largely untrained, and its deficiencies were the subject of bitter complaint." Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 182 (1940).[17] In order to respond to those twin concerns, a compromise was reached: Congress would be authorized to raise and support a national Army[18] [***144] and Navy, and also to organize, arm, discipline, and provide for the calling forth of "the Militia." *U.S. Const., Art. I, § 8, cls. 12-16.* The President, at the same time, was empowered as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Art. II, § 2. But, with respect to the militia, a significant reservation was made to the States: Although Congress would have the power to call forth,[19] organize, arm, and discipline the militia, as well as to govern "such Part of them as may be employed in the

Service of the United States," the States respectively would retain the right to appoint the officers and to train the [**695] militia in accordance with the discipline prescribed by Congress. Art. I, § 8, cl. 16.[20]

16 Indeed, this was one of the grievances voiced by the colonists: Paragraph 13 of the Declaration of Independence charged of King George, "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures."

17 George Washington, writing to Congress on September 24, 1776, warned that for Congress "[t]o place any dependance upon Militia, is, [***145] assuredly, resting upon a broken staff." 6 Writings of George Washington 106, 110 (J. Fitzpatrick ed. 1932). Several years later he reiterated this view in another letter to Congress: "Regular Troops alone are equal to the exigencies of modern war, as well for defence as offence . . . . *No Militia* will ever acquire the habits necessary to resist a regular force. . . . The firmness requisite for the real business of fighting is only to be attained by a constant course of discipline and service." 20 *id.,* at 49, 49-50 (Sept. 15, 1780). And Alexander Hamilton argued this view in many debates. In 1787, he wrote:

> "Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independence. . . . War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice." The Federalist No. 25, p 166 (C. Rossiter ed. 1961).

18 "[B]ut no Appropriation of Money to that Use [raising and supporting Armies] shall be for a longer Term than two Years." *U.S. Const., Art I, § 8, cl. 12*

19 This "calling forth" power [***146] was only permitted in order for the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions." Art. I, § 8, cl. 15.

20 The Court assumes--incorrectly, in my view--that even when a state militia was not called into service, Congress would have had the power to exclude individuals from enlistment in that state militia. See *ante, at ____, 171 L. Ed. 2d, at 662.* That assumption is not supported by the text of the Militia Clauses of the original Constitution, which confer upon Congress the power to "organiz[e], ar[m], and disciplin[e], the Militia," Art. I, § 8, cl. 16, but not the power to say who will be members of a state militia. It is also flatly inconsistent with the *Second Amendment.* The States' power to create their own militias provides an easy answer to the Court's complaint that the right as I have described it is empty because it merely guarantees "citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them." *Ante, at ____, 171 L. Ed. 2d, at 662.*

But the original Constitution's retention of the militia and its creation of divided authority over that body did not prove sufficient to allay fears about the dangers posed by a standing army. For it was [***147] perceived by some that Article I contained a significant gap: While it empowered [*2833] Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia's *dis*armament. As George Mason argued during the debates in Virginia on the ratification of the original Constitution:

> "The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless--by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has the exclusive right to arm them." 3 Elliot 379.

This sentiment was echoed at a number of state ratification conventions; indeed, it was one of the primary objections to the original Constitution voiced by its opponents. The Antifederalists were ultimately unsuccessful in persuading state ratification conventions to condition their approval of the Constitution upon the eventual inclusion of any particular amendment. But a number of States did propose to the first Federal Congress amendments reflecting a desire to ensure that the institution of the militia would remain [***148] protected under the new Government. The proposed amendments sent by the States of Virginia, North Carolina, and New York focused on the importance of preserving the state militias and reiterated the dangers posed by standing armies. New Hampshire sent a proposal that differed significantly from the others; while also

invoking the dangers of a standing army, it suggested that the Constitution should more broadly protect the use and possession of weapons, without tying such a guarantee expressly to the maintenance of the militia. The States of Maryland, Pennsylvania, and Massachusetts sent no relevant proposed amendments to Congress, but in each of those States a minority of the delegates advocated related amendments. While the Maryland minority proposals were exclusively concerned with standing armies and conscientious objectors, the unsuccessful proposals in both Massachusetts and Pennsylvania would have protected a more broadly worded right, less clearly tied to service in a state militia. Faced with all of these options, it is telling that James Madison chose to craft the *Second Amendment* as he did.

The relevant proposals sent by the [**696] Virginia Ratifying Convention read as follows:

> "17th. [***149] That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and be governed by the civil power." *Id.*, at Elliot 659.
>
> "19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead." *Ibid.*

North Carolina adopted Virginia's proposals and sent them to Congress as its own, although it did not actually ratify the original Constitution until Congress had sent the proposed *Bill of Rights* to the States for ratification. 2 Schwartz 932-933; see The Complete *Bill of Rights* 182-183 (N. Cogan ed. 1997) (hereinafter Cogan).

New York produced a proposal with nearly identical language. It read:

> "That the people have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, [*2834] natural and safe [***150] defence of a free State. . . . That standing Armies, in time of Peace, are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be kept under strict Subordination to the civil Power." 2 Schwartz 912.

Notably, each of these proposals used the phrase "keep and bear arms," which was eventually adopted by Madison. And each proposal embedded the phrase within a group of principles that are distinctly military in meaning.[21]

> 21 In addition to the cautionary references to standing armies and to the importance of civil authority over the military, each of the proposals contained a guarantee that closely resembled the language of what later became the *Third Amendment*. The 18th proposal from Virginia and North Carolina read: "That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the law directs." 3 Elliot 659. And New York's language read: "That in time of Peace no Soldier ought to be quartered in any House without the consent of the Owner, and in time of War only by the Civil Magistrate in such manner as the Laws may direct." 2 Schwartz [***151] 912.

By contrast, New Hampshire's proposal, although it followed another proposed amendment that echoed the familiar concern about standing armies, [22] described the protection involved in more clearly personal terms. Its proposal read:

> 22 *"Tenth,* That no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress, nor shall Soldiers in Time of Peace be quartered upon private Houses with out the consent of the Owners." *Id.*, at 761.
>
> *"Twelfth,* Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *Id.*, at 758, 761.

The proposals considered in the other three States, although ultimately rejected by their respective ratification conventions, are also relevant to our historical inquiry. First, the Maryland proposal, endorsed by a mi-

nority of the delegates and later circulated in pamphlet form, read:

> [**697] "4. That no standing army shall be kept up in time of peace, unless with the consent of two thirds of the members present of each branch of Congress.
>
> . . . . .
>
> "10. That no person conscientiously scrupulous of bearing arms, in any case, shall be compelled personally to serve as a soldier." *Id.*, at 729, 735.

The [***152] rejected Pennsylvania proposal, which was later incorporated into a critique of the Constitution titled "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787," signed by a minority of the State's delegates (those who had voted against ratification of the Constitution), *id.*, at 628, 662, read:

> "7. That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to, and be governed by the civil powers." *Id.*, at 665.

Finally, after the delegates at the Massachusetts Ratification Convention had compiled a list of proposed amendments and alterations, a motion was made to add to the list the following language: "that [*2835] the said Constitution be never construed to authorize Congress to . . . prevent the people of the United [***153] States, who are peaceable citizens, from keeping their own arms." Cogan 181. This motion, however, failed to achieve the necessary support, and the proposal was excluded from the list of amendments the State sent to Congress. 2 Schwartz 674-675.

Madison, charged with the task of assembling the proposals for amendments sent by the ratifying States, was the principal draftsman of the *Second Amendment*.[23] He had before him, or at the very least would have been aware of, all of these proposed formulations. In addition, Madison had been a member, some years earlier, of the committee tasked with drafting the Virginia Declaration of Rights. That committee considered a proposal by Thomas Jefferson that would have included within the Virginia Declaration the following language: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]." 1 Papers of Thomas Jefferson 363 (J. Boyd ed. 1950). But the committee rejected that language, adopting instead the provision drafted by George Mason.[24]

> 23 Madison explained in a letter to Richard Peters, Aug. 19, 1789, the paramount importance of preparing a list of amendments to placate those States that had ratified the Constitution [***154] in reliance on a commitment that amendments would follow: "In many States the [Constitution] was adopted under a tacit compact in [favor] of some subsequent provisions on this head. In [Virginia]. It would have been *certainly* rejected, had no assurances been given by its advocates that such provisions would be pursued. As an honest man *I feel* my self bound by this consideration." Creating the *Bill of Rights* 281, 282 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit).
>
> 24 The adopted language, *Virginia Declaration of Rights P13 (1776)*, read as follows: "That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power." 1 Schwartz 235.

With all of these sources upon [**698] which to draw, it is strikingly significant that Madison's first draft omitted any mention of nonmilitary use or possession of weapons. Rather, his original draft repeated the essence of the two proposed amendments sent by Virginia, combining the [***155] substance of the two provisions succinctly into one, which read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Cogan 169.

Madison's decision to model the *Second Amendment* on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When Madison prepared his

first draft, and when that draft was debated and modified, it is reasonable to assume that all participants in the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.

Madison's initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. It confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military [***156] character of both. The objections voiced to the conscientious-objector clause only confirm the central [*2836] meaning of the text. Although records of the debate in the Senate, which is where the conscientious-objector clause was removed, do not survive, the arguments raised in the House illuminate the perceived problems with the clause: Specifically, there was concern that Congress "can declare who are those religiously scrupulous, and prevent them from bearing arms."[25] The ultimate removal of the clause, therefore, only serves to confirm the purpose of the Amendment--to protect against congressional disarmament, by whatever means, of the States' militias.

25 Veit 182. This was the objection voiced by Elbridge Gerry, who went on to remark, in the next breath: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. . . . Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins." *Ibid.*

The Court also contends that because "Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever," *ante, at ____, 171 L. Ed. 2d, at 656* [***157] , the inclusion of a conscientious-objector clause in the original draft of the Amendment does not support the conclusion that the phrase "bear Arms" was military in meaning. But that claim cannot be squared with the record. In the proposals cited *supra, at ____ - ____, 171 L. Ed. 2d, at 696*, both Virginia and North Carolina included the following language: "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent *to employ another to bear* [**699] *arms in his stead*" (emphasis added).[26] There is no plausible argument that the use of "bear arms" in those provisions was not unequivocally and exclusively military: The State simply does not compel its citizens to carry arms for the purpose of private "confrontation," *ante, at ____, 171 L. Ed. 2d, at 652*, or for self-defense.

26 The failed Maryland proposals contained similar language. See *supra, at ____, 171 L. Ed. 2d, at 696*.

The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger. But state militias could not effectively check the prospect of a federal standing [***158] army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed.[27] As we explained in *Miller:* "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the *Second Amendment* were made. It must be interpreted and applied with that end in view." *307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206.* The evidence plainly refutes the claim that the Amendment was motivated by the Framers' fears that Congress might act to regulate any civilian uses of weapons. And even if the historical record were genuinely ambiguous, the burden would remain on the parties advocating a change in the law to introduce facts or arguments "'newly ascertained,'" *Vasquez, 474 U.S., at 266, 106 S. Ct. 617, 88 L. Ed. 2d 598*; the Court is unable to identify any such facts or arguments.

27 The Court suggests that this historical analysis casts the *Second Amendment* as an "odd outlier," *ante, at ____, 171 L. Ed. 2d, at 664*; if by "outlier," the Court means that the *Second Amendment* was enacted in a unique and novel context, and responded to the particular challenges presented by the Framers' federalism experiment, I have no quarrel with the Court's characterization.

III

Although it gives [***159] short shrift to the drafting history of the *Second Amendment*, [*2837] the Court dwells at length on four other sources: the 17th-century English *Bill of Rights*; Blackstone's Commentaries on the Laws of England; postenactment commentary on the *Second Amendment*; and post-Civil War legislative history.[28] All of these sources shed only indirect light on the question before us, and in any [**700] event offer little support for the Court's conclusion. [29]

28 The Court's fixation on the last two types of sources is particularly puzzling, since both have the same characteristics as postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining

the intent of any provision's drafters. As has been explained:

> "The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history'--which presumably means the post-enactment history of a statute's consideration and enactment--is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expression not of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they [***160] were voting for), but of what a law previously enacted means. . . . In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed." *Sullivan v. Finkelstein, 496 U.S. 617, 631-632, 110 S. Ct. 2658, 110 L. Ed. 2d 563 (1990)* (Scalia, J., concurring in part).

29 The Court stretches to derive additional support from scattered state-court cases primarily concerned with state constitutional provisions. See *ante, at ____ - ____, 171 L. Ed. 2d, at 669-670.* To the extent that those state courts assumed that the *Second Amendment* was coterminous with their differently worded state constitutional arms provisions, their discussions were of course dicta. Moreover, the cases on which the Court relies were decided between 30 and 60 years after the ratification of the *Second Amendment*, and there is no indication that any of them engaged in a careful textual or historical analysis of the federal constitutional provision. Finally, the interpretation of the *Second Amendment* advanced in those cases is not as clear as the Court apparently believes. In *Aldridge v. Commonwealth, 4 Va. 447, 2 Va. Cas. 447 (Gen. Ct. 1824)*, for example, a Virginia court pointed to the restriction on [***161] free blacks' "right to bear arms" as evidence that the protections of the State and Federal Constitutions did not extend to free blacks. The Court asserts that "[t]he claim was obviously not that blacks were prevented from carrying guns in the militia." *Ante, at ____, 171 L. Ed. 2d, at 669.* But it is not obvious at all. For in many States, including Virginia, free blacks during the colonial period were prohibited from carrying guns in the militia, instead being required to "muste[r] without arms"; they were later barred from serving in the militia altogether. See Siegel, The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry, *92 Nw. U. L. Rev. 477, 497-498, and n 120 (1998).* But my point is not that the *Aldridge* court endorsed my view of the Amendment--plainly it did not, as the premise of the relevant passage was that the *Second Amendment* applied to the States. Rather, my point is simply that the court could have understood the *Second Amendment* to protect a militia-focused right, and thus that its passing mention of the right to bear arms provides scant support for the Court's position.

The English Bill of Rights

The Court's reliance on Article VII of the 1689 English *Bill of Rights*--which, [***162] like most of the evidence offered by the Court today, was considered in *Miller*[30] -- [*2838] is misguided both because Article VII was enacted in response to different concerns from those that motivated the Framers of the *Second Amendment*, and because the guarantees of the two provisions were by no means coextensive. Moreover, the English text contained no preamble or other provision identifying a narrow, militia-related purpose.

30 The Government argued in its brief:

> "[I]t would seem that the early English law did not guarantee an unrestricted right to bear arms. Such recognition as existed of a right in the people to keep and bear arms appears to have resulted from oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people. This right, however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense." Brief for United States in United States

v. Miller, O. T. 1938, No. 696, pp 11-12 (citations omitted). The Government then cited at length the Tennessee [***163] Supreme Court's opinion in *Aymette, 21 Tenn. 154*, which further situated the English *Bill of Rights* in its historical context. See *n 10, supra.*

The English *Bill of Rights* responded to abuses by the Stuart monarchs; among the grievances set forth in the *Bill of Rights* was that the King had violated the law "[b]y causing several good Subjects being Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law." L. Schwoerer, The Declaration of Rights, 1689, App. 1, p. 295 (1981). Article VII of the *Bill of Rights* was a response to that selective disarmament; it guaranteed that "the Subjects which are Protestants may have Armes for their defence Suitable to their condition and as allowed by Law." *Id.*, at 297. This grant did not establish a general right of all persons, or even of all Protestants, to possess weapons. Rather, the right was qualified in two distinct ways: First, it was restricted [**701] to those of adequate social and economic status ("suitable to their Condition"); second, it was only available subject to regulation by Parliament ("as allowed by Law"). [31]

31 Moreover, it was the Crown, not Parliament, that was bound by the English provision; [***164] indeed, according to some prominent historians, Article VII is best understood not as announcing any individual right to unregulated firearm ownership (after all, such a reading would fly in the face of the text), but as an assertion of the concept of parliamentary supremacy. See Brief for Jack N. Rakove et al. as *Amici Curiae* 6-9.

The Court may well be correct that the English *Bill of Rights* protected the right of *some* English subjects to use *some* arms for personal self-defense free from restrictions by the Crown (but not Parliament). But that right--adopted in a different historical and political context and framed in markedly different language--tells us little about the meaning of the *Second Amendment*.

Blackstone's Commentaries

The Court's reliance on Blackstone's Commentaries on the Laws of England is unpersuasive for the same reason as its reliance on the English *Bill of Rights*. Blackstone's invocation of "'the natural right of resistance and self-preservation,'" *ante, at ____, 171 L. Ed. 2d, at 658*, and "'the right of having and using arms for self-preservation and defence,'" *ibid.*, referred specifically to Article VII in the English *Bill of Rights*. The excerpt from Blackstone offered by the Court, therefore, [***165] is, like Article VII itself, of limited use in interpreting the very differently worded, and differently historically situated, *Second Amendment*.

What *is* important about Blackstone is the instruction he provided on reading the sort of text before us today. Blackstone described an interpretive approach that gave far more weight to preambles than the Court allows. Counseling that "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable," Blackstone explained: "[I]f words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus, the proeme, or preamble, is often called in to help the construction of an act of parliament." 1 Commentaries on the Laws of England 59-60 (1765). In light of the Court's invocation of Blackstone as "'the preeminent authority on English law for the founding [*2839] generation,'" *ante, at ____, 171 L. Ed. 2d, at 658* (quoting *Alden v. Maine, 527 U.S. 706, 715, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999))*, its disregard for his guidance [***166] on matters of interpretation is striking.

Postenactment Commentary

The Court also excerpts, without any real analysis, commentary by a number of additional scholars, some near in time to the framing and others postdating it by close to a century. Those scholars are for the most part of limited relevance in construing the guarantee of the *Second Amendment*: Their views are not altogether clear,[32] they tended to collapse the *Second Amendment* with Article VII of the [**702] English *Bill of Rights*, and they appear to have been unfamiliar with the drafting history of the *Second Amendment*.[33]

32 For example, St. George Tucker, on whom the Court relies heavily, did not consistently adhere to the position that the Amendment was designed to protect the "Blackstonian" self-defense right, *ante, at ____, 171 L. Ed. 2d, at 666*. In a series of unpublished lectures, Tucker suggested that the Amendment should be understood in the context of the compromise over military power represented by the original Constitution and the *Second* and *Tenth Amendments*:

"If a State chooses to incur the expense of putting arms into the Hands of its own Citizens for their

> defense, it would require no small ingenuity to prove that they have no right to do [***167] it, or that it could by any means contravene the Authority of the federal Govt. It may be alleged indeed that this might be done for the purpose of resisting the laws of the federal Government, or of shaking off the Union: to which the plainest answer seems to be, that whenever the States think proper to adopt either of these measures, they will not be with-held by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above mentioned, would be subversive of every principle of Freedom in our Government; of which the first Congress appears to have been sensible by proposing an Amendment to the Constitution, which has since been ratified and has become part of it, viz., 'That a well regulated militia being necessary to the Security of a free State, the right of the people to keep & bear arms shall not be infringed.' To this we may add that this power of arming the militia, is not one of those prohibited to the States by the Constitution, and, consequently, is reserved to them under the twelfth Article of the ratified aments." 4 S. Tucker, Ten Notebooks of Law Lectures, 1790s, pp. 127-128, in Tucker-Coleman Papers [***168] (College of William and Mary).

See also Cornell, St. George Tucker and the *Second Amendment*: Original Understandings and Modern Misunderstandings, *47 Wm. & Mary L. Rev. 1123 (2006).*

33 The Court does acknowledge that at least one early commentator described the *Second Amendment* as creating a right conditioned upon service in a state militia. See *ante, at* ____ - ____, *171 L. Ed. 2d, at 668-669* (citing B. Oliver, The Rights of an American Citizen (1832)). Apart from the fact that Oliver is the *only* commentator in the Court's exhaustive survey who appears to have inquired into the intent of the drafters of the Amendment, what is striking about the Court's discussion is its failure to refute Oliver's description of the meaning of the Amendment or the intent of its drafters; rather, the Court adverts to simple nosecounting to dismiss his view.

The most significant of these commentators was Joseph Story. Contrary to the Court's assertions, however, Story actually supports the view that the Amendment was designed to protect the right of each of the States to maintain a well-regulated militia. When Story used the term "palladium" in discussions of the *Second Amendment*, he merely echoed the concerns that animated the Framers of the Amendment and [***169] led to its adoption. An excerpt from his 1833 Commentaries on the Constitution of the United States--the same passage cited by the Court in *Miller*[34]--merits reproducing at some length:

> "The importance of [the *Second Amendment*] will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural [*2840] defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, [**703] though this truth would seem so clear, and the importance [***170] of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some or-

> ganization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by the clause of our national *bill of rights*." 2 J. Story, Commentaries on the Constitution of the United States § 1897, pp 620-621 (4th ed. 1873) (footnote omitted).

34 *Miller, 307 U.S., at 182, n 3, 59 S. Ct. 816, 83 L. Ed. 1206.*

Story thus began by tying the significance of the Amendment directly to the paramount importance of the militia. He then invoked the fear that drove the Framers of the *Second Amendment* --specifically, the threat to liberty posed by a standing army. An important check on that danger, he suggested, was a "well-regulated militia," *id.*, at 621, for which he assumed that arms would have to be kept and, when necessary, borne. There is not so much as a whisper in the passage above [***171] that Story believed that the right secured by the Amendment bore any relation to private use or possession of weapons for activities like hunting or personal self-defense.

After extolling the virtues of the militia as a bulwark against tyranny, Story went on to decry the "growing indifference to any system of militia discipline." *Ibid.* When he wrote, "[h]ow it is practicable to keep the people duly armed without some organization it is difficult to see," *ibid.*, he underscored the degree to which he viewed the arming of the people and the militia as indissolubly linked. Story warned that the "growing indifference" he perceived would "gradually undermine all the protection intended by this clause of our national *bill of rights*," *ibid.* In his view, the importance of the Amendment was directly related to the continuing vitality of an institution in the process of apparently becoming obsolete.

In an attempt to downplay the absence of any reference to nonmilitary uses of weapons in Story's commentary, the Court relies on the fact that Story characterized Article VII of the English Declaration of Rights as a "'similar provision,'" *ante, at ____, 171 L. Ed. 2d, at 667.* The two provisions were indeed similar, in that [***172] both protected some uses of firearms. But Story's characterization in no way suggests that he believed that the provisions had the same scope. To the contrary, Story's exclusive focus on the militia in his discussion of the *Second Amendment* confirms his understanding of the right protected by the *Second Amendment* as limited to military uses of arms.

[*2841] Story's writings as a Justice of this Court, to the extent that they shed light on this question, only confirm that Justice Story did not view the Amendment as conferring upon individuals any "self-defense" right disconnected from service in a state militia. Justice Story dissented from the Court's decision in *Houston v. Moore, 18 U.S. 1, 5 Wheat. 1, 24, 5 L. Ed. 19 (1820)*, which held that a state court "had a concurrent jurisdiction" with the federal courts "to try a militia man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent." *Id., at 32, 5 L. Ed. 19.* Justice Story believed [**704] that Congress' power to provide for the organizing, arming, and disciplining of the militia was, when Congress acted, plenary; but he explained that in the absence of congressional action, "I am certainly not prepared to deny the legitimacy of [***173] such an exercise of [state] authority." *Id., at 52, 5 L. Ed. 19.* As to the *Second Amendment*, he wrote that it "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id., at 52-53, 5 L. Ed. 19.* The Court contends that had Justice Story understood the Amendment to have a militia purpose, the Amendment would have had "enormous and obvious bearing on the point." *Ante, at ____, 171 L. Ed. 2d, at 668.* But the Court has it quite backwards: If Story had believed that the purpose of the Amendment was to permit civilians to keep firearms for activities like personal self-defense, what "confirm[ation] and illustrat[ion]," *Houston, 5 Wheat., at 53, 5 L. Ed. 19*, could the Amendment possibly have provided for the point that States retained the power to organize, arm, and discipline their own militias?

Post-Civil War Legislative History

The Court suggests that by the post-Civil War period, the *Second Amendment* was understood to secure a right to firearm use and ownership for purely private purposes like personal self-defense. While it is true that some of the legislative history on which the Court relies supports that contention, see *ante, at ____ - ____, 171 L. Ed. 2d, at 670-672,* [***174] such sources are entitled to limited, if any, weight. All of the statements the Court cites were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation.

What is more, much of the evidence the Court offers is decidedly less clear than its discussion allows. The

Court notes: "[B]lacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms." *Ante, at ____, 171 L. Ed. 2d, at 671.* The Court hastily concludes that "[n]eedless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia," *ibid.* But some of the claims of the sort the Court cites may have been just that. In some Southern States, Reconstruction-era Republican governments created state militias in which both blacks and whites were permitted to serve. Because "[t]he decision to allow blacks to serve alongside whites meant that most southerners refused to [***175] join the new militia," the bodies were dubbed "'Negro militia[s].'" S. Cornell, A Well-Regulated Militia 177 (2006). The "arming of the Negro militias met with especially fierce resistance in South Carolina. . . . The sight of organized, armed freedmen incensed opponents of Reconstruction and led to an intensified campaign of Klan terror. Leading members of the Negro militia were beaten or lynched and their weapons stolen." *Id.,* at 176-177.

[*2842] One particularly chilling account of Reconstruction-era Klan violence directed at a black militia member is recounted in the memoir of Louis F. Post, A "Carpetbagger" in South [**705] Carolina, 10 Journal of Negro History 10 (1925). Post describes the murder by local Klan members of Jim Williams, the captain of a "Negro militia company," *id.,* at 59, this way:

> "[A] cavalcade of sixty cowardly white men, completely disguised with face masks and body gowns, rode up one night in March, 1871, to the house of Captain Williams . . . in the wood [they] hanged [and shot] him . . . [and on his body they] then pinned a slip of paper inscribed, as I remember it, with these grim words: 'Jim Williams gone to his last muster.'" *Id.,* at 61.

In light of this evidence, it is [***176] quite possible that at least some of the statements on which the Court relies actually did mean to refer to the disarmament of black militia members.

IV

The brilliance of the debates that resulted in the *Second Amendment* faded into oblivion during the ensuing years, for the concerns about Article I's Militia Clauses that generated such pitched debate during the ratification process and led to the adoption of the *Second Amendment* were short lived.

In 1792, the year after the Amendment was ratified, Congress passed a statute that purported to establish "an Uniform Militia throughout the United States." 1 Stat. 271. The statute commanded every able-bodied white male citizen between the ages of 18 and 45 to be enrolled therein and to "provide himself with a good musket or firelock" and other specified weaponry. [35]*Ibid.* The statute is significant, for it confirmed the way those in the founding generation viewed firearm ownership: as a duty linked to military service. The statute they enacted, however, "was virtually ignored for more than a century," and was finally repealed in 1901. See *Perpich, 496 U.S., at 341, 110 S. Ct. 2418, 110 L. Ed. 2d 312.*

> 35 The additional specified weaponry included: "a sufficient bayonet and belt, [***177] two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle and a quarter of a pound of powder." 1 Stat. 271.

The postratification history of the *Second Amendment* is strikingly similar. The Amendment played little role in any legislative debate about the civilian use of firearms for most of the 19th century, and it made few appearances in the decisions of this Court. Two 19th-century cases, however, bear mentioning.

In *United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1876),* the Court sustained a challenge to respondents' convictions under the Enforcement Act of 1870 for conspiring to deprive any individual of "'any right or privilege granted or secured to him by the constitution or laws of the United States.'" *Id., at 548, 23 L. Ed. 588.* The Court wrote, as to counts 2 and 10 of respondents' indictment:

> "The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any [***178] manner dependent on that instrument for its existence. The *second amendment* declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than [**706] to restrict the powers of the national government." *Id., at 553, 23 L. Ed. 588.*

[*2843] The majority's assertion that the Court in *Cruikshank* "described the right protected by the *Second Amendment* as '"bearing arms for a lawful purpose,"'" *ante, at ____, 171 L. Ed. 2d, at 674* (quoting *Cruikshank, 92 U.S., at 553, 23 L. Ed. 588*), is not accurate. The *Cruikshank* Court explained that the defective *indictment* contained such language, but the Court did not itself describe the right, or endorse the indictment's description of the right.

Moreover, it is entirely possible that the basis for the indictment's counts 2 and 10, which charged respondents with depriving the victims of rights secured by the *Second Amendment*, was the prosecutor's belief that the victims--members of a group of citizens, mostly black but also white, who were rounded up by the sheriff, sworn in as a posse to defend the local courthouse, and attacked by a white mob--bore sufficient resemblance to members of a state militia [***179] that they were brought within the reach of the *Second Amendment*. See generally C. Lane, The Day Freedom Died: The Colfax Massacre, The Supreme Court, and the Betrayal of Reconstruction (2008).

Only one other 19th-century case in this Court, *Presser v. Illinois, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615 (1886)*, engaged in any significant discussion of the *Second Amendment*. The petitioner in *Presser* was convicted of violating a state statute that prohibited organizations other than the Illinois National Guard from associating together as military companies or parading with arms. Presser challenged his conviction, asserting, as relevant, that the statute violated both the Second and the *Fourteenth Amendments*. With respect to the *Second Amendment*, the Court wrote:

> "We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress [***180] and the National government, and not upon that of the States." *Id., at 264-265, 6 S. Ct. 580, 29 L. Ed. 615.*

And in discussing the *Fourteenth Amendment*, the Court explained:

> "The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offence for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred." [**707] *Id., at 266, 6 S. Ct. 580, 29 L. Ed. 615.*

Presser, therefore, both affirmed *Cruikshank*'s holding that the *Second Amendment* posed no obstacle to regulation by state governments, and suggested that in any event nothing in the Constitution protected the use of arms outside the context [***181] of a militia "authorized by law" and organized by the State or Federal Government.[36]

> 36 In another case the Court endorsed, albeit indirectly, the reading of *Miller* that has been well settled until today. In *Burton v. Sills, 394 U.S. 812, 89 S. Ct. 1486, 22 L. Ed. 2d 748 (1969)(per curiam),* the Court dismissed for want of a substantial federal question an appeal from a decision of the New Jersey Supreme Court upholding, against a *Second Amendment* challenge, New Jersey's gun-control law. Although much of the analysis in the New Jersey court's opinion turned on the inapplicability of the *Second Amendment* as a constraint on the States, the court also quite correctly read *Miller* to hold that "Congress, though admittedly governed by the *second amendment*, may regulate interstate firearms so long as the regulation does not impair the maintenance of the active, organized militia of the states." *Burton v. Sills, 53 N. J. 86, 99, 248 A.2d 521, 527 (1968).*

[*2844] In 1901 the President revitalized the militia by creating "'the National Guard of the several States,'" *Perpich, 496 U.S., at 341, 110 S. Ct. 2418, 110 L. Ed. 2d 312*, and nn 9-10; meanwhile, the dominant understanding of the *Second Amendment's* inapplicability to private gun ownership continued well into the [***182] 20th century. The first two federal laws directly restricting civilian use and possession of firearms--the 1927 Act prohibiting mail delivery of "pistols, revolvers, and other firearms capable of being concealed on the person," ch. 75, 44 Stat. 1059, and the 1934 Act prohibiting the possession of sawed-off shotguns and machineguns--were enacted over minor *Second Amendment* objections dismissed by the vast majority of the legislators who participated in the debates.[37] Members of Congress clashed over the wisdom and efficacy of such laws as crime-control measures. But since the statutes did not infringe upon the military use or possession of weapons, for most legislators they did not even raise the specter of possible conflict with the *Second Amendment.*

> 37 The 1927 Act was enacted with no mention of the *Second Amendment* as a potential obstacle, although an earlier version of the bill had generated some limited objections on *Second Amendment* grounds; see 66 Cong. Rec. 725-735 (1924). And the 1934 Act featured just one colloquy, during the course of lengthy Committee debates, on whether the *Second Amendment* constrained Congress' ability to legislate in this sphere; see Hearings on H. R. 9006, before the House [***183] Committee on Ways and Means, 73d Cong., 2d Sess., p 19 (1934).

Thus, for most of our history, the invalidity of *Second-Amendment*-based objections to firearms regulations has been well settled and uncontroversial.[38] Indeed, the *Second Amendment* was not even mentioned [*2845] [**708] in either full House of Congress during the legislative proceedings that led to the passage of the 1934 Act. Yet enforcement of that law produced the judicial decision that confirmed the status of the Amendment as limited in reach to military usage. After reviewing many of the same sources that are discussed at greater length by the Court today, the *Miller* Court unanimously concluded that the *Second Amendment* did not apply to the possession of a firearm that did not have "some reasonable relationship to the preservation or efficiency of a well regulated militia." *307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206.*

> 38 The majority appears to suggest that even if the meaning of the *Second Amendment* has been considered settled by courts and legislatures for over two centuries, that settled meaning is overcome by the "reliance of millions of Americans" "upon the true meaning of the right to keep and bear arms." *Ante, at ____, n 24, 171 L. Ed. 2d, at 677.* Presumably [***184] by this the Court means that many Americans own guns for self-defense, recreation, and other lawful purposes, and object to government interference with their gun ownership. I do not dispute the correctness of this observation. But it is hard to see how Americans have "relied," in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question. Rather, gun owners have "relied" on the laws passed by democratically elected legislatures, which have generally adopted only limited gun-control measures.
>
> Indeed, reliance interests surely cut the other way: Even apart from the reliance of judges and legislators who properly believed, until today, that the *Second Amendment* did not reach possession of firearms for purely private activities, "millions of Americans" have relied on the power of government to protect their safety and well-being, and that of their families. With respect to the case before us, the legislature of the District of Columbia has relied on its ability to act to "reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia," Firearm Control Regulations Act of 1975 (Council Act No. 1-142), Hearing and Disposition before the House Committee on the District of Columbia, 94th Congr., 2d Sess., on H. [***185] Con. Res. 694, Ser. No. 94-24, p. 25 (1976); see *post, at ____ - ____, 171 L. Ed. 2d, at 718* (Breyer, J., dissenting); so, too, have the residents of the District.

The key to that decision did not, as the Court belatedly suggests, *ante, at ____ - ____, 171 L. Ed. 2d, at 675-676*, turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the *Second Amendment* were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for *Second Amendment* protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?

Perhaps in recognition of the weakness of its attempt to distinguish *Miller*, the Court argues in the alternative that *Miller* should be discounted because of its decisional history. It is true that the appellees in *Miller* did not file a brief or make an appearance, although the court below

had held that the relevant provision of the National Firearms Act violated the *Second Amendment* (albeit without any reasoned opinion). But, as our decision [***186] in *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60*, in which only one side appeared and presented arguments, demonstrates, the absence of adversarial presentation alone is not a basis for refusing to accord *stare decisis* effect to a decision of this Court. See Bloch, *Marbury* Redux, in Arguing *Marbury* v. *Madison* 59, 63 (M. Tushnet ed. 2005). Of course, if it can be demonstrated that new evidence or arguments were genuinely not available to an earlier Court, that fact should be given special weight as we consider whether to overrule a prior case. But the Court does not make that claim, because it cannot. Although it is true that the drafting history of the Amendment was not discussed in the Government's brief, see *ante, at ____, 171 L. Ed. 2d, at 676*, it is certainly not the drafting history that the Court's decision today turns on. And those sources upon which the Court today relies most heavily *were* available to the *Miller* Court. The Government cited the English *Bill of Rights* and quoted a lengthy passage from *Aymette* v. *State*, 21 Tenn. 154 (1840), detailing the history leading to the English guarantee, Brief for United States in *United States* v. *Miller*, O. T. 1938, No. 696, pp 12-13; it also cited Blackstone, *id.*, at 9, n 2, Cooley, *id.*, at 12, 15, [***187] and Story, *id.*, at 15. The Court is reduced to critiquing the number of *pages* the Government devoted to exploring [**709] the English legal sources. Only two (in a brief 21 pages in length)! Would the Court be satisfied with four? Ten?

The Court is simply wrong when it intones that *Miller* contained "*not a word*" about the Amendment's history. *Ante, at ____, 171 L. Ed. 2d, at 676*. The Court plainly looked to history to construe the term "Militia," and, on the best reading of *Miller*, the entire guarantee of the *Second Amendment*. After noting the original Constitution's grant of power to Congress and to the States over the militia, the Court explained:

> "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the *Second Amendment* [*2846] were made. It must be interpreted and applied with that end in view.
>
> "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia --civilians primarily, soldiers [***188] on occasion.
>
> "The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators." *Miller, 307 U.S., at 178-179, 59 S. Ct. 816, 83 L. Ed. 1206.*

The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the *Miller* Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.

V

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights "enshrine[d]" in the Constitution. *Ante, at ____, 171 L. Ed. 2d, at 684*. But the right the Court announces was not "enshrined" in the *Second Amendment* by the Framers; it is the product of today's law-changing decision. The majority's exegesis has utterly failed to establish that as a matter of text or history, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" is "elevate[d] above all other interests" by the *Second Amendment*. *Ante, at ____, 171 L. Ed. 2d, at 684*.

Until [***189] today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a "law-abiding, responsible citize[n]" the right to keep and use weapons in the home for self-defense is "off the table." *Ante, at ____, 171 L. Ed. 2d, at 684*. Given the presumption that most citizens are law abiding, and the [**710] reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.[39]

> 39 It was just a few years after the decision in *Miller* that Justice Frankfurter (by any measure a true judicial conservative) warned of the perils

> that would attend this Court's entry into the "political thicket" of legislative districting. *Colegrove v. Green, 328 U.S. 549, 556, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946)* [***190] (plurality opinion). The equally controversial political thicket that the Court has decided to enter today is qualitatively different from the one that concerned Justice Frankfurter: While our entry into that thicket was justified because the political process was manifestly unable to solve the problem of unequal districts, no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control. What impact the Court's unjustified entry into *this* thicket will have on that ongoing debate--or indeed on the Court itself--is a matter that future historians will no doubt discuss at length. It is, however, clear to me that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today.

I do not know whether today's decision will increase the labor of federal judges to [*2847] the "breaking point" envisioned by Justice Cardozo, but it will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries.

The Court properly disclaims any interest in evaluating the wisdom [***191] of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice--the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun-control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

For these reasons, I respectfully dissent.

Justice **Breyer,** with whom Justice **Stevens,** Justice **Souter,** and Justice **Ginsburg** join, dissenting.

We must decide whether a District of Columbia law that prohibits the possession of handguns in the home violates the *Second Amendment.* The Court, relying upon its view that the *Second Amendment* seeks to protect a right of personal self-defense, holds that this law violates that Amendment. In my view, it does not.

I

The majority's conclusion is wrong for two independent reasons. The first reason is that set forth by Justice [***192] Stevens--namely, that the *Second Amendment* protects militia-related, not self-defense-related, interests. These two interests are sometimes intertwined. To assure 18th-century citizens that they could keep arms for militia purposes would necessarily have allowed them to keep arms that they could have used for self-defense as well. But self-defense alone, detached from any militia-related objective, is not the Amendment's concern.

The second independent reason is that the protection the Amendment provides is not absolute. The Amendment permits government to regulate [**711] the interests that it serves. Thus, irrespective of what those interests are--whether they do or do not include an independent interest in self-defense--the majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in *Second Amendment* terms. This the majority cannot do.

In respect to the first independent reason, I agree with Justice Stevens, and I join his opinion. In this opinion I shall focus upon the second reason. I shall show that the District's law is consistent with the *Second Amendment* even if that Amendment is interpreted as protecting a wholly separate [***193] interest in individual self-defense. That is so because the District's regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem.

Thus I here assume that one objective (but, as the majority concedes, *ante, at ____, 171 L. Ed. 2d, at 661-662,* not the *primary* objective) of those who wrote the *Second Amendment* was to help assure citizens that they would have arms available for purposes of self-defense. Even so, a legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope [*2848] and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the *Second Amendment* was adopted. In these circumstances, the District's law falls [***194] within the zone that the *Second Amendment* leaves open to regulation by legislatures.

II

The *Second Amendment* says: "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 and applying this Amendment, I take as a starting point the following four propositions, based on our precedent and today's opinions, to which I believe the entire Court subscribes:

(1) The Amendment protects an "individual" right--*i.e.*, one that is separately possessed, and may be separately enforced, by each person on whom it is conferred. See, *e.g., ante, at ____, 171 L. Ed. 2d, at 659* (opinion of the Court); *ante, at ____, 171 L. Ed. 2d, at 684* (Stevens, J., dissenting).

(2) As evidenced by its preamble, the Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces." *United States v. Miller, 307 U.S. 174, 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)*; see *ante, at ____, 171 L. Ed. 2d, at 661* (opinion of the Court); *ante, at ____, 171 L. Ed. 2d, at 684* (Stevens, J., dissenting).

(3) The Amendment "must be interpreted and applied with that end in view." *Miller, supra, at 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373*

(4) The right protected by the *Second Amendment* is not absolute, but instead is subject to government [***195] regulation. [**712] See *Robertson v. Baldwin, 165 U.S. 275, 281-282, 17 S. Ct. 326, 41 L. Ed. 715 (1897)*; *ante, at ____, ____, 171 L. Ed. 2d, at 659, 678* (opinion of the Court).

My approach to this case, while involving the first three points, primarily concerns the fourth. I shall, as I said, assume with the majority that the Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense, at least to some degree. And I shall then ask whether the Amendment nevertheless permits the District handgun restriction at issue here.

Although I adopt for present purposes the majority's position that the *Second Amendment* embodies a general concern about self-defense, I shall not assume that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars. The majority, which presents evidence in favor of the former proposition, does not, because it cannot, convincingly show that the *Second Amendment* seeks to maintain the latter in pristine, unregulated form.

To the contrary, colonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the "right to keep and bear arms," whether embodied in [***196] Federal or State Constitutions, or the background common law. And those examples include substantial regulation of firearms in urban areas, including regulations that imposed obstacles to the use of firearms for the protection of the home.

Boston, Philadelphia, and New York City, the three largest cities in America during that period, all restricted the firing of guns within city limits to at least some degree. See Churchill, Gun Regulation, the Police Power, and the Right to Keep [*2849] Arms in Early America, *25 Law & Hist. Rev. 139, 162 (2007)*; Dept. of Commerce, Bureau of Census, C. Gibson, Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990 (1998) (Table 2), online at http://www.census.gov/population/documentation/twps0027/tab02.txt (all Internet materials as visited June 19, 2008, and available in Clerk of Court's case file). Boston in 1746 had a law prohibiting the "discharge" of "any Gun or Pistol charged with Shot or Ball in the Town" on penalty of 40 shillings, a law that was later revived in 1778. See Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay, p. 208; An Act for Reviving and Continuing Sundry Laws that are Expired, and Near Expiring, 1778 Mass. Sess., [***197] Laws, ch. V, pp 193, 194. Philadelphia prohibited, on penalty of five shillings (or two days in jail if the fine were not paid), firing a gun or setting off fireworks in Philadelphia without a "governor's special license." See Act of Aug. 26, 1721, § IV, in 3 Stat. at Large of Pa. 253-254 (J. Mitchell & H. Flanders Comm'rs. 1896). And New York City banned, on penalty of a 20-shilling fine, the firing of guns (even in houses) for the three days surrounding New Year's Day. 5 Colonial Laws of New York, ch. 1501, pp 244-246 (1894); see also An Act to Suppress the Disorderly Practice of Firing Guns, & c., on the Times Therein Mentioned (1774), in 8 Stat. at Large of Pa. 410-412 (1902) (similar law for all "inhabited parts" of Pennsylvania). See also An Act for preventing Mischief being done in the Town of *Newport*, or in any other Town in this Government, 1731 Rhode Island Session Laws [**713] pp. 240-241 (prohibiting, on penalty of five shillings for a first offense and more for subsequent offenses, the firing of "any Gun or Pistol . . . in the Streets of any of the Towns of this Government, or in any Tavern of the same, after dark, on any Night whatsoever").

Furthermore, several towns and cities (including Philadelphia, [***198] New York, and Boston) regulated, for fire-safety reasons, the storage of gunpowder, a necessary component of an operational firearm. See Cornell & DeDino, A Well Regulated Right, *73 Ford. L. Rev. 487, 510-512 (2004)*. Boston's law in particular impacted the use of firearms in the home very much as the District's law does today. Boston's gunpowder law imposed a £10 fine upon "any Person" who "shall take into any Dwelling-House, Stable, Barn, Out-house,

Ware-house, Store, Shop, or other Building, within the Town of *Boston*, any . . . Fire-Arm, loaded with, or having Gun-Powder." An Act in Addition to the several Acts already made for the prudent Storage of Gun-Powder within the Town of *Boston*, ch. XIII, 1783 Mass. Acts pp. 218-219; see also 1 S. Johnson, A Dictionary of the English Language 751 (4th ed. 1773) (defining "firearms" as "[a]rms which owe their efficacy to fire; guns"). Even assuming, as the majority does, see *ante, at ____ - ____, 171 L. Ed. 2d, at 681*, that this law included an implicit self-defense exception, it would nevertheless have prevented a homeowner from keeping in his home a gun that he could immediately pick up and use against an intruder. Rather, the homeowner would have had to get the gunpowder [***199] and load it into the gun, an operation that would have taken a fair amount of time to perform. See Hicks, United States Military Shoulder Arms, 1795-1935, 1 Journal of Am. Military Hist. Foundation 23, 30 (1937) (experienced soldier could, with specially prepared cartridges as opposed to plain gunpowder and ball, load and fire musket 3-to-4 times per minute); *id.*, at 26-30 (describing the loading process); see also Grancsay, The Craft of the Early American Gunsmith, 6 Metropolitan Museum of Art Bulletin 54, 60 (1947) (noting that rifles were slower to load and fire than muskets).

[*2850] Moreover, the law would, as a practical matter, have prohibited the carrying of loaded firearms anywhere in the city, unless the carrier had no plans to enter any building or was willing to unload or discard his weapons before going inside. And Massachusetts residents must have believed this kind of law compatible with the provision in the Massachusetts Constitution that granted "[t]he people . . . a right to keep and to bear arms for the common defence"--a provision that the majority says was interpreted as "secur[ing] an individual right to bear arms for defensive purposes." Art. XVII (1780), in 3 The Federal and State [***200] Constitutions, Colonial Charters, and Other Organic Laws 1888, 1892 (F. Thorpe ed. 1909) (hereinafter Thorpe); *ante, at ____ - ____, 171 L. Ed. 2d, at 663* (opinion of the Court).

The New York City law, which required that gunpowder in the home be stored in certain sorts of containers, and laws in certain Pennsylvania towns, which required that gunpowder be stored on the highest story of the home, could well have presented similar obstacles to in-home use of firearms. See Act of Apr. 13, 1784, ch. 28, 1784 N. Y. Laws p 627; An Act for Erecting the Town of Carlisle, in the County of Cumberland, into a Borough, ch. XIV, § XLII, 1782 Pa. Laws p 49; An Act for Erecting the Town of [**714] Reading, in the County of Berks, into a Borough, ch. LXXVI, § XLII, 1783 Pa. Laws p 211. Although it is unclear whether these laws, like the Boston law, would have prohibited the storage of gunpowder inside a firearm, they would at the very least have made it difficult to reload the gun to fire a second shot unless the homeowner happened to be in the portion of the house where the extra gunpowder was required to be kept. See 7 United States Encyclopedia of History 1297 (P. Oehser ed. 1967) ("Until 1835 all small arms [were] single-shot [***201] weapons, requiring reloading by hand after every shot"). And Pennsylvania, like Massachusetts, had at the time one of the self-defense-guaranteeing state constitutional provisions on which the majority relies. See *ante, at ____, 171 L. Ed. 2d, at 663* (citing *Pa. Declaration of Rights, § XIII (1776)*, in 5 Thorpe 3083).

The majority criticizes my citation of these colonial laws. See *ante, at ____ - ____, 171 L. Ed. 2d, at 681-682*. But, as much as it tries, it cannot ignore their existence. I suppose it is possible that, as the majority suggests, see *ante, at ____ - ____, 171 L. Ed. 2d, at 681-682*, they all in practice contained self-defense exceptions. But none of them expressly provided one, and the majority's assumption that such exceptions existed relies largely on the preambles to these acts--an interpretive methodology that it elsewhere roundly derides. Compare *ibid.* (interpreting 18th-century statutes in light of their preambles), with *ante, at ____ - ____, 171 L. Ed. 2d, at 649, and n 3* (contending that the operative language of an 18th-century enactment may extend beyond its preamble). And in any event, as I have shown, the gunpowder-storage laws would have *burdened* armed self-defense, even if they did not completely *prohibit* it.

This historical evidence demonstrates that a self-defense assumption [***202] is the *beginning*, rather than the *end*, of any constitutional inquiry. That the District law impacts self-defense merely raises *questions* about the law's constitutionality. But to answer the questions that are raised (that is, to see whether the statute is unconstitutional) requires us to focus on practicalities, the statute's rationale, the problems that called it into being, its relation to those objectives--in a word, the details. There are no purely logical or conceptual answers to such questions. All of which to say that to raise a self-defense question is not to answer it.

III

I therefore begin by asking a process-based question: How is a court to determine [*2851] whether a particular firearm regulation (here, the District's restriction on handguns) is consistent with the *Second Amendment*? What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect?

The question matters. The majority is wrong when it says that the District's law is unconstitutional "[u]nder any of the standards of scrutiny that we have applied to

enumerated constitutional rights." *Ante, at ____, 171 L. Ed. 2d, at 679.* How could that be? It certainly would not be unconstitutional under, for example, [***203] a "rational-basis" standard, which requires a court to uphold regulation so long as it bears a "rational relationship" to a "legitimate governmental purpose." *Heller v. Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).* [**715] The law at issue here, which in part seeks to prevent gun-related accidents, at least bears a "rational relationship" to that "legitimate" life-saving objective. And nothing in the three 19th-century state cases to which the majority turns for support mandates the conclusion that the present District law must fall. See *Andrews v. State, 50 Tenn. 165, 177, 186-187, 192 (1871)* (striking down, as violating a *state* constitutional provision adopted in 1870, a *statewide* ban on carrying a broad class of weapons, insofar as it applied to revolvers); *Nunn v. State, 1 Ga. 243, 246, 250-251 (1846)* (striking down similarly broad ban on openly carrying weapons, based on erroneous view that the Federal *Second Amendment* applied to the States); *State v. Reid, 1 Ala. 612, 614-615, 622 (1840)* (*upholding* a concealed-weapon ban against a *state* constitutional challenge). These cases were decided well (80, 55, and 49 years, respectively) after the framing; they neither claim nor provide any special insight [***204] into the intent of the Framers; they involve laws much less narrowly tailored that the one before us; and state cases in any event are not determinative of federal constitutional questions, see, *e.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)* (citing *Martin v. Hunter's Lessee, 14 U.S. 304, 1 Wheat. 304, 4 L. Ed. 97 (1816)).*

Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." *Abrams v. Johnson, 521 U.S. 74, 82, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997)*; see Brief for Respondent 54-62. But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws--prohibitions on concealed weapons, forfeiture by criminals of the *Second Amendment* right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales--whose constitutionality under a strict scrutiny standard would be far from clear. See *ante, at ____, 171 L. Ed. 2d, at 678.*

Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. That is because almost every gun-control regulation will seek to advance [***205] (as the one here does) a "primary concern of every government--a concern for the safety and indeed the lives of its citizens." *United States v. Salerno, 481 U.S. 739, 755, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).* The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," see *id., at 750, 754, 107 S. Ct. 2095, 95 L. Ed. 2d 697*, and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, see, *e.g., Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam)* (*First Amendment* [*2852] free speech rights); *Sherbert v. Verner, 374 U.S. 398, 403, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)* (*First Amendment* religious rights); *Brigham City v. Stuart, 547 U.S. 398, 403-404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)* (*Fourth Amendment* protection of the home); *New York v. Quarles, 467 U.S. 649, 655, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984)* (*Fifth Amendment* rights under *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*); *Salerno, supra, at 755, 107 S.* [**716] *Ct. 2095, 95 L. Ed. 2d 697* (*Eighth Amendment* bail rights). Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the *Second Amendment* on one side and the governmental public-safety concerns on the other, [***206] the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. See *Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 402, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000)* (Breyer, J., concurring). Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. See *ibid.* Contrary to the majority's unsupported suggestion that this sort of "proportionality" approach is unprecedented, see *ante, at ____, 171 L. Ed. 2d, at 682,* [***207] the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases. See *528 U.S., at 403, 120 S. Ct. 897, 145 L. Ed. 2d 886* (citing examples where the Court has taken such an approach); see also, *e.g., Thompson v. Western States Medical Center, 535 U.S. 357, 388, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002)* (Breyer, J., dissenting) (commercial speech);

Burdick v. Takushi, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (election regulation); *Mathews v. Eldridge, 424 U.S. 319, 339-349, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)* (procedural due process); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)* (government employee speech).

In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. See *Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195-196, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997)*; see also *Nixon, supra, at 403, 120 S. Ct. 897, 145 L. Ed. 2d 886* (Breyer, J., concurring). Nonetheless, a court, not a legislature, must make the ultimate constitutional conclusion, exercising its "independent judicial judgment" in light of the whole record to determine whether a law exceeds constitutional boundaries. *Randall v. Sorrell, 548 U.S. 230, 249, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006)* [***208] (opinion of Breyer, J.) (citing *Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).*

The above-described approach seems preferable to a more rigid approach here for a further reason. Experience as much as logic has led the Court to decide that in one area of constitutional law or another [*2853] the interests [**717] are likely to prove stronger on one side of a typical constitutional case than on the other. See, *e.g., United States v. Virginia, 518 U.S. 515, 531-534, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)* (applying heightened scrutiny to gender-based classifications, based upon experience with prior cases); *Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955)* (applying rational-basis scrutiny to economic legislation, based upon experience with prior cases). Here, we have little prior experience. Courts that *do* have experience in these matters have uniformly taken an approach that treats empirically based legislative judgment with a degree of deference. See Winkler, Scrutinizing the *Second Amendment, 105 Mich. L. Rev. 683, 687, 716-718 (2007)* (describing hundreds of gun-law decisions issued in the last half century by Supreme Courts in 42 States, which courts with "surprisingly little variation" [***209] have adopted a standard more deferential than strict scrutiny). While these state cases obviously are not controlling, they are instructive. Cf., *e.g., Bartkus v. Illinois, 359 U.S. 121, 134, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959)* (looking to the "experience of state courts" as informative of a constitutional question). And they thus provide some comfort regarding the practical wisdom of following the approach that I believe our constitutional precedent would in any event suggest.

IV

The present suit involves challenges to three separate District firearm restrictions. The first requires a license from the District's Chief of Police in order to carry a "pistol," *i.e.*, a handgun, anywhere in the District. See *D. C. Code § 22-4504(a)* (2001); see also *§§ 22-4501(a), 22-4506.* Because the District assures us that respondent could obtain such a license so long as he meets the statutory eligibility criteria, and because respondent concedes that those criteria are facially constitutional, I, like the majority, see no need to address the constitutionality of the licensing requirement. See *ante, at ____ - ____, 171 L. Ed. 2d, at 680-681.*

The second District restriction requires that the lawful owner of a firearm keep his weapon "unloaded and disassembled or bound [***210] by a trigger lock or similar device" unless it is kept at his place of business or being used for lawful recreational purposes. See *§ 7-2507.02.* The only dispute regarding this provision appears to be whether the Constitution requires an exception that would allow someone to render a firearm operational when necessary for self-defense (*i.e.*, that the firearm may be operated under circumstances where the common law would normally permit a self-defense justification in defense against a criminal charge). See *Parker v. District of Columbia, 375 U.S. App. D.C. 140, 478 F.3d 370, 401 (2007)* (case below); *ante, at ____ - ____, 171 L. Ed. 2d, at 680* (opinion of the Court); Brief for Respondent 52-54. The District concedes that such an exception exists. See Brief for Petitioners 56-57. This Court has final authority (albeit not often used) to definitively interpret District law, which is, after all, simply a species of federal law. See, *e.g., Whalen v. United States, 445 U.S. 684, 687-688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)*; see also *Griffin v. United States, 336 U.S. 704, 716-718, 69 S. Ct. 814, 93 L. Ed. 993 (1949).* And because I see nothing in the District law that would *preclude* the [**718] existence of a background common-law self-defense exception, I would avoid the constitutional question by interpreting [***211] the statute to include it. See *Ashwander v. TVA, 297 U.S. 288, 348, 56 S. Ct. 466, 80 L. Ed. 688 (1936)* (Brandeis, J., concurring).

I am puzzled by the majority's unwillingness to adopt a similar approach. It readily reads unspoken self-defense exceptions into every colonial law, but it refuses [*2854] to accept the District's concession that this law has one. Compare *ante, at ____ - ____, 171 L. Ed. 2d, at 681-682*, with *ante, at ____ - ____, 171 L. Ed. 2d, at 680.* The one District case it cites to support that refusal, *McIntosh v. Washington, 395 A.2d 744, 755-756 (1978)*, merely concludes that the District Legislature had a rational basis for applying the trigger-lock law in homes but not in places of business. Nowhere does that

case say that the statute precludes a self-defense exception of the sort that I have just described. And even if it did, we are not bound by a lower court's interpretation of federal law.

The third District restriction prohibits (in most cases) the registration of a handgun within the District. See *§ 7-2502.02(a)(4)*. Because registration is a prerequisite to firearm possession, see *§ 7-2502.01(a)*, the effect of this provision is generally to prevent people in the District from possessing handguns. In determining whether this regulation violates the *Second Amendment*, [***212] I shall ask how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the *Second Amendment* seeks to protect, and whether there are practical less burdensome ways of furthering those interests. The ultimate question is whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate. See *Nixon, 528 U.S., at 402, 120 S. Ct. 897, 145 L. Ed. 2d 886* (Breyer, J., concurring).

A

No one doubts the constitutional importance of the statute's basic objective, saving lives. See, *e.g., Salerno, 481 U.S., at 755, 107 S. Ct. 2095, 95 L. Ed. 2d 697*. But there is considerable debate about whether the District's statute helps to achieve that objective. I begin by reviewing the statute's tendency to secure that objective from the perspective of (1) the legislature (namely, the Council of the District of Columbia (hereinafter Council)) that enacted the statute in 1976, and (2) a court that seeks to evaluate the Council's decision today.

1

First, consider the facts as the legislature saw them when it adopted the District statute. As stated by the local council committee that recommended its adoption, the major substantive goal of the District's handgun restriction is "to reduce [***213] the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia." Firearm Control Regulations Act of 1975 (Council Act No. 1-142), Hearing and Disposition before the House Committee on the District of Columbia, 94th Cong., 2d Sess., on H. Con. Res. 694, Ser. No. 94-24, p 25 (1976) (herinafter DC Rep.) (reproducing, *inter alia,* the Council committee report). The committee concluded, on the basis of "extensive public hearings" and "lengthy research," that "[t]he easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 [**719] years." *Id.,* at 24, 25. It reported to the Council "startling statistics," *id.,* at 26, regarding gun-related crime, accidents, and deaths, focusing particularly on the relation between handguns and crime and the proliferation of handguns within the District. See *id.,* at 25-26.

The committee informed the Council that guns were "responsible for 69 deaths in this country each day," for a total of "[a]pproximately 25,000 gun-deaths . . . each year," along with an additional 200,000 gun-related injuries. *Id.,* at 25. Three thousand of these deaths, the report stated, were accidental. *Ibid.* [***214] A quarter of the victims in those accidental deaths were children under the age of 14. *Ibid.* And according to the committee, "[f]or every [*2855] intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home." *Ibid.*

In respect to local crime, the committee observed that there were 285 murders in the District during 1974--a record number. *Id.,* at 26. The committee also stated that, "[c]ontrary to popular opinion on the subject, firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities." *Ibid.* Citing an article from the American Journal of Psychiatry, the committee reported that "[m]ost murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion or intoxication, and where the killer and victim are acquainted." *Ibid.* "Twenty-five percent of these murders," the committee informed the Council, "occur within families." *Ibid.*

The committee report furthermore presented statistics strongly correlating handguns with crime. Of the 285 murders in the District in 1974, 155 were committed with handguns. *Ibid.* This did not appear [***215] to be an aberration, as the report revealed that "handguns [had been] used in roughly 54% of all murders" (and 87% of murders of law enforcement officers) nationwide over the preceding several years. *Ibid.* Nor were handguns only linked to murders, as statistics showed that they were used in roughly 60% of robberies and 26% of assaults. *Ibid.* "A crime committed with a pistol," the committee reported, "is 7 times more likely to be lethal than a crime committed with any other weapon." *Id.*, at 25. The committee furthermore presented statistics regarding the availability of handguns in the United States, *ibid.*, and noted that they had "become easy for juveniles to obtain," even despite then-current District laws prohibiting juveniles from possessing them, *id.,* at 26.

In the committee's view, the current District firearms laws were unable "to reduce the potentiality for gun-related violence," or to "cope with the problems of gun control in the District" more generally. *Ibid.* In the absence of adequate federal gun legislation, the committee concluded, it "becomes necessary for local governments to act to protect their citizens, and certainly the

District of Columbia as the only totally urban [***216] statelike jurisdiction should be strong in its approach." *Id.*, at 27. It recommended that the Council adopt a restriction on handgun registration to reflect "a legislative decision that, at this point in time and due to the gun-control tragedies and horrors enumerated previously" in the committee report, "pistols . . . are no longer justified in this [**720] jurisdiction." *Id.*, at 31; see also *ibid.* (handgun restriction "denotes a policy decision that handguns . . . have no legitimate use in the purely urban environment of the District").

The District's special focus on handguns thus reflects the fact that the committee report found them to have a particularly strong link to undesirable activities in the District's exclusively urban environment. See *id.*, at 25-26. The District did not seek to prohibit possession of other sorts of weapons deemed more suitable for an "urban area." See *id.*, at 25. Indeed, an original draft of the bill, and the original committee recommendations, had sought to prohibit registration of shotguns as well as handguns, but the Council as a whole decided to narrow the prohibition. Compare *id.*, at 30 (describing early version of the bill), with *D. C. Code § 7-2502.02*).

2

Next, [***217] consider the facts as a court must consider them looking at the matter as of today. See, *e.g., Turner, 520 U.S., at 195, 117 S. Ct. 1174, 137 L. Ed. 2d 369* (discussing role of court as [*2856] fact-finder in a constitutional case). Petitioners, and their *amici,* have presented us with more recent statistics that tell much the same story that the committee report told 30 years ago. At the least, they present nothing that would permit us to second-guess the Council in respect to the numbers of gun crimes, injuries, and deaths, or the role of handguns.

From 1993 to 1997, there were 180,533 firearm-related deaths in the United States, an average of over 36,000 per year. Dept. of Justice, Bureau of Justice Statistics, M. Zawitz & K. Strom, Firearm Injury and Death from Crime, 1993-97, p 2 (Oct. 2000), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/fidc9397.pdf (hereinafter Firearm Injury and Death from Crime). Fifty-one percent were suicides, 44% were homicides, 1% were legal interventions, 3% were unintentional accidents, and 1% were of undetermined causes. See *ibid.* Over that same period there were an additional 411,800 nonfatal firearm-related injuries treated in U. S. hospitals, an average of over 82,000 per year. *Ibid.* Of these, [***218] 62% resulted from assaults, 17% were unintentional, 6% were suicide attempts, 1% were legal interventions, and 13% were of unknown causes. *Ibid.*

The statistics are particularly striking in respect to children and adolescents. In over one in every eight firearm-related deaths in 1997, the victim was someone under the age of 20. American Academy of Pediatrics, Firearm-Related Injuries Affecting the Pediatric Population, 105 Pediatrics 888 (2000) (hereinafter Firearm-Related Injuries). Firearm-related deaths account for 22.5% of all injury deaths between the ages of 1 and 19. *Ibid.* More male teenagers die from firearms than from all natural causes combined. Dresang, Gun Deaths in Rural and Urban Settings, 14 J. Am. Bd. Family Practice 107 (2001). Persons under 25 accounted for 47% of hospital-treated firearm injuries between June 1, 1992, and May 31, 1993. Firearm-Related Injuries 891.

Handguns are involved in a majority of firearm deaths and injuries in the United States. *Id.*, at 888. From 1993 to 1997, 81% of firearm-homicide victims were killed by handgun. Firearm Injury and Death from Crime 4; see also Dept. of Justice, Bureau of Justice Statistics, C. Perkins, Weapon Use and Violent [***219] Crime 8 (Sept. 2003) (Table 10), http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf [**721] (hereinafter Weapon Use and Violent Crime) (statistics indicating roughly the same rate for 1993-2001). In the same period, for the 41% of firearm injuries for which the weapon type is known, 82% of them were from handguns. Firearm Injury and Death from Crime 4. And among children under the age of 20, handguns account for approximately 70% of all unintentional firearm-related injuries and deaths. Firearm-Related Injuries 890. In particular, 70% of all firearm-related teenage suicides in 1996 involved a handgun. *Id.*, at 889; see also Zwerling, Lynch, Burmeister, & Goertz, The Choice of Weapons in Firearm Suicides in Iowa, 83 Am. J. Pub. Health 1630, 1631 (1993) (Table 1) (handguns used in 36.6% of all firearm suicides in Iowa from 1980-1984 and 43.8% from 1990-1991).

Handguns also appear to be a very popular weapon among criminals. In a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun. See Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Firearm Use by Offenders [***220] 3 (Nov. 2001), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/fuo.pdf; see also Weapon Use and Violent Crime 2 (Table 2) (statistics indicating that handguns were used in over [*2857] 84% of nonlethal violent crimes involving firearms from 1993 to 2001). And handguns are not only popular tools for crime, but popular objects of it as well: the Federal Bureau of Investigation received on average over 274,000 reports of stolen guns for each year between 1985 and 1994, and almost 60% of stolen guns are handguns. Dept. of Justice, Bureau of Justice Statistics, M. Zawitz, Guns Used in Crime 3 (July 1995), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf.

Department of Justice studies have concluded that stolen handguns in particular are an important source of weapons for both adult and juvenile offenders. *Ibid.*

Statistics further suggest that urban areas, such as the District, have different experiences with gun-related death, injury, and crime than do less densely populated rural areas. A disproportionate amount of violent and property crimes occur in urban areas, and urban criminals are more likely than other offenders to use a firearm during the commission of a violent crime. See Dept. of Justice, Bureau [***221] of Justice Statistics, D. Duhart, Urban, Suburban, and Rural Victimization, 1993-98, pp 1, 9 (Oct. 2000), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/usrv98.pdf. Homicide appears to be a much greater issue in urban areas; from 1985 to 1993, for example, "half of all homicides occurred in 63 cities with 16% of the nation's population." Wintemute, The Future of Firearm Violence Prevention, 282 JAMA 475 (1999). One study concluded that although the overall rate of gun death between 1989 and 1999 was roughly the same in urban and rural areas, the urban homicide rate was three times as high; even after adjusting for other variables, it was still twice as high. Branas, Nance, Elliott, Richmond, & Schwab, Urban-Rural Shifts in Intentional Firearm Death, 94 Am. J. Pub. Health 1750, 1752 (2004); see also *ibid.* (noting that rural areas appear to have a higher rate of firearm suicide). And a study of firearm injuries to children and adolescents in Pennsylvania between 1987 and 2000 showed an injury rate in urban counties 10 times higher than in nonurban [**722] counties. Nance et al., The Rural-Urban Continuum, 156 Archives of Pediatrics & Adolescent Medicine 781, 782 (2002).

Finally, the linkage [***222] of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas. "[S]tudies to date generally support the hypothesis that the greater number of rural gun deaths are from rifles or shotguns, whereas the greater number of urban gun deaths are from handguns." Dresang, *supra*, at 108. And the Pennsylvania study reached a similar conclusion with respect to firearm injuries--they are much more likely to be caused by handguns in urban areas than in rural areas. See Nance et al., *supra*, at 784.

3

Respondent and his many *amici* for the most part do not disagree about the *figures* set forth in the preceding subsection, but they do disagree strongly with the District's *predictive judgment* that a ban on handguns will help solve the crime and accident problems that those figures disclose. In particular, they disagree with the District Council's assessment that "freezing the pistol . . . population within the District," DC Rep., at 26, will reduce crime, accidents, and deaths related to guns. And they provide facts and figures designed to show that it has not done so in the past, and hence will not do so in the future.

First, they point out that, since the ban [***223] took effect, violent crime in the District has increased, not decreased. See Brief for Criminologists et al. as *Amici Curiae* 4-8, 3a (hereinafter Criminologists' Brief); Brief for Congress of Racial Equality as [*2858] *Amicus Curiae* 35-36; Brief for National Rifle Assn. et al. as *Amici Curiae* 28-30 (hereinafter NRA Brief). Indeed, a comparison with 49 other major cities reveals that the District's homicide rate is actually substantially *higher* relative to these other cities than it was before the handgun restriction went into effect. See Brief for Academics et al. as *Amici Curiae* 7-10 (hereinafter Academics' Brief); see also Criminologists' Brief 6-9, 3a-4a, 7a. Respondent's *amici* report similar results in comparing the District's homicide rates during that period to that of the neighboring States of Maryland and Virginia (neither of which restricts handguns to the same degree), and to the homicide rate of the Nation as a whole. See Academics' Brief 11-17; Criminologists' Brief 6a, 8a.

Second, respondent's *amici* point to a statistical analysis that regresses murder rates against the presence or absence of strict gun laws in 20 European nations. See Criminologists' Brief 23 (citing Kates & Mauser, [***224] Would Banning Firearms Reduce Murder and Suicide? *30 Harv. J. L. & Pub. Pol'y 649, 651-694 (2007)*). That analysis concludes that strict gun laws are correlated with *more* murders, not fewer. See Criminologists' Brief 23; see also *id.*, at 25-28. They also cite domestic studies, based on data from various cities, States, and the Nation as a whole, suggesting that a reduction in the number of guns does not lead to a reduction in the amount of violent crime. See *id.*, at 17-20. They further argue that handgun bans do not reduce suicide rates, see *id.*, at 28-31, 9a, or rates of accidents, even those involving children, see Brief for International Law Enforcement Educators and Trainers Assn. et al. as *Amici Curiae* App. 7-15 (hereinafter ILEETA Brief).

[**723] Third, they point to evidence indicating that firearm ownership does have a beneficial self-defense effect. Based on a 1993 survey, the authors of one study estimated that there were 2.2-to-2.5 million defensive uses of guns (mostly brandishing, about a quarter involving the actual firing of a gun) annually. See Kleck & Gertz, Armed Resistance to Crime, 86 J. Crim. L. & C. 150, 164 (1995); see also ILEETA Brief App. 1-6 (summarizing studies regarding [***225] defensive uses of guns). Another study estimated that for a period of 12 months ending in 1994, there were 503,481 incidents in which a burglar found himself confronted by an armed homeowner, and that in 497,646

(98.8%) of them, the intruder was successfully scared away. See Ikeda, Dahlberg, Sacks, Mercy, & Powell, Estimating Intruder-Related Firearms Retrievals in U. S. Households, 12 Violence & Victims 363 (1997). A third study suggests that gun-armed victims are substantially less likely than non-gun-armed victims to be injured in resisting robbery or assault. Barnett & Kates, Under Fire, *45 Emory L. J. 1139, 1243-1244, n 478 (1996)*. And additional evidence suggests that criminals are likely to be deterred from burglary and other crimes if they know the victim is likely to have a gun. See Kleck, Crime Control Through the Private Use of Armed Force, 35 Social Problems 1, 15 (1988) (reporting a substantial drop in the burglary rate in an Atlanta suburb that required heads of households to own guns); see also ILEETA Brief 17-18 (describing decrease in sexual assaults in Orlando when women were trained in the use of guns).

Fourth, respondent's *amici* argue that laws criminalizing gun [***226] possession are self-defeating, as evidence suggests that they will have the effect only of restricting law-abiding citizens, but not criminals, from acquiring guns. See, *e.g.*, Brief for President *Pro Tempore* of Senate of Pennsylvania as *Amicus Curiae* 35, 36, and n 15. That effect, they argue, will be especially pronounced in the District, whose proximity [*2859] to Virginia and Maryland will provide criminals with a steady supply of guns. See Brief for Heartland Institute as *Amicus Curiae* 20.

In the view of respondent's *amici*, this evidence shows that other remedies--such as *less* restriction on gun ownership, or liberal authorization of law-abiding citizens to carry concealed weapons--better fit the problem. See, *e.g.*, Criminologists' Brief 35-37 (advocating easily obtainable gun licenses); Brief for Southeastern Legal Foundation, Inc., et al. as *Amici Curiae* 15 (hereinafter SLF Brief) (advocating "widespread gun ownership" as a deterrent to crime); see also J. Lott, More Guns, Less Crime (2d ed. 2000). They further suggest that at a minimum the District fails to show that its *remedy,* the gun ban, bears a reasonable relation to the crime and accident *problems* that the District seeks to solve. [***227] See, *e.g.*, Brief for Respondent 59-61.

These empirically based arguments may have proved strong enough to convince many legislatures, as a matter of legislative policy, not to adopt total handgun bans. But the question here is whether they are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them. And that they are not. For one thing, they can lead us more deeply into the uncertainties that surround any effort to reduce crime, but they cannot prove either that handgun possession diminishes [**724] crime or that handgun bans are ineffective. The statistics do show a soaring District crime rate. And the District's crime rate went up after the District adopted its handgun ban. But, as students of elementary logic know, *after it* does not mean *because of it.* What would the District's crime rate have looked like without the ban? Higher? Lower? The same? Experts differ; and we, as judges, cannot say.

What about the fact that foreign nations with strict gun laws have higher crime rates? Which is the cause and which the effect? The proposition that strict gun laws *cause* crime is harder to accept than the proposition that strict gun laws in part grow out [***228] of the fact that a nation already has a higher crime rate. And we are then left with the same question as before: What would have happened to crime without the gun laws--a question that respondent and his *amici* do not convincingly answer.

Further, suppose that respondent's *amici* are right when they say that householders' possession of loaded handguns help to frighten away intruders. On that assumption, one must still ask whether that benefit is worth the potential death-related cost. And that is a question without a directly provable answer.

Finally, consider the claim of respondent's *amici* that handgun bans *cannot* work; there are simply too many illegal guns already in existence for a ban on legal guns to make a difference. In a word, they claim that, given the urban sea of pre-existing legal guns, criminals can readily find arms regardless. Nonetheless, a legislature might respond, we want to make an effort to try to dry up that urban sea, drop by drop. And none of the studies can show that effort is not worthwhile.

In a word, the studies to which respondent's *amici* point raise policy-related questions. They succeed in proving that the District's predictive judgments are controversial. [***229] But they do not by themselves show that those judgments are incorrect; nor do they demonstrate a consensus, academic or otherwise, supporting that conclusion.

Thus, it is not surprising that the District and its *amici* support the District's [*2860] handgun restriction with studies of their own. One in particular suggests that, statistically speaking, the District's law has indeed had positive life-saving effects. See Loftin, McDowall, Weirsema, & Cottey, Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia, 325 New England J. Med. 1615 (1991) (hereinafter Loftin study). Others suggest that firearm restrictions as a general matter reduce homicides, suicides, and accidents in the home. See, *e.g.*, Duggan, More Guns, More Crime, 109 J. Pol. Econ. 1086 (2001); Kellermann, Somes, Rivara, Lee, & Banton, Injuries and Deaths Due to Firearms in the Home, 45 J. Trauma: Injury, Infection & Critical Care 263 (1998); Miller,

Azrael, & Hemenway, Household Firearm Ownership and Suicide Rates in the United States, 13 Epidemiology 517 (2002). Still others suggest that the defensive uses of handguns are not as great in number as respondent's *amici* claim. See, *e.g.*, Brief for [***230] American Public Health Assn. et al. as *Amici Curiae* 17-19 (hereinafter APHA Brief) (citing studies).

Respondent and his *amici* reply to these responses; and in doing so, they seek to discredit as methodologically flawed the studies and evidence relied upon by the District. See, *e.g.*, Criminologists' Brief 9-17, 20-24; Brief for [**725] Assn. Am. Physicians and Surgeons, Inc., as *Amicus Curiae* 12-18; SLF Brief 17-22; Britt, Kleck, & Bordua, A Reassessment of the D.C. Gun Law, 30 Law & Soc'y Rev. 361 (1996) (criticizing the Loftin study). And, of course, the District's *amici* produce counterrejoinders, referring to articles that defend their studies. See, *e.g.*, APHA Brief 23, n 5 (citing McDowall, Loftin, & Wiersema, Using Quasi-Experiments to Evaluate Firearm Laws, 30 Law & Soc'y Rev. 381 (1996)).

The upshot is a set of studies and counterstudies that, at most, could leave a judge uncertain about the proper policy conclusion. But from respondent's perspective any such uncertainty is not good enough. That is because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact. And, given that constitutional allocation of decisionmaking responsibility, [***231] the empirical evidence presented here is sufficient to allow a judge to reach a firm *legal* conclusion.

In particular this Court, in *First Amendment* cases applying intermediate scrutiny, has said that our "sole obligation" in reviewing a legislature's "predictive judgments" is "to assure that, in formulating its judgments," the legislature "has drawn reasonable inferences based on substantial evidence." *Turner, 520 U.S., at 195, 117 S. Ct. 1174, 137 L. Ed. 2d 369* (internal quotation marks omitted). And judges, looking at the evidence before us, should agree that the District legislature's predictive judgments satisfy that legal standard. That is to say, the District's judgment, while open to question, is nevertheless supported by "substantial evidence."

There is no cause here to depart from the standard set forth in *Turner,* for the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. See *Nixon, 528 U.S., at 402, 120 S. Ct. 897, 145 L. Ed. 2d 886* (Breyer, J., concurring). In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local [***232] solutions. See *Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002)* (plurality opinion) ("[W]e must acknowledge that the Los Angeles City Council is in a better [*2861] position than the Judiciary to gather and evaluate data on local problems"); cf. DC Rep., at 67 (statement of Rep. Gude) (describing District's law as "a decision made on the local level after extensive debate and deliberations"). Different localities may seek to solve similar problems in different ways, and a "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)* (internal quotation marks omitted). "The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them." *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 575, n 8, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)* (Powell, J., dissenting) (citing The Federalist No. 17, p 107 (J. Cooke ed. 1961) (A. Hamilton)). We owe that democratic process some substantial weight in the constitutional calculus.

[**726] For these reasons, [***233] I conclude that the District's statute properly seeks to further the sort of life-preserving and public-safety interests that the Court has called "compelling." *Salerno, 481 U.S., at 750, 754, 107 S. Ct. 2095, 95 L. Ed. 2d 697.*

B

I next assess the extent to which the District's law burdens the interests that the *Second Amendment* seeks to protect. Respondent and his *amici*, as well as the majority, suggest that those interests include: (1) the preservation of a "well regulated Militia"; (2) safeguarding the use of firearms for sporting purposes, *e.g.*, hunting and marksmanship; and (3) assuring the use of firearms for self-defense. For argument's sake, I shall consider all three of those interests here.

1

The District's statute burdens the *Amendment's first* and primary objective hardly at all. As previously noted, there is general agreement among the Members of the Court that the principal (if not the only) purpose of the *Second Amendment* is found in the Amendment's text: the preservation of a "well regulated Militia." See *supra, at ____, 171 L. Ed. 2d, at 711.* What scant Court precedent there is on the *Second Amendment* teaches that the Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [***234] [militia] forces" and "must be interpreted and applied with that end in view." *Miller, 307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206.* Where

that end is implicated only minimally (or not at all), there is substantially less reason for constitutional concern. Compare *ibid.* ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the *Second Amendment* guarantees the right to keep and bear such an instrument").

To begin with, the present case has nothing to do with *actual* military service. The question presented presumes that respondent is "*not* affiliated with any state-regulated militia." *552 U.S. 1035, 128 S. Ct. 645, 169 L. Ed. 2d 417 (2007)* (emphasis added). I am aware of no indication that the District either now or in the recent past has called up its citizenry to serve in a militia, that it has any inkling of doing so anytime in the foreseeable future, or that this law must be construed to prevent the use of handguns during legitimate militia activities. Moreover, even if [*2862] the District were to call up its militia, respondent would not [***235] be among the citizens whose service would be requested. The District does not consider him, at 66 years of age, to be a member of its militia. See *D. C. Code § 49-401 (2001)* (militia includes only male residents ages 18 to 45); App. to Pet. for Cert. 120a (indicating respondent's date of birth).

Nonetheless, as some *amici* claim, the statute might interfere with training in the use of weapons, training useful for military purposes. The 19th-century constitutional scholar, Thomas Cooley, wrote that the *Second Amendment* protects "learning to handle and use [arms] in a way that makes those who keep them ready for their efficient use" during militia service. General Principles of Constitutional Law 271 (1880); *ante, at* ____, [**727] *171 L. Ed. 2d, at 673* (opinion of the Court); see also *ante, at* ____ - ____, *171 L. Ed. 2d, at 673-674* (citing other scholars agreeing with Cooley on that point). And former military officers tell us that "private ownership of firearms makes for a more effective fighting force" because "[m]ilitary recruits with previous firearms experience and training are generally better marksmen, and accordingly, better soldiers." Brief for Retired Military Officers as *Amici Curiae* 1-2 (hereinafter Military Officers' Brief). An *amicus* brief [***236] filed by retired Army generals adds that a "well-regulated militia--whether *ad hoc* or as part of our organized military --depends on recruits who have familiarity and training with firearms --rifles, pistols, and shotguns." Brief for Major General John D. Altenburg, Jr., et al. as *Amici Curiae* 4 (hereinafter Generals' Brief). Both briefs point out the importance of handgun training. Military Officers' Brief 26-28; Generals' Brief 4. Handguns are used in military service, see Military Officers' Brief 26, and "civilians who are familiar with handgun marksmanship and safety are much more likely to be able to safely and accurately fire a rifle or other firearm with minimal training upon entering military service," *id.*, at 28.

Regardless, to consider the military-training objective a modern counterpart to a similar militia-related colonial objective and to treat that objective as falling within the Amendment's primary purposes makes no difference here. That is because the District's law does not seriously affect military-training interests. The law permits residents to engage in activities that will increase their familiarity with firearms. They may register (and thus possess in their homes) weapons other [***237] than handguns, such as rifles and shotguns. See *D. C. Code §§ 7-2502.01, 7-2502.02(a)* (only weapons that cannot be registered are sawed-off shotguns, machineguns, short-barreled rifles, and pistols not registered before 1976); compare Generals' Brief 4 (listing "*rifles*, pistols, and *shotguns*" as useful military weapons (emphasis added). And they may operate those weapons within the District "for lawful recreational purposes." *§ 7-2507.02*; see also *§ 7-2502.01(b)(3)* (nonresidents "participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction," may carry even weapons not registered in the District). These permissible recreations plainly include actually using and firing the weapons, as evidenced by a specific D. C. Code provision contemplating the existence of local firing ranges. See *§ 7-2507.03*.

And while the District law prevents citizens from training with handguns *within the District*, the District consists of only 61.4 square miles of urban area. See Dept. of Commerce, Bureau of Census, United States: 2000 (pt. 1), p 11 (2002) (Table 8). The adjacent States do permit the use of handguns for target [***238] practice, and those States are only a brief subway ride away. See *Md. Crim. Law Code Ann. § 4-203(b)(4)* [*2863] *(Lexis Supp. 2007)* (general handgun restriction does not apply to "the wearing, carrying, or transporting by a person of a handgun used in connection with," *inter alia*, "a target shoot, formal or informal target practice, sport shooting event, hunting, [or] a Department of Natural Resources-sponsored firearms and hunter safety class"); *Va. Code Ann. § 18.2-287.4 (Lexis Supp. 2007)* (general [**728] restriction on carrying certain loaded pistols in certain public areas does not apply "to any person actually engaged in lawful hunting or lawful recreational shooting activities at an established shooting range or shooting contest"); Washington Metropolitan Area Transit Authority, Metrorail System Map, online at http://www.wmata.com/metrorail/systemmap.cfm.

Of course, a subway rider must buy a ticket, and the ride takes time. It also costs money to store a pistol,

say, at a target range, outside the District. But given the costs already associated with gun ownership and firearms training, I cannot say that a subway ticket and a short subway ride (and storage costs) create more than a minimal burden. Compare [***239] *Crawford v. Marion County Election Bd., 553 U.S. 181, 238-239, 128 S. Ct. 1610, 170 L. Ed. 2d 574, 613 (2008)* (Breyer, J., dissenting) (acknowledging travel burdens on indigent persons in the context of voting where public transportation options were limited). Indeed, respondent and two of his coplaintiffs below may well use handguns outside the District on a regular basis, as their declarations indicate that they keep such weapons stored there. See App. to Pet. for Cert. 77a (respondent); see also *id.*, at 78a, 84a (coplaintiffs). I conclude that the District's law burdens the *Second Amendment's* primary objective little, or not at all.

2

The majority briefly suggests that the "right to keep and bear Arms" might encompass an interest in hunting. See, *e.g.*, *ante, at ____, 171 L. Ed. 2d, at 662*. But in enacting the present provisions, the District sought to "take nothing away from sportsmen." DC Rep., at 33. And any inability of District residents to hunt near where they live has much to do with the jurisdiction's exclusively urban character and little to do with the District's firearm laws. For reasons similar to those I discussed in the preceding subsection--that the District's law does not prohibit possession of rifles or shotguns, and [***240] the presence of opportunities for sporting activities in nearby States--I reach a similar conclusion, namely, that the District's law burdens any sports-related or hunting-related objectives that the Amendment may protect little, or not at all.

3

The District's law does prevent a resident from keeping a loaded handgun in his home. And it consequently makes it more difficult for the householder to use the handgun for self-defense in the home against intruders, such as burglars. As the Court of Appeals noted, statistics suggest that handguns are the most popular weapon for self defense. See *478 F.3d at 400* (citing Kleck & Gertz, 86 J. Crim. L. & C., at 182-183). And there are some legitimate reasons why that would be the case: *Amici* suggest (with some empirical support) that handguns are easier to hold and control (particularly for persons with physical infirmities), easier to carry, easier to maneuver in enclosed spaces, and that a person using one will still have a hand free to dial 911. See ILEETA Brief 37-39; NRA Brief 32-33; see also *ante, at ____, 171 L. Ed. 2d, at 679*. But see Brief for Petitioners 54-55 (citing sources preferring shotguns and rifles to handguns for purposes of self-defense). To that extent [***241] the law burdens to some [*2864] degree an interest in self-defense that for present purposes I have assumed the Amendment seeks to further.

[**729] C

In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive, alternatives. Are there *other* potential measures that might similarly promote the same goals while imposing lesser restrictions? See *Nixon, 528 U.S., at 402, 120 S. Ct. 897, 145 L. Ed. 2d 886* (Breyer, J., concurring) ("existence of a clearly superior, less restrictive alternative" can be a factor in determining whether a law is constitutionally proportionate). Here I see none.

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

It does not help respondent's case to describe the District's objective more generally as an "effort to diminish the dangers associated with guns." That is because the very attributes that make handguns [***242] particularly useful for self-defense are also what make them particularly dangerous. That they are easy to hold and control means that they are easier for children to use. See Brief for American Academy of Pediatrics et al. as *Amici Curiae* 19 ("[C]hildren as young as three are able to pull the trigger of most handguns"). That they are maneuverable and permit a free hand likely contributes to the fact that they are by far the firearm of choice for crimes such as rape and robbery. See Weapon Use and Violent Crime 2 (Table 2). That they are small and light makes them easy to steal, see *supra, at ____, 171 L. Ed. 2d, at 721*, and concealable, cf. *ante, at ____, 171 L. Ed. 2d, at 679* (opinion of the Court) (suggesting that concealed-weapon bans are constitutional).

This symmetry suggests that any measure less restrictive in respect to the use of handguns for self-defense will, to that same extent, prove less effective in preventing the use of handguns for illicit purposes. If a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to commit suicide or engage in acts of domestic violence. See *supra, at ____, 171 L. Ed. 2d, at 721* (handguns prevalent in suicides); Brief for National Network to End Domestic [***243] Violence et al. as *Amici Curiae* 27 (handguns prevalent in domestic violence). If it is indeed the case, as the District believes, that the number of guns contributes to the number of gun-related crimes, accidents, and deaths, then, although

there may be less restrictive, *less effective* substitutes for an outright ban, there is no less restrictive *equivalent* of an outright ban.

Licensing restrictions would not similarly reduce the handgun population, and the District may reasonably fear that even if guns are initially restricted to law-abiding citizens, they might be stolen and thereby placed in the hands of criminals. See *supra, at ____, 171 L. Ed. 2d, at 721*. Permitting certain types of handguns, but not others, would affect the commercial market for handguns, but not their availability. And requiring safety devices such as trigger locks, or imposing safe-storage requirements would interfere with any self-defense interest while simultaneously leaving [**730] operable weapons in the hands of owners (or others capable of acquiring the weapon and disabling the safety device) who might use them for domestic violence or other crimes.

The absence of equally effective alternatives to a complete prohibition finds support in [***244] the empirical fact that other States [*2865] and urban centers prohibit particular types of weapons. Chicago has a law very similar to the District's, and many of its suburbs also ban handgun possession under most circumstances. See Chicago, Ill., Municipal Code §§ 8-20-030(k), 8-20-40, 8-20-50(c) (2008); Evanston, Ill., City Code § 9-8-2 (2007); Morton Grove, Ill., Village Code § 6-2-3(C) (2007); Oak Park, Ill., Village Code § 27-2-1 (2007); Winnetka, Ill., Village Ordinance § 9.12.020(B) (2008), online at http:// www.amlegal.com/library/il/ winnetka.shtml; Wilmette, Ill., Ordinance § 12-24(b) (2008), online at http:// www.amlegal.com/library/il/ wilmette.shtml. Toledo bans certain types of handguns. Toledo, Ohio, Municipal Code, § 549.25 (2008). And San Francisco in 2005 enacted by popular referendum a ban on most handgun possession by city residents; it has been precluded from enforcing that prohibition, however, by state-court decisions deeming it pre-empted by state law. See *Fiscal v. City and County of San Francisco, 158 Cal. App. 4th 895, 900-902, 70 Cal.Rptr. 3d 324, 326-328 (2008)*. (Indeed, the fact that as many as 41 States may pre-empt local gun regulation suggests that the absence of more regulation like the District's may perhaps have more to do with state law than with a lack of locally perceived [***245] need for them. See Legal Community Against Violence, Regulating Guns in America 14 (2006), http://www.lcav.org/Library/reports_analyses/National_Audit_Total_8.16.06.pdf.

In addition, at least six States and Puerto Rico impose general bans on certain types of weapons, in particular assault weapons or semiautomatic weapons. See *Cal. Penal Code Ann. § 12280(b) (West Supp. 2008)*; *Conn. Gen. Stat. § 53-202c (2007)*; *Haw. Rev. Stat. § 134-8 (1993)*; *Md. Crim. Law Code Ann. § 4-303(a) (Lexis 2002)*; *Mass. Gen. Laws, ch. 140, § 131M (West 2006)*; *N. Y. Penal Law Ann. § 265.02(7) (West Supp. 2008)*; *25 P.R. Laws Ann. § 456m (Supp. 2006)*; see also *18 U.S.C. § 922(o)* (federal machinegun ban). And at least 14 municipalities do the same. See Albany, N. Y., Municipal Code § 193-16(A) (2005); Aurora, Ill., Ordinance § 29-49(a) (2007); Buffalo, N. Y., City Code § 180-1(F) (2000); Chicago, Ill., Municipal Code §§ 8-24-025(a), 8-20-030(h); Cincinnati, Ohio, Municipal Code § 708-37(a) (Supp. 2008); Cleveland, Ohio, Ordinance § 628.03(a) (2007); Columbus, Ohio, City Code § 2323.31 (2008); Denver, Colo., Revised Municipal Code § 38-130(e) (2008); Morton Grove, Ill., Village Code § 6-2-3(B) (2007); *N.Y. City Admin. Code § 10-303.1 (1996 and Supp. 2007)*; [***246] Oak Park, Ill., *Village Code § 27-2-1 (2007)*; Rochester, N. Y., Code § 47-5(f) (2008), online at http:// www.ci. rochester.ny. us/index.cfm? id=112; South Bend, Ind., Ordinance §§ 13-97(b), 13-98 (2008) online at http://library2. municode.cumm// default/DocView 13974/i/2; Toledo, Ohio, Municipal Code § 549.23(a). These bans, too, suggest that there may be no substitute to an outright prohibition in cases where a governmental body has deemed a particular type of weapon especially dangerous.

D

The upshot is that the District's objectives are compelling; its predictive judgments as to its law's tendency to achieve those objectives are adequately supported; the law does impose a burden upon any self-defense interest that the Amendment seeks to secure; and there is no clear [**731] less restrictive alternative. I turn now to the final portion of the "permissible regulation" question: Does the District's law *disproportionately* burden Amendment-protected interests? Several considerations, taken together, convince me that it does not.

First, the District law is tailored to the life-threatening problems it attempts to address. The law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition. The area that falls within its scope is totally urban. Cf. *Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 563, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)* [***247] (varied [*2866] effect of statewide speech restriction in "rural, urban, or suburban" locales "demonstrates a lack of narrow tailoring"). That urban area suffers from a serious handgun-fatality problem. The District's law directly aims at that compelling problem. And there is no less restrictive way to achieve the problem-related benefits that it seeks.

Second, the self-defense interest in maintaining loaded handguns in the home to shoot intruders is not the

primary interest, but at most a subsidiary interest, that the *Second Amendment* seeks to serve. The *Second Amendment's* language, while speaking of a "Militia," says nothing of "self-defense." As Justice Stevens points out, the *Second Amendment's* drafting history shows that the language reflects the Framers' primary, if not exclusive, objective. See *ante, at ____ - ____, 171 L. Ed. 2d, at 693-700* (dissenting opinion). And the majority itself says that "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was *the* reason that right . . . was codified in a written Constitution." *Ante, at ____, 171 L. Ed. 2d, at 662* (emphasis added). The *way* in which the Amendment's operative clause seeks to promote that interest--by protecting a right "to keep and [***248] bear Arms"--may *in fact* help further an interest in self-defense. But a factual connection falls far short of a primary objective. The Amendment itself tells us that militia preservation was first and foremost in the Framers' minds. See *Miller, 307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206* ("With obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantee of the *Second Amendment* were made," and the Amendment "must be interpreted and applied with that end in view").

Further, any self-defense interest at the time of the framing could not have focused exclusively upon urban-crime-related dangers. Two hundred years ago, most Americans, many living on the frontier, would likely have thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways. See Dept. of Commerce, Bureau of Census, Population: 1790 to 1990 (1998) (Table 4), online at http://www.census.gov/population/censusdata/table-4.pdf (of the 3,929,214 Americans in 1790, only 201,655--about 5%--lived in urban areas). Insofar as the [***249] Framers focused at all on the tiny fraction of the population living in large cities, they would have been aware that these city dwellers were subject to firearm restrictions that their rural counterparts were not. See *supra, at ____ - ____, 171 L. Ed. 2d, at 712-713.* They are unlikely then to [**732] have thought of a right to keep loaded handguns in homes to confront intruders in urban settings as *central.* And the subsequent development of modern urban police departments, by diminishing the need to keep loaded guns nearby in case of intruders, would have moved any such right even further away from the heart of the Amendment's more basic protective ends. See, *e.g.*, Sklansky, The Private Police, *46 UCLA L. Rev. 1165, 1206-1207 (1999)* (professional urban police departments did not develop until roughly the mid-19th century).

Nor, for that matter, am I aware of any evidence that *handguns* in particular were central to the Framers' conception of the *Second Amendment.* The lists of militia-related weapons in the late-18th-century state statutes appear primarily to refer to other sorts of weapons, muskets in particular. See *Miller, supra, at 180-182, 59 S. Ct. 816, 83 L. Ed. 1206* (reproducing colonial militia laws). Respondent points out in his brief that the [***250] Federal Government and two States at the time of the founding had [*2867] enacted statutes that listed handguns as "acceptable" militia weapons. Brief for Respondent 47. But these statutes apparently found them "acceptable" only for certain special militiamen (generally, certain soldiers on horseback), while requiring muskets or rifles for the general infantry. See Act of May 8, 1792, ch. XXXIII, 1 Stat. 271; Laws of the State of North Carolina 592 (1791); First Laws of the State of Connecticut 150 (J. Cushing ed. 1982); see also 25 Journals of the Continental Congress, 1774-1789, pp. 741-742 (G. Hunt ed. 1922).

Third, irrespective of what the Framers *could have thought,* we know what they *did think.* Samuel Adams, who lived in Boston, advocated a constitutional amendment that would have precluded the Constitution from ever being "'construed'" to "'prevent the people of the United States, who are peaceable citizens, from keeping their own arms.'" 6 Documentary History of the Ratification of the Constitution 1453 (J. Kaminski & G. Saladino eds. 2000). Samuel Adams doubtless knew that the Massachusetts Constitution contained somewhat similar protection. And he doubtless knew that Massachusetts law prohibited Bostonians from keeping [***251] loaded guns in the house. So how could Samuel Adams have advocated such protection *unless* he thought that the protection was *consistent* with local regulation that seriously impeded urban residents from using their arms against intruders? It seems unlikely that he meant to deprive the Federal Government of power (to enact Boston-type weapons regulation) that he knew Boston had and (as far as we know) he would have thought constitutional under the Massachusetts Constitution. Indeed, since the District of Columbia (the subject of the Seat of Government Clause, *U.S. Const., Art. I, § 8, cl. 17*) was the only *urban* area under direct federal control, it seems unlikely that the Framers thought about *urban* gun control at all. Cf. *Palmore v. United States, 411 U.S. 389, 398, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973)* (Congress can "legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it").

Of course the District's law and the colonial Boston law are not identical. But the Boston law disabled an even wider class of weapons (indeed, all firearms). And

its existence shows at [***252] the least that local legislatures could [**733] impose (as here) serious restrictions on the right to use firearms. Moreover, as I have said, Boston's law, though highly analogous to the District's, was not the *only* colonial law that could have impeded a homeowner's ability to shoot a burglar. Pennsylvania's and New York's laws could well have had a similar effect. See *supra, at ____ - ____, 171 L. Ed. 2d, at 713*. And the Massachusetts and Pennsylvania laws were not only thought consistent with an *unwritten* common-law gun-possession right, but also consistent with *written* state constitutional provisions providing protections similar to those provided by the Federal *Second Amendment*. See *supra, at ____ - ____, 171 L. Ed. 2d, at 713*. I cannot agree with the majority that these laws are largely uninformative because the penalty for violating them was civil, rather than criminal. *Ante, at ____ - ____, 171 L. Ed. 2d, at 682*. The Court has long recognized that the exercise of a constitutional right can be burdened by penalties far short of jail time. See, *e.g., Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943)* (invalidating $7 per week solicitation fee as applied to religious group); see also *Forsyth County v. Nationalist Movement, 505 U.S. 123, 136, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992)* ("A tax based on the content of [***253] speech does not become more constitutional because it is a small tax").

[*2868] Regardless, why would the majority require a precise colonial regulatory analogue in order to save a modern gun regulation from constitutional challenge? After all, insofar as we look to history to discover how we can constitutionally regulate a right to self-defense, we must look, not to what 18th-century legislatures actually *did* enact, but to what they would have thought they *could* enact. There are innumerable policy-related reasons why a legislature might not act on a particular matter, despite having the power to do so. This Court has "frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States v. Wells, 519 U.S. 482, 496, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997)* (internal quotation marks and brackets omitted). It is similarly "treacherous" to reason from the fact that colonial legislatures *did not* enact certain kinds of legislation to a conclusion that a modern legislature *cannot* do so. The question should not be whether a modern restriction on a right to self-defense *duplicates* a past one, but whether that restriction, when compared with restrictions originally thought [***254] possible, enjoys a similarly strong justification. At a minimum that similarly strong justification is what the District's modern law, compared with Boston's colonial law, reveals.

Fourth, a contrary view, as embodied in today's decision, will have unfortunate consequences. The decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. See *ante, at ____, 171 L. Ed. 2d, at 678, and n 26*. And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time.

As important, the majority's decision threatens severely to limit the ability of more knowledgeable, democratically [**734] elected officials to deal with gun-related problems. The majority says that it leaves the District "a variety of tools for combating" such problems. *Ante, at ____, 171 L. Ed. 2d, at 684*. It fails to list even one seemingly adequate replacement for the law it strikes down. I can understand how reasonable individuals can disagree about the merits of strict gun control [***255] as a crime-control measure, even in a totally urbanized area. But I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order.

V

The majority derides my approach as "judge-empowering." *Ante, at ____, 171 L. Ed. 2d, at 683*. I take this criticism seriously, but I do not think it accurate. As I have previously explained, this is an approach that the Court has taken in other areas of constitutional law. See *supra, at ____ - ____, 171 L. Ed. 2d, at 716*. Application of such an approach, of course, requires judgment, but the very nature of the approach --requiring careful identification of the relevant interests and evaluating the law's effect upon them--limits the judge's choices; and the method's necessary transparency lays bare the judge's reasoning for all to see and to criticize.

The majority's methodology is, in my view, substantially less transparent than mine. At a minimum, I find it difficult to understand the reasoning that seems to underlie certain conclusions that it reaches.

[*2869] The majority [***256] spends the first 54 pages of its opinion attempting to rebut Justice Stevens' evidence that the Amendment was enacted with a purely militia-related purpose. In the majority's view, the Amendment also protects an interest in armed personal self-defense, at least to some degree. But the majority does not tell us precisely what that interest is. "Putting

all of [the *Second Amendment's*] textual elements together," the majority says, "we find that they guarantee the individual right to possess and carry weapons in case of confrontation." *Ante, at ____, 171 L. Ed. 2d, at 657.* Then, three pages later, it says that "we do not read the *Second Amendment* to permit citizens to carry arms for *any sort* of confrontation." *Ante, at ____, 171 L. Ed. 2d, at 659.* Yet, with one critical exception, it does not explain which confrontations count. It simply leaves that question unanswered.

The majority does, however, point to one type of confrontation that counts, for it describes the Amendment as "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Ante, at ____, 171 L. Ed. 2d, at 683.* What is its basis for finding that to be the core of the *Second Amendment* right? The only historical sources identified [***257] by the majority that even appear to touch upon that specific matter consist of an 1866 newspaper editorial discussing the Freedmen's Bureau Act, see *ante, at ____, 171 L. Ed. 2d, at 671*, two quotations from that 1866 Act's legislative history, see *ante, at ____ - ____, 171 L. Ed. 2d, at 671-672*, and a 1980 state-court opinion saying that in colonial times the same were used to defend the home as to maintain the militia, see [**735] *ante, at ____, 171 L. Ed. 2d, at 677.* How can citations such as these support the far-reaching proposition that the *Second Amendment's* primary concern is not its stated concern about the militia, but rather a right to keep loaded weapons at one's bedside to shoot intruders?

Nor is it at all clear to me how the majority decides *which* loaded "arms" a homeowner may keep. The majority says that that Amendment protects those weapons "typically possessed by law-abiding citizens for lawful purposes." *Ante, at ____, 171 L. Ed. 2d, at 677.* This definition conveniently excludes machineguns, but permits handguns, which the majority describes as "the most popular weapon chosen by Americans for self-defense in the home." *Ante, at ____, 171 L. Ed. 2d, at 680*; see also *ante, at ____ - ____, 171 L. Ed. 2d, at 677-678.* But what sense does this approach make? According to the majority's reasoning, if Congress and the States lift restrictions on [***258] the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the *Second Amendment does*, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.

I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive *Second Amendment* scrutiny. These consist of (1) "prohibitions on carrying concealed weapons"; (2) "prohibitions on the possession of firearms by felons"; (3) "prohibitions on the possession of firearms by . . . the mentally ill"; (4) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (5) government [***259] "conditions and qualifications" attached to "the commercial sale of arms." *Ante, at ____, 171 L. Ed. 2d, at 678.* Why these? Is it [*2870] that similar restrictions existed in the late-18th century? The majority fails to cite any colonial analogues. And even were it possible to find analogous colonial laws in respect to all these restrictions, why should these colonial laws count, while the Boston loaded-gun restriction (along with the other laws I have identified) apparently does not count? See *supra, at ____ - ____, ____ - ____, 171 L. Ed. 2d, at 713, 732-733.*

At the same time the majority ignores a more important question: Given the purposes for which the Framers enacted the *Second Amendment*, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pick up a loaded gun on their parents' bedside table? That they (who certainly showed concern for the risk of fire, see *supra, at ____ - ____, 171 L. Ed. 2d, at* [**736] *713*) would have lacked concern for the risk [***260] of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring? Unless we believe that they intended future generations to ignore such matters, answering questions such as the questions in this case requires judgment--judicial judgment exercised within a framework for constitutional analysis that guides that judgment and which makes its exercise transparent. One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit.*

The argument about method, however, is by far the less important argument surrounding today's decision. Far more important are the unfortunate consequences that today's decision is likely to spawn. Not least of these, as I have said, is the fact that the decision threatens to throw into doubt the constitutionality of gun laws throughout the United States. I can find no sound legal

basis for launching the courts on so formidable and potentially dangerous a mission. In my view, there simply is no untouchable constitutional right guaranteed by the *Second Amendment* to keep loaded handguns in the house in crime-ridden urban areas.

VI

For these reasons, I conclude that the District's measure is a [***261] proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it. And, for these reasons as well as the independently sufficient reasons set forth by Justice Stevens, I would find the District's measure consistent with the *Second Amendment's* demands.

With respect, I dissent.

REFERENCES

U.S.C.S., *Constitution, Amendment 2*

2 Antieau on Local Government Law § 29.24 (Matthew Bender 2d ed.)

L Ed Digest, Weapons and Firearms § 1

L Ed Index, Weapons and Firearms

Supreme Court's construction and application of Federal Constitution's militia clauses (Art. I, § 8, cl. 15 and 16), allocating power over militia between Congress and states. *110 L. Ed. 2d 738.*

Supreme Court's views on weight to be accorded to pronouncements of legislature, or members of legislature, respecting meaning or intent of previously enacted statute. *56 L. Ed. 2d 918.*

Supreme Court's views of *Fifth Amendment's double jeopardy clause* pertinent to or applied in federal criminal cases. *50 L. Ed. 2d 830.*

The Supreme Court and the right of free speech and press. *93 L. Ed. 1151, 2 L. Ed. 2d 1706, 11 L. Ed. 2d 1116, 16 L. Ed. 2d 1053, 21 L. Ed. 2d 976.*

Accused's right to counsel under the Federal Constitution--Supreme Court cases. *93 L. Ed. 137, 2 L. Ed. 2d 1644, 9 L. Ed. 2d 1260, 18 L. Ed. 2d 1420.*

EXHIBIT “15”

LEXSEE 130 S.CT. 3020

OTIS MCDONALD, ET AL., PETITIONERS v. CITY OF CHICAGO, ILLINOIS, ET AL.

No. 08-1521

SUPREME COURT OF THE UNITED STATES

130 S. Ct. 3020; 177 L. Ed. 2d 894; 2010 U.S. LEXIS 5523; 22 Fla. L. Weekly Fed. S 619

March 2, 2010, Argued
June 28, 2010, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [***1]

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

NRA of Am., Inc. v. City of Chicago, 567 F.3d 856, 2009 U.S. App. LEXIS 11721 (7th Cir. Ill., 2009)

DISPOSITION: Reversed and remanded.

SYLLABUS

[*3021] Two years ago, in *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637*, 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 [***2] precedent. The Seventh Circuit affirmed, relying on three 19th-century cases -- *United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588*, *Presser v. Illinois, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615*, and *Miller v. Texas, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812* -- 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, 83 U.S. 36, 16 Wall. 36, 21 L. Ed. 394*.

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) [***3] 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, 32 U.S. 243, 7 Pet. 243, 247, 8 L. Ed. 672*, 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 [*3022] 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, 83 U.S. 36, 21 L. Ed. 394*, and that the fundamental rights predating the creation of the Federal Government were not protected [***4] by the Clause, *id., at 76, 83 U.S. 36, 21 L. Ed. 394*. Under this narrow reading, the Court held that the Privileges or Immunities Clause protects only very limited rights. *Id., at 79-80, 83 U.S. 36, 21 L. Ed. 394*. Subsequently, the Court held that the *Second Amendment* applies only to the Federal Government in *Cruikshank, 92 U.S. 542, 23 L. Ed. 588*, *Presser, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615*, and *Miller, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812*, 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, 4 S. Ct. 111, 28 L. Ed. 232*. 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, 99, 29 S. Ct. 14, 53 L. Ed. 97*. Second, the Court explained that the only rights due process protected against state infringement were those "of such a nature that they [***5] 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, 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*. 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, 666, 45 S. Ct. 625, 69 L. Ed. 1138*; *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357*, 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, 71-72, 67 S. Ct. 1672, 91 L. Ed. 1903* (Black, J., dissenting), but the Court never has embraced that theory. Pp. 13-15.

(3) The Court eventually moved in the direction [***6] 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, 341, 83 S. Ct. 792, 9 L. Ed. 2d 799*. 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, 88 S. Ct. 1444, 20 L. Ed. 2d 491*. 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 [*3023] must "all . . . be enforced against the States under the *Fourteenth Amendment* according to the same standards that protect those personal rights against federal encroachment." *Malloy v. Hogan, 378 U.S. 1, 10, 84 S. Ct. 1489, 12 L. Ed. 2d 653*. 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, 62 S. Ct. 1252, 86 L. Ed. 1595*. Pp. 15-19.

(d) The *Fourteenth Amendment* makes the [***7] *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, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491*, 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, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*. *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 ___, ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637.* 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 ___, ___-___, 128 S. Ct. 2783, 171 L. Ed. 2d 637.* It thus concluded that citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." *Id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637. Heller* also clarifies that this right is "deeply rooted in this Nation's history and traditions," *Glucksberg, supra, at 721.* [***8] *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 [***9] in systematic efforts to disarm and injure African Americans, see *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637.* 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,* [*3024] *458 U.S. 375, 389, 102 S. Ct. 3141, 73 L. Ed. 2d 835.* 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,* [***10] 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 [***11] 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. ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637,* 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, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491,* and "deeply rooted in this Nation's history and tradi-

tions," *Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.* 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 [***12] 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 ___,* [*3025] *128 S. Ct. 2783, 171 L. Ed. 2d 637.* 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.

COUNSEL: **Alan Gura** argued the cause for petitioners.

Paul D. Clement argued the cause for respondents National Rifle Association, Inc. et al., in support of petitioners. **James A. Feldman** argued the cause for respondents City of Chicago, Illinois, et al.

JUDGES: 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 [***13] 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.

OPINION BY: ALITO

OPINION

[*3026] [**903] 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. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (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 [***14] Government and the States. Applying the standard that is well established in our case law, we hold that the *Second Amendment* right is fully applicable to the States.

I

Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson (Chicago petitioners) are Chicago residents who would like to keep handguns in their homes for self-defense [**904] but are prohibited from doing so by Chicago's firearms laws. A City ordinance provides that "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm." Chicago, Ill., Municipal Code § 8-20-040(a) (2009). The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City. § 8-20-050(c). Like Chicago, Oak Park makes it "unlawful for any person to possess . . . any firearm," a term that includes "pistols, revolvers, guns and small arms . . . commonly known as handguns." Oak Park, Ill., Municipal Code §§ 27-2-1 (2007), 27-1-1 (2009).

Chicago enacted its handgun ban to protect its residents "from the loss of property and injury or death from firearms." See Chicago, Ill., Journal of Proceedings of the [***15] 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 [1] and that Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities. [2]

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

2 Brief for Buckeye Firearms Foundation, Inc., et al. as *Amici Curiae* 8-9 ("In 2002 and again in

2008, Chicago had more murders than any other city in the U.S., including the much larger Los Angeles and New York" (internal quotation marks omitted)); see also Brief for International Law Enforcement Educators and Trainers Association et al. as *Amici Curiae* 17-21, and App. A (providing comparisons of Chicago's rates of assault, murder, and robbery to average crime rates in 24 other large cities).

Several of the Chicago petitioners have been the targets of threats and violence. For instance, Otis McDonald, who [***16] is in his [*3027] late seventies, lives in a high-crime neighborhood. He is a community activist involved with alternative policing strategies, and his efforts to improve his neighborhood have subjected him to violent threats from drug dealers. App. 16-17; Brief for State Firearm Associations as *Amici Curiae* 20-21; Brief for State of Texas et al. as *Amici Curiae* 7-8. Colleen Lawson is a Chicago resident whose home has been targeted by burglars. "In Mrs. Lawson's judgment, possessing a handgun in Chicago would decrease her chances of suffering serious injury or death should she ever be threatened again in her home." [3] McDonald, Lawson, and the other Chicago petitioners own handguns that they store outside of the city limits, but they would like to keep their handguns in their homes for protection. See App. 16-19, 43-44 (McDonald), 20-24 (C. Lawson), 19, 36 (Orlov), 20-21, 40 (D. Lawson).

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

After our decision in *Heller*, the Chicago petitioners and two groups [4] filed suit against the City in the United States District Court for the Northern District of Illinois. They sought a declaration that the handgun ban and several related Chicago [***17] ordinances violate the *Second* and *Fourteenth Amendments to the United States Constitution*. Another action challenging the Oak Park law was filed in the same District Court [**905] by the National Rifle Association (NRA) and two Oak Park residents. In addition, the NRA and others filed a third action challenging the Chicago ordinances. All three cases were assigned to the same District Judge.

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

The District Court rejected plaintiffs' argument that the Chicago and Oak Park laws are unconstitutional. See App. 83-84; *NRA, Inc. v. Oak Park, 617 F. Supp. 2d 752, 754 (ND Ill. 2008)*. The court noted that the Seventh Circuit had "squarely upheld the constitutionality of a ban on handguns a quarter century ago," *id., at 753* (citing *Quilici v. Morton Grove, 695 F.2d 261 (CA7 1982))*, and that *Heller* had explicitly refrained from "opin[ing] on the subject of incorporation vel non of the *Second Amendment*," *NRA, 617 F. Supp. 2d, at 754*. The court observed that a district judge has a "duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point [***18] in a different direction." *Id., at 753*.

The Seventh Circuit affirmed, relying on three 19th-century cases -- *United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1876)*, *Presser v. Illinois, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615 (1886)*, and *Miller v. Texas, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812 (1894)* -- that were decided in the wake of this Court's interpretation of the Privileges or Immunities Clause of the *Fourteenth Amendment* in the *Slaughter-House Cases, 83 U.S. 36, 16 Wall. 36, 21 L. Ed. 394 (1873)*. The Seventh Circuit described the rationale of those cases as "defunct" and recognized that they did not consider the question whether the *Fourteenth Amendment's Due Process Clause* incorporates the *Second Amendment* right to keep and bear arms. *NRA, Inc. v. Chicago, 567 F.3d 856, 857, 858 (2009)*. Nevertheless, the Seventh Circuit observed that it was obligated to follow Supreme Court precedents that have "direct application," and it declined to predict how the *Second Amendment* would fare under this Court's modern "selective incorporation" approach. *Id., at 857-858* (internal quotation marks omitted).

[*3028] We granted certiorari. *557 U.S. ___, 130 S. Ct. 48, 174 L. Ed. 2d 632 (2009)*.

II

A

Petitioners argue that the Chicago and Oak Park laws violate the right to keep and bear arms for two reasons. Petitioners' primary [***19] submission is that this right is among the "privileges or immunities of citizens of the United States" and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases, supra*, should now be rejected. As a secondary argument, petitioners contend that the *Fourteenth Amendment's Due Process Clause* "incorporates" the *Second Amendment* right.

Chicago and Oak Park (municipal respondents) maintain that a right set out in the *Bill of Rights* applies to the States only if that right is an indispensable attribute of *any* "'civilized'" legal system. Brief for Municipal Respondents 9. If it is possible to imagine a civilized country that does not recognize the right, the municipal respondents tell us, then that right is not protected by due process. *Ibid.* And since there are civilized countries that ban or strictly regulate the private possession of

handguns, the municipal respondents maintain that due process does not preclude such [**906] measures. *Id.*, at 21-23. In light of the parties' far-reaching arguments, we begin by recounting this Court's analysis over the years of the relationship between the provisions of the *Bill of Rights* and the States.

B

The *Bill of Rights*, [***20] including the *Second Amendment*, originally applied only to the Federal Government. In *Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 7 Pet. 243, 8 L. Ed. 672 (1833)*, the Court, in an opinion by Chief Justice Marshall, explained that this question was "of great importance" but "not of much difficulty." *Id., at 247, 7 Pet. 243, 8 L. Ed. 672*. In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government. See also *Lessee of Livingston v. Moore, 32 U.S. 469, 7 Pet. 469, 551-552, 8 L. Ed. 751 (1833)* ("[I]t is now settled that those amendments [in the *Bill of Rights*] do not extend to the states").

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

Four years after the adoption of the *Fourteenth Amendment*, this Court was asked to interpret the Amendment's reference to "the privileges or immunities [***21] 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, 83 U.S. 36, 21 L. Ed. 394*. 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, 83 U.S. 36, 21 L. Ed. 394*.

In drawing a sharp distinction between the rights of federal and state citizenship, [*3029] the Court relied on two principal arguments. First, the Court emphasized that the *Fourteenth Amendment's* Privileges or Immunities Clause spoke of "the privileges or immunities of *citizens of the United States*," and the Court contrasted this phrasing with the wording in the first sentence of the *Fourteenth Amendment* and in the Privileges and Immunities Clause of Article IV, both of which refer to *state* citizenship. [5] [***22] (Emphasis added.) Second, the Court stated that a contrary reading would "radically chang[e] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people," and the Court refused to conclude [**907] that such a change had been made "in the absence of language which expresses such a purpose too clearly to admit of doubt." *Id., at 78, 83 U.S. 36, 21 L. Ed. 394*. Finding the phrase "privileges or immunities of citizens of the United States" lacking by this high standard, the Court reasoned that the phrase must mean something more limited.

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

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 [***23] 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, 83 U.S. 36, 21 L. Ed. 394* (internal quotation marks omitted).

Finding no constitutional protection against state intrusion of the kind envisioned by the Louisiana statute, the Court upheld the statute. Four Justices dissented. Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, criticized the majority for reducing the *Fourteenth Amendment's* Privileges or Immunities Clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *Id., at 96, 83 U.S. 36, 21 L. Ed. 394*; see also *id., at 104, 83 U.S. 36, 21 L. Ed. 394*. Justice Field opined that the Privileges or Immunities Clause protects rights that are "in their nature . .

. fundamental," including the right of every man to pursue his profession without the imposition of unequal or discriminatory restrictions. *Id., at 96-97, 83 U.S. 36, 21 L. Ed. 394.* Justice Bradley's dissent observed that "we are not bound to resort to implication . . . to [***24] find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." *Id., at 118, 83 U.S. 36, 21 L. Ed. 394.* Justice Bradley would have construed the Privileges or Immunities Clause to include those rights enumerated in the Constitution as well as some unenumerated rights. *Id., at 119, 83 U.S. 36, 21 L. Ed. 394.* 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, 83 U.S. 36, 21 L. Ed. 394* (dissenting opinion).

Today, many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation. See, *e.g., Saenz v. Roe, 526 U.S. 489, 522, n. 1, 527, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999)* (THOMAS, J., dissenting) (scholars of the *Fourteenth Amendment* agree "that the Clause does not mean what the Court said it meant in 1873"); Amar, Substance and Method in the Year 2000, *28 Pepperdine L. Rev. 601, 631, n. 178* [*3030] *(2001)* ("Virtually no serious modern scholar -- left, right, and center -- thinks that this [interpretation] is a plausible reading of the Amendment"); Brief for Constitutional Law Professors as *Amici Curiae* 33 (claiming an "overwhelming consensus among leading constitutional scholars" [***25] that the opinion is "egregiously wrong"); C. Black, A New Birth of Freedom 74-75 (1997).

Three years after the decision in the *Slaughter-House Cases,* the Court decided *Cruikshank,* the first of the three 19th-century cases on which the [**908] Seventh Circuit relied. *92 U.S. 542, 23 L. Ed. 588.* In that case, the Court reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on Easter Sunday 1873. Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men. [6] Cruikshank himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed. [7] Ninety-seven men were indicted for participating in the massacre, but only nine went to trial. Six of the nine were acquitted of all charges; the remaining three were acquitted of murder but convicted under the Enforcement Act of 1870, 16 Stat. 140, for banding and conspiring together to deprive their victims of various constitutional rights, including the right to bear arms. [8]

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

7 See Lane, *supra,* at 106.

8 *United States v. Cruikshank, 92 U.S. 542, 544-545, 23 L. Ed. 588* [***26] (statement of the case), 548, 553 (opinion of the Court) (1875); Lawrence, Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes, *67 Tulane L. Rev. 2113, 2153 (1993).*

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, 544-545, 23 L. Ed. 588.* 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, 544-545, 23 L. Ed. 588.* "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, 6 S. Ct. 580, 29 L. Ed. 615 (1886),* and *Miller v. Texas, 153 U.S. 535, 538, 14 S. Ct. 874, 38 L. Ed. 812 (1894),* reaffirmed that the *Second Amendment* applies only to the Federal Government." *Heller, 554 U.S., at ___, n. 23, 128 S. Ct. 2783, 171 L. Ed. 2d 637.*

C

As previously noted, the Seventh Circuit concluded that *Cruikshank, Presser,* and *Miller* doomed petitioners' claims at the Court of Appeals level. Petitioners argue, however, that we should overrule those decisions and hold [***27] that the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." In petitioners' view, the Privileges or Immunities Clause protects all of the rights set out in the *Bill of Rights,* as well as some others, see Brief for Petitioners 10, 14, 15-21, but petitioners are unable to identify the Clause's full scope, Tr. of Oral Arg. 5-6, 8-11. Nor is there any consensus on that question among the scholars who agree that the *Slaughter-House Cases'* interpretation is flawed. See *Saenz, supra, at 522, n. 1, 119 S. Ct. 1518, 143 L. Ed. 2d 689* (THOMAS, J., dissenting).

We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the [*3031] *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,* [**909] *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, 128 S. Ct. 2783, 171 L. Ed. 2d 637.* [***28] None of those cases "engage[d] in the sort of *Fourteenth Amendment* inquiry required by our later cases." *Ibid.* As explained more fully below, *Cruikshank*, *Presser*, and *Miller* all preceded the era in which the Court began the process of "selective incorporation" under the *Due Process Clause*, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.

Indeed, *Cruikshank* has not prevented us from holding that other rights that were at issue in that case are binding on the States through the *Due Process Clause*. In *Cruikshank*, the Court held that the general "right of the people peaceably to assemble for lawful purposes," which is protected by the *First Amendment*, applied only against the Federal Government and not against the States. See *92 U.S., at 551-552, 544-545, 23 L. Ed. 588.* Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a "fundamental righ[t] . . . safeguarded by the *due process clause of the Fourteenth Amendment.*" *De Jonge v. Oregon, 299 U.S. 353, 364, 57 S. Ct. 255, 81 L. Ed. 278 (1937).* We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the *Due Process Clause*.

D

1

In [***29] 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, 4 S. Ct. 111, 28 L. Ed. 232 (1884)* (due process does not require grand jury indictment); *Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (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, 29 S. Ct. 14, 53 L. Ed. 97 (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, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947); Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942); Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937); Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).* While it was "possible that some of the personal [***30] 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, 29 S. Ct. 14, 53 L. Ed. 97.*

[*3032] The Court used different formulations [**910] 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, 29 S. Ct. 14, 53 L. Ed. 97* (internal quotation marks omitted). In *Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (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, 58 S. Ct. 149, 82 L. Ed. 288.*

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 [***31] protection." *Duncan v. Louisiana, 391 U.S. 145, 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (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, 17 S. Ct. 581, 41 L. Ed. 979.* 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, 29 S. Ct. 14, 53 L. Ed. 97.*

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, 45 S. Ct. 625, 69 L. Ed. 1138 (1925)* (freedom of speech and press); *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)* (same); *Powell, supra* (assistance of counsel in capital cases); *De Jonge, supra* (freedom of assembly); *Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)* (free exercise of religion). But others [***32]

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, 62 S. Ct. 1252, 86 L. Ed. 1595*. Similarly, in *Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (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* [**911] " but that the exclusionary rule, which applied in federal cases, did not apply to the States. *Id., at 27-28, 33, 69 S. Ct. 1359, 93 L. Ed. 1782*.

2

An alternative theory [***33] regarding the relationship between the *Bill of Rights* and [*3033] *§ 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, 67 S. Ct. 1672, 91 L. Ed. 1903* (Black, J., dissenting); *Duncan, supra, at 166, 88 S. Ct. 1444, 20 l. Ed. 2d 491* (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the *Fourteenth Amendment* espoused the view that the Amendment made the *Bill of Rights* applicable to the States and, in so doing, overruled this Court's decision in *Barron*. [9] *Adamson, 332 U.S., at 72, 67 S. Ct. 1672, 91 L. Ed. 1903* (dissenting opinion). [10] Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory.

9 Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of "the personal rights guarantied and secured by the first eight amendments of the Constitution." Cong. Globe, 39th Cong., 1st Sess., 2765 (1866) (hereinafter 39th Cong. Globe). Representative John Bingham, the principal author of the text of *§ 1*, said that the Amendment would "arm the Congress . . . with the [***34] power to enforce the *bill of rights* as it stands in the Constitution today." *Id.*, at 1088; see also *id.*, at 1089-1090; A. Amar, The *Bill of Rights*: Creation and Reconstruction 183 (1998) (hereinafter Amar, *Bill of Rights*). After ratification of the Amendment, Bingham maintained the view that the rights guaranteed by *§ 1 of the Fourteenth Amendment* "are chiefly defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42d Cong., 1st Sess., App. 84 (1871). Finally, Representative Thaddeus Stevens, the political leader of the House and acting chairman of the Joint Committee on Reconstruction, stated during the debates on the Amendment that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States." 39th Cong. Globe 2459; see also M. Curtis, No State Shall Abridge: The *Fourteenth Amendment* and the *Bill of Rights* 112 (1986) (counting at least 30 statements during the debates in Congress interpreting *§ 1* to incorporate the *Bill of Rights*); Brief for Constitutional Law Professors as *Amici Curiae* 20 (collecting authorities [***35] and stating that "[n]ot a single senator or representative disputed [the incorporationist] understanding" of the *Fourteenth Amendment*).

10 The municipal respondents and some of their *amici* dispute the significance of these statements. They contend that the phrase "privileges or immunities" is not naturally read to mean the rights set out in the first eight Amendments, see Brief for Historians et al. as *Amici Curiae* 13-16, and that "there is 'support in the legislative history for no fewer than four interpretations of the . . . Privileges or Immunities Clause.'" Brief for Municipal Respondents 69 (quoting Currie, The Reconstruction Congress, *75 U. Chi. L. Rev. 383, 406 (2008)*; brackets omitted). They question whether there is sound evidence of "'any strong public awareness of nationalizing the *entire Bill of Rights*.'" Brief for Municipal Respondents 69 (quoting Wildenthal, Nationalizing the *Bill of Rights*: Revisiting the Original Understanding of the *Fourteenth Amendment* in 1866-67, *68 Ohio St. L. J. 1509, 1600 (2007)*). Scholars have also disputed the total incorporation theory. See, *e.g.*, Fairman, Does the *Fourteenth Amendment* Incorporate the *Bill of Rights*? 2 Stan. L. Rev. 5 (1949); [***36] Berger, Incorporation of the *Bill of Rights in the Fourteenth Amendment*: A Nine-Lived Cat, 42 Ohio St. L. J. 435 (1981).

Proponents of the view that *§ 1 of the Fourteenth Amendment* makes all of the provisions of

the *Bill of Rights* applicable to the States respond that the terms privileges, immunities, and rights were used interchangeably at the time, see, *e.g.*, Curtis, *supra*, at 64-65, and that the position taken by the leading congressional proponents of the Amendment was widely publicized and understood, see, *e.g.*, *Wildenthal, supra, at 1564-1565, 1590*; Hardy, Original Popular Understanding of the *Fourteenth Amendment* as Reflected in the Print Media of 1866-1868, *30 Whittier L. Rev. 695 (2009)*. A number of scholars have found support for the total incorporation of the *Bill of Rights*. See Curtis, *supra*, at 57-130; Aynes, On Misreading John Bingham and the *Fourteenth Amendment*, *103 Yale L. J. 57, 61 (1993)*; see also Amar, *Bill of Rights* 181-230. We take no position with respect to this academic debate.

[*3034] [**912] 3

While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," *i.e.*, the Court [***37] 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, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)*; *Malloy v. Hogan, 378 U.S. 1, 5-6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)*; *Pointer v. Texas, 380 U.S. 400, 403-404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)*; *Washington v. Texas, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)*; *Duncan, 391 U.S., at 147-148, 88 S. Ct. 1444, 20 L. Ed. 2d 491*; *Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)*.

The decisions during this time abandoned three of the previously noted characteristics of the earlier period. [11] The Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection." *Duncan, 391 U.S., at 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*. 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, 88 S. Ct. 1444, 20 L. Ed. 2d 491*; see also *id., at 148, 88 S. Ct. 1444, 20 L. Ed. 2d 491* (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)).

11 By contrast, the Court has never retreated from the proposition that the Privileges or Immunities Clause and the *Due Process Clause* [***38] present different questions. And in recent cases addressing unenumerated rights, we have required that a right also be "implicit in the concept of ordered liberty." See, *e.g.*, *Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)* (internal quotation marks omitted).

The Court also shed any reluctance to hold that rights guaranteed by the *Bill of Rights* met the requirements for protection under the *Due Process Clause*. The Court eventually incorporated almost all of the provisions of the *Bill of Rights*. [12] Only [*3035] a [**913] handful of the *Bill of Rights* protections remain unincorporated. [13]

12 With respect to the *First Amendment*, see *Everson v. Board of Ed. of Ewing, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947)* (*Establishment Clause*); *Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)* (*Free Exercise Clause*); *De Jonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937)* (freedom of assembly); *Gitlow v. New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925)* (free speech); *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)* (freedom of the press).

With respect to the *Fourth Amendment*, see *Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)* (warrant requirement); *Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961)* (exclusionary rule); *Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949)* (freedom from unreasonable searches and seizures).

With [***39] respect to the *Fifth Amendment*, see *Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)* (*Double Jeopardy Clause*); *Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)* (privilege against self-incrimination); *Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897)* (*Just Compensation Clause*).

With respect to the *Sixth Amendment*, see *Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)* (trial by jury in criminal cases); *Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)* (compulsory process); *Klopfer v. North Carolina, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)* (speedy trial); *Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)* (right to confront adverse witness); *Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)* (assistance of counsel); *In re Oliver, 333*

U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (right to a public trial).

With respect to the *Eighth Amendment*, see *Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962)* (cruel and unusual punishment); *Schilb v. Kuebel, 404 U.S. 357, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971)* (prohibition against excessive bail).

13 In addition to the right to keep and bear arms (and the *Sixth Amendment* right to a unanimous jury verdict, see n. 14, *infra*), the only rights not fully incorporated are (1) the *Third Amendment's* protection against quartering of soldiers; (2) the *Fifth Amendment's* grand jury indictment requirement; (3) [***40] the *Seventh Amendment* right to a jury trial in civil cases; and (4) the *Eighth Amendment's* prohibition on excessive fines.

We never have decided whether the *Third Amendment* or the *Eighth Amendment's* prohibition of excessive fines applies to the States through the *Due Process Clause*. See *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276, n. 22, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)* (declining to decide whether the excessive-fines protection applies to the States); see also *Engblom v. Carey, 677 F.2d 957, 961 (CA2 1982)* (holding as a matter of first impression that the "*Third Amendment* is incorporated into the *Fourteenth Amendment* for application to the states").

Our governing decisions regarding the Grand Jury Clause of the *Fifth Amendment* and the *Seventh Amendment's* civil jury requirement long predate the era of selective incorporation.

Finally, the Court abandoned "the notion that the *Fourteenth Amendment* applies to the States only a watered-down, subjective version of the individual guarantees of the *Bill of Rights*," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *Malloy, 378 U.S., at 10-11, 84 S. Ct. 1489, 12 L. Ed. 2d 653* [***41] (internal quotation marks omitted). Instead, the Court decisively held that incorporated *Bill of Rights* protections "are all to be enforced against the States under the *Fourteenth Amendment* according to the same standards that protect those personal rights against federal encroachment." *Id., at 10, 84 S. Ct. 1489, 12 L. Ed. 2d 653*; see also *Mapp v. Ohio, 367 U.S. 643, 655-656, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961)*; *Ker v. California, 374 U.S. 23, 33-34, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963)*; *Aguilar v. Texas, 378 U.S. 108, 110, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)*; *Pointer, 380 U.S., at 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923*; *Duncan, supra, at 149, 157-158, 88 S. Ct. 1444, 20 L. Ed. 2d 491*; *Benton, 395 U.S., at 794-795, 89 S. Ct. 2056, 23 L. Ed. 2d 707*; *Wallace v. Jaffree, 472 U.S. 38, 48-49, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)*. [14]

14 There is one exception to this general rule. The Court has held that although the *Sixth Amendment* right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials. See *Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972)*; see also *Johnson v. Louisiana, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)* (holding that the *Due Process Clause* does not require unanimous jury verdicts in state criminal trials). But that ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation. In *Apodaca*, eight Justices [***42] agreed that the *Sixth Amendment* applies identically to both the Federal Government and the States. See *Johnson, supra, at 395, 92 S. Ct. 1620, 32 L. Ed. 2d 152* (Brennan, J., dissenting). Nonetheless, among those eight, four Justices took the view that the *Sixth Amendment* does not require unanimous jury verdicts in either federal or state criminal trials, *Apodaca, 406 U.S., at 406, 92 S. Ct. 1628, 32 L. Ed. 2d 184* (plurality opinion), and four other Justices took the view that the *Sixth Amendment* requires unanimous jury verdicts in federal and state criminal trials, *id., at 414-415, 92 S. Ct. 1628, 32 L. Ed. 2d 184* (Stewart, J., dissenting); *Johnson, supra, at 381-382, 92 S. Ct. 1620, 32 L. Ed. 2d 152* (Douglas, J., dissenting). Justice Powell's concurrence in the judgment broke the tie, and he concluded that the *Sixth Amendment* requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well-established rule that incorporated *Bill of Rights* protections apply identically to the States and the Federal Government. See *Johnson, supra, at 395-396, 92 S. Ct. 1620, 32 L. Ed. 2d 152* (Brennan, J., dissenting) (footnote omitted) ("In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the *Bill of Rights* that extends to the States, the *Sixth Amendment's* [***43] jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments").

[*3036] Employing this approach, the Court overruled earlier decisions in which it [**914] had held that particular *Bill of Rights* guarantees or remedies did not apply to the States. See, *e.g.*, *Mapp, supra* (overruling in part *Wolf, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782*); *Gideon, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799* (overruling *Betts, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595*); *Malloy, supra* (overruling *Adamson, 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903*, and *Twining, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97*); *Benton, supra, at 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707* (overruling *Palko, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288*).

III

With this framework in mind, we now turn directly to the question whether the *Second Amendment* right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncan, 391 U.S., at 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491*, 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, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)* (internal quotation marks omitted).

A

Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many [***44] legal systems from ancient times to the present day, [15] and in *Heller,* we held that individual self-defense is "the *central component*" of the *Second Amendment* right. *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 662*; see also *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679* (stating that the "inherent right of self-defense has been central to the *Second Amendment* right"). Explaining that "the need for defense of self, family, and property is most acute" in the home, *ibid.*, we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679* (some internal quotation marks omitted); see also *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679* (noting that handguns are "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense); *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 680* ("[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 [**915] self-defense." *Id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 680.*

15 Citing Jewish, Greek, and Roman law, Blackstone wrote that if a person killed an attacker, "the [***45] slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame." 4 W. Blackstone, Commentaries on the Laws of England 182 (reprint 1992).

Heller makes it clear that this right is "deeply rooted in this Nation's history and tradition." *Glucksberg, supra, at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* (internal quotation marks omitted). *Heller* explored the right's origins, noting that the 1689 English *Bill of Rights* explicitly protected a right to keep arms for self-defense, *554 U.S., at ___-___, 128 S. Ct. 2783, 171 L. Ed. 2d at 664-672*, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen," *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 658.*

[*3037] Blackstone's assessment was shared by the American colonists. As we noted in *Heller*, King George III's attempt to disarm the colonists in the 1760's and 1770's "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." [16] *Id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 659*; see also L. Levy, Origins of the *Bill of Rights* 137-143 (1999) (hereinafter Levy).

16 For example, an article in the Boston Evening Post stated: "For it is certainly [***46] beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the *Bill of Rights*, and, who live in a province where the law requires them to be equip'd with arms, &c. are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs." Boston Evening Post, Feb. 6, 1769, in Boston Under Military Rule 1768-1769, p. 61 (1936) (emphasis deleted).

The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the *Bill of Rights*. "During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 661* (citing Letters from the Federal Farmer III (Oct. 10, 1787), in 2 The Complete Anti-Federalist 234, 242 (H. Storing ed. 1981)); see also Federal Farmer: An Additional Number of Letters to the Republican, Letter XVIII (Jan. 25, 1788), in 17 Documentary History of the Ratification of the Constitution 360, 362-363 (J. Kaminski & G. Saladino eds. 1995); S. Halbrook, The Founders' Second

Amendment [***47] 171-278 (2008). Federalists responded, not by arguing that the right was insufficiently important to warrant protection but by contending that the right was adequately protected by the Constitution's assignment of only limited powers to the Federal Government. *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 25-26)*; cf. The Federalist No. 46, p. 296 (C. Rossiter ed. 1961) (J. Madison). Thus, Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government. See Levy 143-149; J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 155-164 (1994). But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the *Bill of Rights* as a condition for ratification of the Constitution. See 1 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 327-331 (2d ed. 1854); 3 *id.*, at 657-661; 4 *id.*, at 242-246, 248-249; see also Levy 26-34; A. Kelly & W. Harbison, The American Constitution: [**916] Its Origins and Development 110, 118 (7th ed. 1991). This is surely powerful evidence that the right [***48] was regarded as fundamental in the sense relevant here.

This understanding persisted in the years immediately following the ratification of the *Bill of Rights*. In addition to the four States that had adopted *Second Amendment* analogues before ratification, nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820. *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 663*. Founding-era legal commentators confirmed the importance of the right to early Americans. St. George Tucker, for example, described the right to keep and bear arms as "the true palladium of liberty" and explained that prohibitions on the right would place liberty "on the brink of destruction." 1 Blackstone's Commentaries, Editor's App. 300 (S. Tucker ed. 1803); see also W. Rawle, A View of the Constitution of the United States of America, 125-126 (2d ed. 1829) (reprint [*3038] 2009); 3 J. Story, Commentaries on the Constitution of the United States § 1890, p. 746 (1833) ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary [***49] power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them").

B

1

By the 1850's, the perceived threat that had prompted the inclusion of the *Second Amendment* in the *Bill of Rights* -- the fear that the National Government would disarm the universal militia -- had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense. See M. Doubler, Civilian in Peace, Soldier in War 87-90 (2003); Amar, *Bill of Rights* 258-259. Abolitionist authors wrote in support of the right. See L. Spooner, The Unconstitutionality of Slavery 66 (1860) (reprint 1965); J. Tiffany, A Treatise on the Unconstitutionality of American Slavery 117-118 (1849) (reprint 1969). And when attempts were made to disarm "Free-Soilers" in "Bloody Kansas," Senator Charles Sumner, who later played a leading role in the adoption of the *Fourteenth Amendment*, proclaimed that "[n]ever was [the rifle] more needed in just self-defense than now in Kansas." The Crime Against Kansas: The Apologies for the Crime: The True Remedy, Speech of Hon. Charles Sumner in the Senate of the United States 64-65 (1856). [***50] Indeed, the 1856 Republican Party Platform protested that in Kansas the constitutional rights of the people had been "fraudulently and violently taken from them" and the "right of the people to keep and bear arms" had been "infringed." National Party Platforms 1840-1972, p. 27 (5th ed. 1973). [17]

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

After the Civil War, many of the over 180,000 African Americans who [**917] 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 ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (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 [***51] negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife." Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, in 1 Documentary History of Reconstruction 289 (W. Fleming ed. 1950); see also Regulations for Freedmen in Louisiana, in *id.*, at 279-280; H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866) (describing a Kentucky law); E.

McPherson, The Political History of the United States of America During the Period of Reconstruction 40 (1871) (describing a Florida law); *id.*, at 33 (describing an Alabama law). [18]

18 In South Carolina, prominent black citizens held a convention to address the State's black code. They drafted a memorial to Congress, in which they included a plea for protection of their constitutional right to keep and bear arms: "'We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed . . . that the late efforts of the Legislature of this State to pass an act to deprive us [of] arms be forbidden, [***52] as a plain violation of the Constitution.'" S. Halbrook, Freedmen, The *Fourteenth Amendment*, and The Right to Bear Arms, 1866-1876, p. 9 (1998) (hereinafter Halbrook, Freedmen) (quoting 2 Proceedings of the Black State Conventions, 1840-1865, p. 302 (P. Foner & G. Walker eds. 1980)). Senator Charles Sumner relayed the memorial to the Senate and described the memorial as a request that black citizens "have the constitutional protection in keeping arms." 39th Cong. Globe 337.

[*3039] 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* [***53] [19] -- 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 [**918] perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description." 39th Cong. Globe 915 (1866). [20]

19 See B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 265-266 (1914); *Adamson v. California, 332 U.S. 46, 108-109, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947)* (appendix to dissenting opinion of Black, J.).

20 Disarmament by bands of former Confederate soldiers eventually gave way to attacks by the Ku Klux Klan. In [***54] debates over the later enacted Enforcement Act of 1870, Senator John Pool observed that the Klan would "order the colored men to give up their arms; saying that everybody would be Kukluxed in whose house fire-arms were found." Cong. Globe, 41st Cong., 2d Sess., 2719 (1870); see also H. R. Exec. Doc. No. 268, 42d Cong., 2d Sess., 2 (1872).

Union Army commanders took steps to secure the right of all citizens to keep and bear arms, [21] but the 39th Congress concluded [*3040] 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.

21 For example, the occupying Union commander in South Carolina issued an order stating that "[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed." General Order No. 1, Department of South Carolina, January 1, 1866, in 1 Documentary History of Reconstruction 208 (W. Fleming ed. 1950). Union officials in Georgia issued a similar order, declaring that "'[a]ll men, without the distinction of color, have the right to keep arms to defend their homes, families or themselves.'" Cramer, "This Right is Not Allowed by Governments [***55] That Are Afraid of The People": The Public Meaning of the *Second Amendment* When the *Fourteenth Amendment* was Ratified, *17 Geo. Mason L. Rev. 823, 854 (2010)* (hereinafter Cramer) (quoting Right to Bear Arms, Christian Recorder, Feb. 24, 1866, pp. 1-2). In addition, when made aware of attempts by armed parties to disarm blacks, the head of the Freedmen's Bureau in Alabama "made public [his] determination to maintain the right of the negro to keep and to bear arms, and [his] disposition to send an armed force into any neighborhood in which that right should be systematically interfered with." Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 3, p. 140 (1866).

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 [***56] (emphasis added). [22] Section 14 thus explicitly guaranteed that "all the citizens," black and white, would have "the constitutional right to bear arms."

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

The Civil Rights Act of 1866, 14 Stat. 27, which was considered at the same time as the Freedmen's Bureau Act, similarly sought to protect the right of all citizens to keep and bear arms. [23] Section 1 of the Civil Rights Act guaranteed the "full and equal [**919] 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 [***57] 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 [*3041] 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").

> 23 There can be do doubt that the principal proponents of the Civil Rights Act of 1866 meant to end the disarmament of African Americans in the South. In introducing the bill, Senator Trumbull described its purpose as securing to blacks the "privileges which are essential to freemen." *Id.*, at 474. [***58] He then pointed to the previously described Mississippi law that "prohibit[ed] any negro or mulatto from having fire-arms" and explained that the bill would "destroy" such laws. *Ibid.* Similarly, Representative Sidney Clarke cited disarmament of freedmen in Alabama and Mississippi as a reason to support the Civil Rights Act and to continue to deny Alabama and Mississippi representation in Congress: "I regret, sir, that justice compels me to say, to the disgrace of the Federal Government, that the 'reconstructed' State authorities of Mississippi were allowed to rob and disarm our veteran soldiers and arm the rebels fresh from the field of treasonable strife. Sir, the disarmed loyalists of Alabama, Mississippi, and Louisiana are powerless to-day, and oppressed by the pardoned and encouraged rebels of those States. They appeal to the American Congress for protection. In response to this appeal I shall vote for every just measure of protection, for I do not intend to be among the treacherous violators of the solemn pledge of the nation." *Id.*, at 1838-1839.

Congress, however, ultimately deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's [***59] pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks. [24] Today, it is generally accepted that the *Fourteenth Amendment* was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866. See *General Building Contractors Assn., Inc. v. Pennsylvania, 458 U.S. 375, 389, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982)*; see also Amar, *Bill of Rights* 187; Calabresi, Two Cheers for Professor Balkin's Originalism, *103 Nw. U. L. Rev. 663, 669-670 (2009)*.

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

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" "safe-

guards of liberty under our form of Government." 39th [***60] 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.*

[**920] Even those who thought the *Fourteenth Amendment* unnecessary believed that blacks, as citizens, "have equal right to protection, and to keep and bear arms for self-defense." *Id.*, at 1073 (Sen. James Nye); see also Foner 258-259. [25]

> 25 Other Members of the 39th Congress stressed the importance of the right to keep and bear arms in discussing other measures. In speaking generally on reconstruction, Representative Roswell Hart listed the "'right of the people to keep and bear arms'" as among those rights necessary to a "republican form of government." 39th Cong. Globe 1629. Similarly, in objecting to a bill designed to disarm southern militias, Senator Willard Saulsbury argued that such a measure would violate the *Second Amendment.* [***61] *Id.*, at 914-915. Indeed, the bill "ultimately passed in a form that disbanded militias but maintained the right of individuals to their private firearms." Cramer 858.

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 [*3042] 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 [***62] Law of the United States § 239, pp. 152-153 (3d ed. 1875).

The right to keep and bear arms was also widely protected by state constitutions at the time when the *Fourteenth Amendment* was ratified. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms. See Calabresi & Agudo, Individual Rights Under State Constitutions when the *Fourteenth Amendment* was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition? *87 Texas L. Rev. 7, 50 (2008).* [26] Quite a few of these state constitutional guarantees, moreover, explicitly protected the right to keep and bear arms as an individual right to self-defense. See Ala. Const., Art. I, § 28 (1868); *Conn. Const., Art. I, § 17* (1818); *Ky. Const., Art. XIII, § 25* (1850); Mich. Const., Art. XVIII, § 7 (1850); *Miss. Const., Art. I, § 15* (1868); *Mo. Const., Art. I, § 8* (1865); *Tex. Const., Art. I, § 13* (1869); see also Mont. Const., Art. III, § 13 (1889); *Wash. Const., Art. I, § 24* (1889); *Wyo. Const., Art. I, § 24* (1889); see also *State v. McAdams, 714 P.2d 1236, 1238 (Wyo. 1986).* What is more, state constitutions adopted during the Reconstruction era by [***63] former Confederate States included a right to keep and bear arms. See, *e.g.*, Ark. Const., Art. I, § 5 (1868); *Miss. Const., Art. I, § 15* (1868); *Tex. Const., Art. I, § 13* (1869). A clear majority of the States in 1868, therefore, recognized the right to keep [**921] and bear arms as being among the foundational rights necessary to our system of Government. [27]

> 26 More generally worded provisions in the constitutions of seven other States may also have encompassed a right to bear arms. See Calabresi & Agudo, *87 Texas L. Rev., at 52.*
>
> 27 These state constitutional protections often reflected a lack of law enforcement in many sections of the country. In the frontier towns that did not have an effective police force, law enforcement often could not pursue criminals beyond the town borders. See Brief for Rocky Mountain Gun Owners et al. as *Amici Curiae* 15. Settlers in the West and elsewhere, therefore, were left to "repe[l] force by force when the intervention of society . . . [was] too late to prevent an injury." *District of Columbia v. Heller, 554 U.S. ___, ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 659 (2008)* (internal quotation marks omitted). The settlers' dependence on game for food and economic livelihood, moreover, [***64] undoubtedly undergirded these state constitutional guarantees. See *id., at ___, ___, ___, 128 S. Ct. 2783; 171 L. Ed. 2d 637 (slip. op, at 26, 36, 42).*

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

2

Despite all this evidence, municipal respondents contend that Congress, in the years immediately following the Civil War, merely sought to outlaw "discriminatory measures taken against freedmen, which it addressed by adopting a non-discrimination principle" and that even an outright ban on the possession of firearms was regarded as acceptable, "so long as it was not done in a discriminatory manner." Brief for Municipal Respondents 7. They argue that Members of Congress overwhelmingly viewed *§ 1 of the Fourteenth Amendment* "as an antidiscrimination rule," and they cite statements to the effect [*3043] that the section would outlaw discriminatory measures. *Id.*, at 64. This argument is implausible.

First, while *§ 1 of the Fourteenth Amendment* contains "an antidiscrimination rule," namely, the *Equal Protection Clause*, municipal respondents can hardly mean that *§ 1* does no more than prohibit [***65] discrimination. If that were so, then the *First Amendment*, as applied to the States, would not prohibit nondiscriminatory abridgments of the rights to freedom of speech or freedom of religion; the *Fourth Amendment*, as applied to the States, would not prohibit all unreasonable searches and seizures but only discriminatory searches and seizures -- and so on. We assume that this is not municipal respondents' view, so what they must mean is that the *Second Amendment* should be singled out for special -- and specially unfavorable -- treatment. We reject that suggestion.

Second, municipal respondents' argument ignores the clear terms of the Freedmen's Bureau Act of 1866, which acknowledged the existence of the right to bear arms. If that law had used language such as "the equal benefit of laws concerning the bearing of arms," it would be possible to interpret it as simply a prohibition of racial discrimination. But § 14 speaks of and protects "the constitutional right to bear arms," an unmistakable reference to the right protected by the *Second Amendment*. And it protects the "full and equal benefit" of this right in the States. 14 Stat. 176-177. It would have been nonsensical for Congress [***66] to guarantee the full and equal benefit of a constitutional right that does not exist.

Third, if the 39th Congress had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African Americans in the South would likely have remained vulnerable to attack [**922] by many of their worst abusers: the state militia and state peace officers. In the years immediately following the Civil War, a law banning the possession of guns by all private citizens would have been nondiscriminatory only in the formal sense. Any such law -- like the Chicago and Oak Park ordinances challenged here -- presumably would have permitted the possession of guns by those acting under the authority of the State and would thus have left firearms in the hands of the militia and local peace officers. And as the Report of the Joint Committee on Reconstruction revealed, see *supra*, at 24-25, those groups were widely involved in harassing blacks in the South.

Fourth, municipal respondents' purely antidiscrimination theory of the *Fourteenth Amendment* disregards the plight of whites in the South who opposed the Black Codes. If the 39th Congress and the ratifying public had simply prohibited [***67] racial discrimination with respect to the bearing of arms, opponents of the Black Codes would have been left without the means of self-defense -- as had abolitionists in Kansas in the 1850's.

Fifth, the 39th Congress' response to proposals to disband and disarm the Southern militias is instructive. Despite recognizing and deploring the abuses of these militias, the 39th Congress balked at a proposal to disarm them. See 39th Cong. Globe 914; Halbrook, Freedmen, *supra*, 20-21. Disarmament, it was argued, would violate the members' right to bear arms, and it was ultimately decided to disband the militias but not to disarm their members. See Act of Mar. 2, 1867, § 6, 14 Stat. 485, 487; Halbrook, Freedmen 68-69; Cramer 858-861. It cannot be doubted that the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the [*3044] States legislated in an evenhanded manner.

IV

Municipal respondents' remaining arguments are at war with our central holding in *Heller*: that the *Second Amendment* protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in effect, ask us to treat [***68] the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other *Bill of Rights* guarantees that we have held to be incorporated into the *Due Process Clause*.

Municipal respondents' main argument is nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era. Municipal respondents submit that the *Due Process Clause* protects only those rights "'recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice.'" Brief for Municipal Respondents 9 (quoting *Chicago, B. & Q. R. Co., 166*

U.S., at 238, 17 S. Ct. 581, 41 L. Ed. 979). According to municipal respondents, if it is possible to imagine *any* civilized legal system that does not recognize a particular right, then the *Due Process Clause* does not make that right binding on the States. Brief for Municipal Respondents 9. Therefore, the municipal respondents continue, because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to [**923] possess such weapons is protected by the *Fourteenth Amendment*. [***69] *Id.*, at 21-23.

This line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases. See *Duncan, 391 U.S., at 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491*, and n. 14. And the present-day implications of municipal respondents' argument are stunning. For example, many of the rights that our *Bill of Rights* provides for persons accused of criminal offenses are virtually unique to this country. [28] If *our* understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of *any* civilized country, it would follow that the United States is the only civilized Nation in the world.

28 For example, the United States affords criminal jury trials far more broadly than other countries. See, *e.g.*, Van Kessel, Adversary Excesses in the American Criminal Trial, *67 Notre Dame L. Rev. 403 (1992)*; Leib, A Comparison of Criminal Jury Decision Rules in Democratic Countries, *5 Ohio St. J. Crim. L. 629, 630 (2008)*; Henderson, The Wrongs of Victim's Rights, *37 Stan. L. Rev. 937, 1003, n. 296 (1985)*; see also *Roper v. Simmons, 543 U.S. 551, 624, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)* (SCALIA, J., dissenting) ("In many significant respects the laws of most other countries [***70] differ from our law -- including . . . such explicit provisions of our Constitution as the right to jury trial"). Similarly, our rules governing pretrial interrogation differ from those in countries sharing a similar legal heritage. See Dept. of Justice, Office of Legal Policy, Report to the Attorney General on the Law of Pretrial Interrogation: Truth in Criminal Justice Report No. 1 (Feb. 12, 1986), reprinted in *22 U. Mich. J. L. Ref. 437, 534-542 (1989)* (comparing the system envisioned by *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*, with rights afforded by England, Scotland, Canada, India, France, and Germany). And the "Court-pronounced exclusionary rule . . . is distinctively American." *Roper, supra, at 624, 125 S. Ct. 1183, 161 L. Ed. 2d 1* (SCALIA, J., dissenting) (citing *Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)* (Burger, C. J., dissenting) (noting that exclusionary rule was "unique to American jurisprudence" (internal quotation marks omitted))); see also Sklansky, Anti-Inquisitorialism, *122 Harv. L. Rev. 1634, 1648-1656, 1689-1693 (2009)* (discussing the differences between American and European confrontation rules).

[*3045] Municipal respondents attempt to salvage their position by suggesting that [***71] their argument applies only to substantive as opposed to procedural rights. Brief for Municipal Respondents 10, n. 3. But even in this trimmed form, municipal respondents' argument flies in the face of more than a half-century of precedent. For example, in *Everson v. Board of Ed. of Ewing, 330 U.S. 1, 8, 67 S. Ct. 504, 91 L. Ed. 711 (1947)*, the Court held that the *Fourteenth Amendment* incorporates the *Establishment Clause of the First Amendment*. Yet several of the countries that municipal respondents recognize as civilized have established state churches. [29] If we were to adopt municipal respondents' theory, all of this Court's *Establishment Clause* precedents involving actions taken by state and local governments would go by the boards.

29 England and Denmark have state churches. See Torke, The English Religious Establishment, 12 J. of Law & Religion 399, 417-427 (1995-1996) (describing legal status of Church of England); Constitutional Act of Denmark, pt. I, § 4 (1953) ("The Evangelical Lutheran Church shall be the Established Church of Denmark"). The Evangelical Lutheran Church of Finland has attributes of a state church. See Christensen, Is the Lutheran Church Still the State Church? An Analysis of Church-State [***72] Relations in Finland, *1995 B. Y. U. L. Rev. 585, 596-600* (describing status of church under Finnish law). The Web site of the Evangelical Lutheran Church of Finland states that the church may be usefully described as both a "state church" and a "folk church." See J. Seppo, The Current Condition of Church-State Relations in Finland, online at http://evl.fi/EVLen.nsf/Documents/838DDBEF4A28712AC225730F001F7C67?OpenDocument&lang=EN (all Internet materials as visited June 23, 2010, and available in Clerk of Court's case file).

[**924] Municipal respondents maintain that the *Second Amendment* differs from all of the other provisions of the *Bill of Rights* because it concerns the right to possess a deadly implement and thus has implications for

public safety. Brief for Municipal Respondents 11. And they note that there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries. *Id.*, at 11, 13-17.

The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution [***73] of crimes fall into the same category. See, *e.g.*, *Hudson v. Michigan, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006)* ("The exclusionary rule generates 'substantial social costs,' *United States v. Leon, 468 U.S. 897, 907, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*, which sometimes include setting the guilty free and the dangerous at large"); *Barker v. Wingo, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (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, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)* (Harlan, J., dissenting); *id., at 542, 86 S. Ct. 1602, 16 L. Ed. 2d 694* (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, 81 S. Ct. 1684, 6 L. Ed. 2d 1081.* Municipal respondents cite no case in which we have refrained from holding that a provision of the *Bill of Rights* is binding on the States on the ground that the right at issue has disputed public safety implications.

We likewise reject municipal respondents' argument that we should depart from our established incorporation methodology on the ground that making the [*3046] *Second Amendment* binding on the States and their [***74] subdivisions is inconsistent with principles of federalism and will stifle experimentation. Municipal respondents point out -- quite correctly -- that conditions and problems differ from locality to locality and that citizens in different jurisdictions have divergent views on the issue of gun control. Municipal respondents therefore urge us to allow state and local governments to enact any gun control law that they deem to be reasonable, including a complete ban on the possession of handguns in the home for self-defense. Brief for Municipal Respondents 18-20, 23.

There is nothing new in the argument that, in order to respect federalism and allow useful state experimentation, a federal constitutional right should not be fully binding on the States. This argument was made repeatedly and eloquently by Members of this Court who rejected the concept of incorporation and urged retention of the two-track approach to incorporation. Throughout the era of "selective incorporation," Justice Harlan in particular, invoking the values of federalism and state experimentation, fought a determined rearguard action to preserve the two-track approach. See, *e.g.*, *Roth v. United States, 354 U.S. 476, 500-503, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)* [***75] (Harlan, J., concurring in result in part and dissenting in part); *Mapp, supra, at 678-680, 81 S. Ct. 1684, 6 L. Ed. 2d 1081* [**925] (Harlan, J., dissenting); *Gideon, 372 U.S., at 352, 83 S. Ct. 792, 9 L. Ed. 2d 799* (Harlan, J., concurring); *Malloy, 378 U.S., at 14-33, 84 S. Ct. 1489, 12 L. Ed. 2d 653* (Harlan, J., dissenting); *Pointer, 380 U.S., at 408-409, 85 S. Ct. 1065, 13 L. Ed. 2d 923* (Harlan, J., concurring in result); *Washington, 388 U.S., at 23-24, 87 S. Ct. 1920, 18 L. Ed. 2d 1019* (Harlan, J., concurring in result); *Duncan, 391 U.S., at 171-193, 88 S. Ct. 1444, 20 L. Ed. 2d 491* (Harlan, J., dissenting); *Benton, 395 U.S., at 808-809, 89 S. Ct. 2056, 23 L. Ed. 2d 707* (Harlan, J., dissenting); *Williams v. Florida, 399 U.S. 78, 117, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970)* (Harlan, J., dissenting in part and concurring in result in part).

Time and again, however, those pleas failed. Unless we turn back the clock or adopt a special incorporation test applicable only to the *Second Amendment*, municipal respondents' argument must be rejected. Under our precedents, if a *Bill of Rights* guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, [30] that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, "[s]tate [***76] and local experimentation with reasonable firearms regulations will continue under the *Second Amendment*." Brief for State of Texas et al. as *Amici Curiae* 23.

30 As noted above, see n. 13, *supra*, cases that predate the era of selective incorporation held that the Grand Jury Clause of the *Fifth Amendment* and the *Seventh Amendment's* civil jury requirement do not apply to the States. See *Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884)* (indictment); *Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961 (1916)* (civil jury).

As a result of *Hurtado*, most States do not require a grand jury indictment in all felony cases, and many have no grand juries. See Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, State Court Organization 2004, pp. 213, 215-217 (2006) (Table 38), online at http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf.

As a result of *Bombolis*, cases that would otherwise fall within the *Seventh Amendment* are now tried without a jury in state small claims courts. See, *e.g.*, *Cheung v. Eighth Judicial Dist. Court, 121 Nev. 867, 124 P. 3d 550 (2005)* (no right to jury trial in small claims court under Nevada Constitution).

[*3047] Municipal respondents and their *amici* complain [***77] that incorporation of the *Second Amendment* right will lead to extensive and costly litigation, but this argument applies with even greater force to constitutional rights and remedies that have already been held to be binding on the States. Consider the exclusionary rule. Although the exclusionary rule "is not an individual right," *Herring v. United States, 555 U.S. ___, 129 S. Ct. 695, 172 L. Ed. 2d 496, 504 (2009)*, but a "judicially created rule," *id., at ___, 129 S. Ct. 695, 172 L. Ed. 2d at 504*, this Court made the rule applicable to the States. See *Mapp, supra, at 660, 81 S. Ct. 1684, 6 L. Ed. 2d 1081*. The exclusionary rule is said to result in "tens of thousands of contested suppression motions each year." Stuntz, The Virtues and Vices of the Exclusionary Rule, 20 Harv. J. Law & Pub. Pol'y, 443, 444 (1997).

Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. Brief for Municipal Respondents 23-31. In *Heller*, however, we expressly rejected [**926] the argument that the scope of the *Second Amendment* right should be determined by judicial interest balancing, *554 U.S., at ___-___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 62-63)*, and [***78] this Court decades ago abandoned "the notion that the *Fourteenth Amendment* applies to the States only a watered-down, subjective version of the individual guarantees of the *Bill of Rights*," *Malloy, supra, at 10-11, 84 S. Ct. 1489, 12 L. Ed. 2d 653* (internal quotation marks omitted).

As evidence that the *Fourteenth Amendment* has not historically been understood to restrict the authority of the States to regulate firearms, municipal respondents and supporting *amici* cite a variety of state and local firearms laws that courts have upheld. But what is most striking about their research is the paucity of precedent sustaining bans comparable to those at issue here and in *Heller*. Municipal respondents cite precisely one case (from the late 20th century) in which such a ban was sustained. See Brief for Municipal Respondents 26-27 (citing *Kalodimos v. Morton Grove, 103 Ill. 2d 483, 470 N.E.2d 266, 83 Ill. Dec. 308 (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 [***79] is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 678*). 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 ___-___, 128 S. Ct. 2783, 171 L. Ed. 2d at 678*. We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

Municipal respondents argue, finally, that the right to keep and bear arms is unique among the rights set out in the first eight Amendments "because the reason for codifying the *Second Amendment* (to protect the militia) differs from the purpose (primarily, to use firearms to engage in self-defense) that is claimed to make the right implicit in the concept of ordered liberty." Brief for Municipal Respondents 36-37. Municipal respondents suggest that the *Second Amendment* right differs [*3048] from the rights [***80] heretofore incorporated because the latter were "valued for [their] own sake." *Id.*, at 33. But we have never previously suggested that incorporation of a right turns on whether it has intrinsic as opposed to instrumental value, and quite a few of the rights previously held to be incorporated -- for example the right to counsel and the right to confront and subpoena witnesses -- are clearly instrumental by any measure. Moreover, this contention repackages one of the chief arguments that we rejected in *Heller*, *i.e.*, that the scope of the *Second Amendment* right is defined by the immediate threat that led to the inclusion of that right in the *Bill of Rights*. In *Heller*, we recognized that the codification of this right was prompted by fear that the Federal Government would disarm [**927] and thus disable the militias, but we rejected the suggestion that the right was valued only as a means of preserving the militias. *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 661*. On the contrary, we stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was "the *central component* of the right itself." *Ibid.*

V

A

We turn, finally, to the [***81] two dissenting opinions. JUSTICE STEVENS' eloquent opinion covers ground already addressed, and therefore little need be added in response. JUSTICE STEVENS would "'ground

the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments.'" *Post,* at 8 (quoting *Malloy, 378 U.S., at 24, 84 S. Ct. 1489, 12 L. Ed. 2d 653* (Harlan, J., dissenting)). The question presented in this case, in his view, "is whether the particular right asserted by petitioners applies to the States because of the *Fourteenth Amendment* itself, standing on its own bottom." *Post,* at 27. He would hold that "[t]he rights protected against state infringement by the *Fourteenth Amendment's Due Process Clause* need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the *Bill of Rights*." *Post,* at 9.

As we have explained, the Court, for the past half-century, has moved away from the two-track approach. If we were now to accept JUSTICE STEVENS' theory across the board, decades of decisions would be undermined. We assume that this is not what is proposed. What is urged instead, it appears, is that this theory be revived solely [***82] for the individual right that *Heller* recognized, over vigorous dissents.

The relationship between the *Bill of Rights'* guarantees and the States must be governed by a single, neutral principle. It is far too late to exhume what Justice Brennan, writing for the Court 46 years ago, derided as "the notion that the *Fourteenth Amendment* applies to the States only a watered-down, subjective version of the individual guarantees of the *Bill of Rights*." *Malloy, supra, at 10-11, 84 S. Ct. 1489, 12 L. Ed. 2d 653* (internal quotation marks omitted).

B

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

JUSTICE BREYER's conclusion that the *Fourteenth Amendment* does not incorporate [*3049] 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, [***83] *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 [**928] 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 [***84] et al. as *Amici Curiae* 4. Another brief submitted by 38 States takes the same position. Brief for State of Texas et al. as *Amici Curiae* 6.

Second, petitioners and many others who live in high-crime areas dispute the proposition that the *Second Amendment* right does not protect minorities and those lacking political clout. The plight of Chicagoans living in high-crime areas was recently highlighted when two Illinois legislators representing Chicago districts called on the Governor to deploy the Illinois National Guard to patrol the City's streets. [31] The legislators noted that the number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black. [32] *Amici* supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime. [33] If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the *Second Amendment* [***85] right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

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

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

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

[*3050] 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. [***86] 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 [**929] enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller, 554 U.S., at __, 128 S. Ct. 2783, 171 L. Ed. 2d at 684.* This conclusion is no more remarkable with respect to the *Second Amendment* than it is with respect to all the other limitations on state power found in the Constitution.

Finally, JUSTICE BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. See *supra,* at 38-39. "The very enumeration of the right takes out of the hands of government -- even the Third Branch of Government -- the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 683.*

* * *

In *Heller*, we held that the *Second Amendment* protects the right to possess [***87] 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, 88 S. Ct. 1444, 20 L. Ed. 2d 491*, 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.

CONCUR BY: SCALIA; THOMAS (In Part)

CONCUR

JUSTICE SCALIA, concurring.

I join the Court's opinion. Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the *Bill of Rights* "because it is both long established and narrowly limited." *Albright v. Oliver, 510 U.S. 266, 275, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)* (SCALIA, J., concurring). This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it.

I write separately only to respond to some aspects of JUSTICE STEVENS' dissent. Not that aspect which disagrees with the majority's [***88] application of our precedents to this case, which is fully covered by the Court's opinion. But much of what JUSTICE STEVENS writes is a broad condemnation of the theory of interpretation which underlies the Court's opinion, a theory that makes the traditions of our people paramount. He proposes a different theory, which he claims is more "cautiou[s]" and respectful of proper limits on the judicial role. *Post*, at 57. It is that claim I wish to address.

I

A

After stressing the substantive dimension of what he has renamed the "liberty [*3051] clause," *post*, at 4-7, [**930] [1] JUSTICE STEVENS proceeds to urge readoption of the theory of incorporation articulated in *Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937)*, see *post*, at 14-20. But in fact he does not favor application of that theory at all. For whether *Palko* requires only that "a fair and enlightened system of justice would be impossible without" the right sought to be incorporated, *302 U.S., at 325, 58 S. Ct. 149, 82 L. Ed. 288*, or requires in addition that the right be rooted in the "traditions and conscience of our people," *ibid.* (internal quotation marks omitted), many of the rights JUSTICE STEVENS thinks are incorporated could not pass muster under either test: abortion, *post*, [***89] at 7 (citing *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)*); homosexual sodomy, *post*, at 16 (citing *Lawrence v. Texas, 539 U.S. 558, 572, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)*); the right to have excluded from criminal trials evidence obtained in violation of the *Fourth Amendment*, *post*, at 18 (citing *Mapp v. Ohio, 367 U.S. 643, 650, 655-657, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961)*); and the right to teach one's children foreign languages, *post*, at 7 (citing *Meyer v. Nebraska, 262 U.S. 390, 399-403, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)*), among others.

1 I do not entirely understand JUSTICE STEVENS' renaming of the *Due Process Clause*. What we call it, of course, does not change what

the Clause says, but shorthand should not obscure what it says. Accepting for argument's sake the shift in emphasis -- from avoiding certain deprivations without that "process" which is "due," to avoiding the deprivations themselves -- the Clause applies not just to deprivations of "liberty," but also to deprivations of "life" and even "property."

That JUSTICE STEVENS is not applying any version of *Palko* is clear from comparing, on the one hand, the rights he believes *are* covered, with, on the other hand, his conclusion that the right to keep and bear arms is *not* covered. Rights [***90] that pass his test include not just those "relating to marriage, procreation, contraception, family relationships, and child rearing and education," but also rights against "[g]overnment action that shocks the conscience, pointlessly infringes settled expectations, trespasses into sensitive private realms or life choices without adequate justification, [or] perpetrates gross injustice." *Post*, at 23 (internal quotation marks omitted). Not *all* such rights are in, however, since only "*some* fundamental aspects of personhood, dignity, and the like" are protected, *post*, at 24 (emphasis added). Exactly what is covered is not clear. But whatever else is in, he *knows* that the right to keep and bear arms is out, despite its being as "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)* (internal quotation marks omitted), as a right can be, see *District of Columbia v. Heller, 554 U.S. ___, ___-___, ___-___, ___-___, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (slip op., at 20-21, 26-30, 41-44)*. I can find no other explanation for such certitude except that JUSTICE STEVENS, despite his forswearing of "personal and private notions," *post*, at 21 (internal quotation marks omitted), [***91] deeply believes it should be out.

[**931] The subjective nature of JUSTICE STEVENS' standard is also apparent from his claim that it is the courts' prerogative -- indeed their *duty* -- to update the *Due Process Clause* so that it encompasses new freedoms the Framers were too narrow-minded to imagine, *post*, at 19-20, and n. 21. Courts, he proclaims, must "do justice to [the Clause's] urgent call and its open texture" by exercising the "interpretive discretion the latter embodies." *Post*, [*3052] at 21. (Why the *people* are not up to the task of deciding what new rights to protect, even though it is *they* who are authorized to make changes, see *U.S. Const., Art. V*, is never explained. [2]) And it would be "judicial abdication" for a judge to "tur[n] his back" on *his* task of determining what the *Fourteenth Amendment* covers by "outsourc[ing]" the job to "historical sentiment," *post*, at 20 -- that is, by being guided by what the American people throughout our history have thought. It is only we judges, exercising our "own reasoned judgment," *post*, at 15, who can be entrusted with deciding the *Due Process Clause*'s scope -- which rights serve the Amendment's "central values," *post*, at 23 -- which basically means [***92] picking the rights we want to protect and discarding those we do not.

2 JUSTICE STEVENS insists that he would not make courts the *sole* interpreters of the "liberty clause"; he graciously invites "[a]ll Americans" to ponder what the Clause means to them today. *Post*, at 20, n. 22. The problem is that in his approach the people's ponderings do not matter, since whatever the people decide, courts have the last word.

B

JUSTICE STEVENS resists this description, insisting that his approach provides plenty of "guideposts" and "constraints" to keep courts from "injecting excessive subjectivity" into the process. [3] *Post*, at 21. Plenty indeed -- and that alone is a problem. The ability of omnidirectional guideposts to constrain is inversely proportional to their number. But even individually, each lodestar or limitation he lists either is incapable of restraining judicial whimsy or cannot be squared with the precedents he seeks to preserve.

3 JUSTICE BREYER is not worried by that prospect. His interpretive approach applied to incorporation of the *Second Amendment* includes consideration of such factors as "the extent to which incorporation will further other, perhaps more basic, constitutional aims; [***93] and the extent to which incorporation will advance or hinder the Constitution's structural aims"; whether recognizing a particular right will "further the Constitution's effort to ensure that the government treats each individual with equal respect" or will "help maintain the democratic form of government"; whether it is "inconsistent . . . with the Constitution's efforts to create governmental institutions well suited to the carrying out of its constitutional promises"; whether it fits with "the Framers' basic reason for believing the Court ought to have the power of judicial review"; courts' comparative advantage in answering empirical questions that may be involved in applying the right; and whether there is a "strong offsetting justification" for removing a decision from the democratic process. *Post*, at 7, 11-17 (dissenting opinion).

He begins with a brief nod to history, *post*, at 21, but as he has just made clear, he thinks historical inquiry

unavailing, *post*, at 19-20. Moreover, trusting the meaning of the *Due Process Clause* to what has historically been protected is circular, see *post*, at 19, since that would mean no *new* rights could get in.

[**932] JUSTICE STEVENS moves on to the "most [***94] basic" constraint on subjectivity his theory offers: that he would "esche[w] attempts to provide any all-purpose, top-down, totalizing theory of 'liberty.'" *Post*, at 22. The notion that the absence of a coherent theory of the *Due Process Clause* will somehow *curtail* judicial caprice is at war with reason. Indeterminacy means opportunity for courts to impose whatever rule they like; it is the problem, not the solution. The idea that interpretive pluralism would *reduce* courts' ability to impose their will on the ignorant masses is not merely naive, but absurd. If there are no right answers, there are no wrong answers either.

JUSTICE STEVENS also argues that requiring courts to show "respect for the [*3053] democratic process" should serve as a constraint. *Post*, at 23. That is true, but JUSTICE STEVENS would have them show respect in an extraordinary manner. In his view, if a right "is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate." *Ibid.* In other words, a right, such as the right to keep and bear arms, that has long been recognized but on which the States are considering restrictions, apparently deserves [***95] *less* protection, while a privilege the political branches (instruments of the democratic process) have withheld entirely and continue to withhold, deserves *more*. That topsy-turvy approach conveniently accomplishes the objective of ensuring that the rights this Court held protected in *Casey*, *Lawrence*, and other such cases fit the theory -- but at the cost of insulting rather than respecting the democratic process.

The next constraint JUSTICE STEVENS suggests is harder to evaluate. He describes as "an important tool for guiding judicial discretion" "sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society." *Post*, at 24. I cannot say whether that sensitivity will really guide judges because I have no idea what it is. Is it some sixth sense instilled in judges when they ascend to the bench? Or does it mean judges are more constrained when they agonize about the cosmic conflict between liberty and its potentially harmful consequences? Attempting to give the concept more precision, JUSTICE STEVENS explains that "sensitivity is an aspect of a deeper principle: the need to approach our work with humility and caution." *Ibid.* [***96] Both traits are undeniably admirable, though what relation they bear to sensitivity is a mystery. But it makes no difference, for the first case JUSTICE STEVENS cites in support, see *ibid.*, *Casey, 505 U.S., at 849, 112 S. Ct. 2791, 120 L. Ed. 2d 674*, dispels any illusion that he has a meaningful form of judicial modesty in mind.

JUSTICE STEVENS offers no examples to illustrate the next constraint: *stare decisis*, *post*, at 25. But his view of it is surely not very confining, since he holds out as a "canonical" exemplar of the proper approach, see *post*, at 16, 54, *Lawrence*, which overruled a case decided a mere 17 years earlier, *Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986)*, see *539 U.S., at 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508* (it "was not correct when it was decided, and it is not correct today"). Moreover, JUSTICE STEVENS would apply that constraint unevenly: He apparently [**933] approves those Warren Court cases that adopted jot-for-jot incorporation of procedural protections for criminal defendants, *post*, at 11, but would abandon those Warren Court rulings that undercut his approach to substantive rights, on the basis that we have "cut back" on cases from that era before, *post*, at 12.

JUSTICE STEVENS also relies on the requirement of a "careful description of the [***97] asserted fundamental liberty interest" to limit judicial discretion. *Post*, at 25 (internal quotation marks omitted). I certainly agree with that requirement, see *Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)*, though some cases JUSTICE STEVENS approves have not applied it seriously, see, *e.g.*, *Lawrence, supra, at 562, 123 S. Ct. 2472, 156 L. Ed. 2d 508* ("The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions"). But if the "careful description" requirement is used in the manner we have hitherto employed, then the enterprise of determining the *Due Process Clause*'s "conceptual core," *post*, at 23, is a waste of time. In the cases he cites we sought a careful, specific description of the right at issue in order to determine *whether that right, thus narrowly defined, was* [*3054] *fundamental*. See, *e.g.*, *Glucksberg, 521 U.S., at 722-728, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*; *Reno, supra, at 302-306, 113 S. Ct. 1439, 123 L. Ed. 2d 1*; *Collins v. Harker Heights, 503 U.S. 115, 125-129, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)*; *Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 269-279, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990)*; see also *Vacco v. Quill, 521 U.S. 793, 801-808, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997)*. The threshold step of defining the asserted right with precision is entirely unnecessary, however, if (as JUSTICE STEVENS maintains) the "conceptual [***98] core" of the "liberty clause," *post*, at 23, includes a number of capacious, hazily defined categories. There is no need to define the right with much precision in order to conclude that it pertains to the plaintiff's "ability independently to define [his] identity," his "right to make certain unusually im-

portant decisions that will affect his own, or his family's, destiny," or some aspect of his "[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity [or] respect." *Ibid.* (internal quotation marks omitted). JUSTICE STEVENS must therefore have in mind some other use for the careful-description requirement -- perhaps just as a means of ensuring that courts "procee[d] slowly and incrementally," *post*, at 25. But that could be achieved just as well by having them draft their opinions in longhand. [4]

> 4 After defending the careful-description criterion, JUSTICE STEVENS quickly retreats and cautions courts not to apply it too stringently. *Post*, at 26. Describing a right *too* specifically risks robbing it of its "universal valence and a moral force it might otherwise have," *ibid.*, and "loads the dice against its recognition," *post*, at [***99] 26, n. 25 (internal quotation marks omitted). *That* must be avoided, since it endangers rights JUSTICE STEVENS *does* like. See *ibid.* (discussing *Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)).* To make sure *those* rights get in, we must leave leeway in our description, so that a right that has not itself been recognized as fundamental can ride the coattails of one that has been.

II

If JUSTICE STEVENS' account of the [**934] constraints of his approach did not demonstrate that they do not exist, his application of that approach to the case before us leaves no doubt. He offers several reasons for concluding that the *Second Amendment* right to keep and bear arms is not fundamental enough to be applied against the States. [5] None is persuasive, but more pertinent to my purpose, each is either intrinsically indeterminate, would preclude incorporation of rights we have already held incorporated, or both. His approach therefore does nothing to stop a judge from arriving at any conclusion he sets out to reach.

> 5 JUSTICE STEVENS claims that I mischaracterize his argument by referring to the *Second Amendment* right to keep and bear arms, instead of "the interest in keeping a firearm of one's choosing in the home," the [***100] right he says petitioners assert. *Post*, at 38, n. 36. But it is precisely the "*Second Amendment* right to keep and bear arms" that petitioners argue is incorporated by the *Due Process Clause*. See, *e.g.*, Pet. for Cert. i. Under JUSTICE STEVENS' own approach, that should end the matter. See *post*, at 26 ("[W]e must pay close attention to the precise liberty interest the litigants have asked us to vindicate"). In any event, the demise of watered-down incorporation, see *ante*, at 17-19, means that we no longer subdivide *Bill of Rights* guarantees into their theoretical components, only some of which apply to the States. The *First Amendment* freedom of speech is incorporated -- not the freedom to speak on Fridays, or to speak about philosophy.

JUSTICE STEVENS begins with the odd assertion that "firearms have a fundamentally ambivalent relationship to liberty," since sometimes they are used to cause (or sometimes accidentally produce) injury to others. *Post*, at 35. The source of the [*3055] rule that only nonambivalent liberties deserve Due Process protection is never explained -- proof that judges applying JUSTICE STEVENS' approach can add new elements to the test as they see fit. The criterion, moreover, [***101] is inherently manipulable. Surely JUSTICE STEVENS does not mean that the Clause covers only rights that have *zero* harmful effect on *anyone*. Otherwise even the *First Amendment* is out. Maybe what he means is that the right to keep and bear arms imposes *too great* a risk to others' physical well-being. But as the plurality explains, *ante*, at 35-36, other rights we have already held incorporated pose similarly substantial risks to public safety. In all events, JUSTICE STEVENS supplies neither a standard for how severe the impairment on others' liberty must be for a right to be disqualified, nor (of course) any method of measuring the severity.

JUSTICE STEVENS next suggests that the *Second Amendment* right is not fundamental because it is "different in kind" from other rights we have recognized. *Post*, at 37. In one respect, of course, the right to keep and bear arms *is* different from some other rights we have held the Clause protects and he would recognize: It is deeply grounded in our nation's history and tradition. But JUSTICE STEVENS has a different distinction in mind: Even though he does "not doubt for a moment that many Americans . . . see [firearms] as critical to their way of life [***102] as well as to their security," he pronounces that owning a handgun is not "critical to leading a life of autonomy, dignity, or political equality." [6] *Post*, at 37-38. Who says? Deciding what is essential to an enlightened, liberty-filled [**935] life is an inherently political, moral judgment -- the antithesis of an objective approach that reaches conclusions by applying neutral rules to verifiable evidence. [7]

> 6 JUSTICE STEVENS goes a step farther still, suggesting that the right to keep and bear arms is not protected by the "liberty clause" because it is not really a liberty at all, but a "property right." *Post*, at 38. Never mind that the right to bear arms sounds mighty like a liberty; and never

mind that the "liberty clause" is really a *Due Process Clause* which explicitly protects "property," see *United States v. Carlton, 512 U.S. 26, 41-42, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994)* (SCALIA, J., concurring in judgment). JUSTICE STEVENS' theory cannot explain why the *Takings Clause*, which unquestionably protects property, has been incorporated, see *Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 241, 17 S. Ct. 581, 41 L. Ed. 979 (1897)*, in a decision he appears to accept, *post*, at 14, n. 14.

7 As JUSTICE STEVENS notes, see *post*, at 51-52, I accept as a matter [***103] of *stare decisis* the requirement that to be fundamental for purposes of the *Due Process Clause*, a right must be "implicit in the concept of ordered liberty," *Lawrence, supra, at 593, n. 3, 123 S. Ct. 2472, 156 L. Ed. 2d 508* (SCALIA, J., dissenting) (internal quotation marks omitted). But that inquiry provides infinitely less scope for judicial invention when conducted under the Court's approach, since the field of candidates is *immensely* narrowed by the prior requirement that a right be rooted in this country's traditions. JUSTICE STEVENS, on the other hand, is free to scan the universe for rights that he thinks "implicit in the concept, etc." The point JUSTICE STEVENS makes here is merely one example of his demand that an historical approach to the Constitution prove itself, not merely much better than his in restraining judicial invention, but utterly perfect in doing so. See Part III, *infra*.

No determination of what rights the Constitution of the United States covers would be complete, of course, without a survey of what *other* countries do. *Post*, at 40-41. When it comes to guns, JUSTICE STEVENS explains, our Nation is *already* an outlier among "advanced democracies"; not even our "oldest allies" protect as robust a [***104] right as we do, and we should not widen the gap. *Ibid.* Never mind that he explains neither which countries [*3056] qualify as "advanced democracies" nor why others are irrelevant. For there is an even clearer indication that this criterion lets judges pick which rights States must respect and those they can ignore: As the plurality shows, *ante*, at 34-35, and nn. 28-29, this follow-the-foreign-crowd requirement would foreclose rights that we have held (and JUSTICE STEVENS accepts) are incorporated, but that other "advanced" nations do not recognize -- from the exclusionary rule to the *Establishment Clause*. A judge applying JUSTICE STEVENS' approach must either throw all of those rights overboard or, as cases JUSTICE STEVENS approves have done in considering unenumerated rights, simply ignore foreign law when it undermines the desired conclusion, see, *e.g., Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674* (making no mention of foreign law).

JUSTICE STEVENS also argues that since the right to keep and bear arms was *codified* for the purpose of "prevent[ing] elimination of the militia," it should be viewed as "'a federalism provision'" logically incapable of incorporation. *Post*, at 41-42 (quoting *Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 45, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)* [***105] (THOMAS, J., concurring in judgment); some internal quotation marks omitted). This criterion, too, evidently applies only when judges want it to. The opinion JUSTICE STEVENS quotes for the "federalism provision" principle, JUSTICE THOMAS's concurrence in *Newdow*, argued that incorporation of the *Establishment Clause* "makes little sense" because that Clause was originally understood as a limit on congressional interference with state establishments of religion. *Id., at 49-51, 124 S. Ct. 2301,* [**936] *159 L. Ed. 2d 98*. JUSTICE STEVENS, of course, has no problem with applying the *Establishment Clause* to the States. See, *e.g., id., at 8, n. 4, 124 S. Ct. 2301, 159 L. Ed. 2d 98* (opinion for the Court by STEVENS, J.) (acknowledging that the *Establishment Clause* "appl[ies] to the States by incorporation into the *Fourteenth Amendment*"). While he insists *that* Clause is not a "federalism provision," *post*, at 42, n. 40, he does not explain why *it* is not, but the right to keep and bear arms *is* (even though only the latter refers to a "right of the people"). The "federalism" argument prevents the incorporation of only *certain* rights.

JUSTICE STEVENS next argues that even if the right to keep and bear arms is "deeply rooted in some important senses," the roots of States' efforts [***106] to regulate guns run just as deep. *Post*, at 44 (internal quotation marks omitted). But this too is true of other rights we have held incorporated. No fundamental right -- not even the *First Amendment* -- is absolute. The traditional restrictions go to show the scope of the right, not its lack of fundamental character. At least that is what they show (JUSTICE STEVENS would agree) for *other* rights. Once again, principles are applied selectively.

JUSTICE STEVENS' final reason for rejecting incorporation of the *Second Amendment* reveals, more clearly than any of the others, the game that is afoot. Assuming that there is a "plausible constitutional basis" for holding that the right to keep and bear arms is incorporated, he asserts that we ought not to do so *for prudential reasons*. *Post*, at 47. Even if we had the authority to withhold rights that are within the Constitution's command (and we assuredly do not), two of the reasons JUSTICE STEVENS gives for abstention show just how much power he would hand to judges. The States' "right to experiment" with solutions to the problem of gun violence, he says, is at its apex here because "the best solu-

tion is far from clear." *Post*, at 47-48 (internal [***107] quotation marks omitted). That is true of most serious [*3057] social problems -- whether, for example, "the best solution" for rampant crime is to admit confessions unless they are affirmatively shown to have been coerced, but see *Miranda v. Arizona, 384 U.S. 436, 444-445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*, or to permit jurors to impose the death penalty without a requirement that they be free to consider "any relevant mitigating factor," see *Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)*, which in turn leads to the conclusion that defense counsel has provided inadequate defense if he has not conducted a "reasonable investigation" into potentially mitigating factors, see, *e.g.*, *Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*, inquiry into which question tends to destroy any prospect of prompt justice, see, *e.g.*, *Wong v. Belmontes, 558 U.S. ___, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009) (per curiam)* (reversing grant of habeas relief for sentencing on a crime committed in 1981). The obviousness of the optimal answer is in the eye of the beholder. The implication of JUSTICE STEVENS' call for abstention is that if We The Court conclude that They The People's answers to a problem are silly, we are free to "interven[e]," *post*, at 47, but if we too are uncertain of [***108] the right answer, [**937] or merely think the States may be on to something, we can loosen the leash.

A second reason JUSTICE STEVENS says we should abstain is that the States have shown they are "capable" of protecting the right at issue, and if anything have protected it too much. *Post*, at 49. That reflects an assumption that judges can distinguish between a *proper* democratic decision to leave things alone (which we should honor), and a case of democratic market failure (which we should step in to correct). I would not -- and no judge should -- presume to have that sort of omniscience, which seems to me far more "arrogant," *post*, at 41, than confining courts' focus to our own national heritage.

III

JUSTICE STEVENS' response to this concurrence, *post*, at 51-56, makes the usual rejoinder of "living Constitution" advocates to the criticism that it empowers judges to eliminate or expand what the people have prescribed: The traditional, historically focused method, he says, reposes discretion in judges as well. [8] Historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.

> 8 JUSTICE [***109] STEVENS also asserts that his approach is "more faithful to this Nation's constitutional history" and to "the values and commitments of the American people, as they stand today," *post*, at 54. But what he asserts to be the proof of this is that his approach aligns (no surprise) with those cases he approves (and dubs "canonical," *ibid.*). Cases he disfavors are discarded as "hardly bind[ing]" "excesses," *post*, at 12, or less "enduring," *post*, at 17, n. 16. Not proven. Moreover, whatever relevance JUSTICE STEVENS ascribes to current "values and commitments of the American people" (and that is unclear, see *post*, at 48-49, n. 47), it is hard to see how it shows fidelity to them that he disapproves a different subset of old cases than the Court does.

I will stipulate to that. [9] But the question to be decided is not whether the historically focused method is a *perfect* [*3058] *means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world. Or indeed, even more narrowly than that: whether it is demonstrably much better than what JUSTICE STEVENS proposes. I think it beyond all serious dispute that it is much less subjective, and intrudes [***110] much less upon the democratic process. It is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor. In the most controversial matters brought before this Court -- for example, the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty -- *any* historical methodology, under *any* plausible standard of proof, would lead to the same conclusion. [10] Moreover, the methodological differences that divide historians, and the [**938] varying interpretive assumptions they bring to their work, *post*, at 52-54, are nothing compared to the differences among the American people (though perhaps not among graduates of prestigious law schools) with regard to the moral judgments JUSTICE STEVENS would have courts pronounce. And whether or not special expertise is needed to answer historical questions, judges most certainly have no "comparative . . . advantage," *post*, at 24 (internal quotation marks omitted), in resolving moral disputes. What is more, his approach [***111] would not eliminate, but multiply, the hard questions courts must confront, since he would not *replace* history with moral philosophy, but would have courts consider *both*.

> 9 That is not to say that every historical question on which there is room for debate is indeterminate, or that every question on which historians disagree is equally balanced. Cf. *post*, at 52-53. For example, the historical analysis of the principal dissent in *Heller* is as valid as the Court's

only in a two-dimensional world that conflates length and depth.

10 By the way, JUSTICE STEVENS greatly magnifies the difficulty of an historical approach by suggesting that it was *my* burden in *Lawrence* to show the "ancient roots of proscriptions against sodomy," *post*, at 53 (internal quotation marks omitted). *Au contraire*, it was *his* burden (in the opinion he joined) to show the ancient roots of the right of sodomy.

And the Court's approach intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people, with the assurance that their [***112] decision is not subject to judicial revision. JUSTICE STEVENS' approach, on the other hand, deprives the people of that power, since whatever the Constitution and laws may say, the list of protected rights will be whatever courts wish it to be. After all, he notes, the people have been wrong before, *post*, at 55, and courts may conclude they are wrong in the future. JUSTICE STEVENS abhors a system in which "majorities or powerful interest groups always get their way," *post*, at 56, but replaces it with a system in which unelected and life-tenured judges always get their way. That such usurpation is effected unabashedly, see *post*, at 53 -- with "the judge's cards . . . laid on the table," *ibid.* -- makes it even worse. In a vibrant democracy, usurpation should have to be accomplished in the dark. It is JUSTICE STEVENS' approach, not the Court's, that puts democracy in peril.

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

I agree with the Court that the *Fourteenth Amendment* makes the right to keep and bear arms set forth in the *Second Amendment* "fully applicable to the States." *Ante*, at 1. I write separately because I believe there is a more straightforward path to this [***113] conclusion, one that is [*3059] more faithful to the *Fourteenth Amendment's* text and history.

Applying what is now a well-settled test, the plurality opinion concludes that the right to keep and bear arms applies to the States through the *Fourteenth Amendment's Due Process Clause* because it is "fundamental" to the American "scheme of ordered liberty," *ante*, at 19 (citing *Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)*), and "'deeply rooted in this Nation's history and tradition,'" *ante*, at 19 (quoting *Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)*). I agree with that description of the right. But I cannot agree that it is enforceable against the States through a clause that [**939] speaks only to "process." Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the *Fourteenth Amendment's Privileges or Immunities Clause.*

I

In *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)*, this Court held that the *Second Amendment* protects an individual right to keep and bear arms for the purpose of self-defense, striking down a District of Columbia ordinance that banned the possession of handguns in the home. *Id., at __, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 659.* The question [***114] in this case is whether the Constitution protects that right against abridgment by the States.

As the Court explains, if this case were litigated before the *Fourteenth Amendment's* adoption in 1868, the answer to that question would be simple. In *Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 7 Pet. 243, 8 L. Ed. 672 (1833)*, this Court held that the *Bill of Rights* applied only to the Federal Government. Writing for the Court, Chief Justice Marshall recalled that the founding generation added the first eight Amendments to the Constitution in response to Antifederalist concerns regarding the extent of federal -- not state -- power, and held that if "the framers of these amendments [had] intended them to be limitations on the powers of the state governments," "they would have declared this purpose in plain and intelligible language." *Id., at 250, 7 Pet. 243, 8 L. Ed. 672.* Finding no such language in the Bill, Chief Justice Marshall held that it did not in any way restrict state authority. *Id., at 248-250, 7 Pet. 243, 8 L. Ed. 672*; see *Lessee of Livingston v. Moore, 32 U.S. 469, 7 Pet. 469, 551-552, 8 L. Ed. 751 (1833)* (reaffirming *Barron's* holding); *Permoli v. Municipality No. 1 of New Orleans, 44 U.S. 589, 3 How. 589, 609-610, 11 L. Ed. 739 (1845)* (same).

Nearly three decades after *Barron*, the Nation was splintered [***115] by a civil war fought principally over the question of slavery. As was evident to many throughout our Nation's early history, slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure. See, *e.g.*, 3 Records of the Federal Convention of 1787, p. 212 (M. Farrand ed. 1911) (remarks of Luther Martin) ("[S]lavery is inconsistent with the genius of republicanism, and has a tendency to destroy those principles on which it is supported, as it lessens the sense of the equal rights of mankind" (emphasis deleted)); A. Lincoln, Speech at Peoria, Ill. (Oct. 16, 1854), reprinted in 2 The Collected Works of Abraham Lincoln 266 (R.

Basler ed. 1953) ("[N]o man is good enough to govern another man, *without that other's consent*. I say this is the leading principle -- the sheet anchor of American republicanism. . . . Now the relation [*3060] of masters and slaves is, *pro tanto*, a total violation of this principle").

After the war, a series of constitutional amendments were adopted to repair the Nation from the damage slavery had caused. [***116] The provision at issue here, *§ 1 of the Fourteenth Amendment*, significantly altered our system of government. The first sentence of that section provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State [**940] wherein they reside." This unambiguously overruled this Court's contrary holding in *Dred Scott v. Sandford, 60 U.S. 393 (1857)*, that the Constitution did not recognize black Americans as citizens of the United States or their own State. *Id., at 405-406, 19 How. 393, 15 L. Ed. 691.*

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

This Court's precedents accept that point, but define the relevant collection of rights quite narrowly. In the *Slaughter-House Cases, 83 U.S. 36, 16 Wall. 36, 21 L. Ed. 394 (1873)*, decided just five years after the *Fourteenth Amendment's* adoption, [***117] the Court interpreted this text, now known as the *Privileges or Immunities Clause*, for the first time. In a closely divided decision, the Court drew a sharp distinction between the privileges and immunities of state citizenship and those of federal citizenship, and held that the *Privileges or Immunities Clause* protected only the latter category of rights from state abridgment. *Id., at 78, 16 Wall. 36, 21 L. Ed. 394*. The Court defined that category to include only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id., at 79, 16 Wall. 36, 21 L. Ed. 394*. This arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship. See *ibid.* (listing "[t]he right to peaceably assemble" and "the privilege of the writ of *habeas corpus*" as rights potentially protected by the *Privileges or Immunities Clause*). But the Court soon rejected that proposition, interpreting the *Privileges or Immunities Clause* even more narrowly in its later cases.

Chief among those cases is *United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1876)*. There, the Court held that members of a white militia who had brutally [***118] murdered as many as 165 black Louisianians congregating outside a courthouse had not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms. *Ibid.;* see L. Keith, The Colfax Massacre 109 (2008). According to the Court, the right to peaceably assemble codified in the *First Amendment* was not a privilege of United States citizenship because "[t]he right . . . existed long *before* the adoption of the Constitution." *92 U.S., at 551, 23 L. Ed. 588* (emphasis added). Similarly, the Court held that the right to keep and bear arms was not a privilege of United States citizenship because it was not "in any manner dependent upon that instrument for its existence." *Id., at 553, 23 L. Ed. 588*. In other words, the reason the Framers codified the right to bear arms in the *Second Amendment* -- its nature as an inalienable right that pre-existed the Constitution's adoption -- was the very reason citizens could not enforce it against States through the Fourteenth.

That circular reasoning effectively has been the Court's last word on the [**941] *Privileges or Immunities Clause*. [1] [*3061] In the intervening years, the Court has held that the Clause prevents state abridgment of only a handful of rights, [***119] such as the right to travel, see *Saenz v. Roe, 526 U.S. 489, 503, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999)*, that are not readily described as essential to liberty.

> 1 In the two decades after *United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1876)*, was decided, this Court twice reaffirmed its holding that the *Privileges or Immunities Clause* does not apply the *Second Amendment* to the States. *Presser v. Illinois, 116 U.S. 252, 266-267, 6 S. Ct. 580, 29 L. Ed. 615 (1886)*; *Miller v. Texas, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812 (1894)*.

As a consequence of this Court's marginalization of the Clause, litigants seeking federal protection of fundamental rights turned to the remainder of *§ 1* in search of an alternative fount of such rights. They found one in a most curious place -- that section's command that every State guarantee "due process" to any person before depriving him of "life, liberty, or property." At first, litigants argued that this *Due Process Clause* "incorporated" certain procedural rights codified in the *Bill of Rights* against the States. The Court generally rejected those claims, however, on the theory that the rights in question were not sufficiently "fundamental" to warrant such treatment. See, *e.g., Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884)* (grand jury indictment

requirement); [***120] *Maxwell v. Dow, 176 U.S. 581, 20 S. Ct. 448, 44 L. Ed. 597 (1900)* (12-person jury requirement); *Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908)* (privilege against self-incrimination).

That changed with time. The Court came to conclude that certain *Bill of Rights* guarantees *were* sufficiently fundamental to fall within *§ 1*'s guarantee of "due process." These included not only procedural protections listed in the first eight Amendments, see, *e.g., Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)* (protection against double jeopardy), but substantive rights as well, see, *e.g., Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925)* (right to free speech); *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)* (same). In the process of incorporating these rights against the States, the Court often applied them differently against the States than against the Federal Government on the theory that only those "fundamental" aspects of the right required *Due Process Clause* protection. See, *e.g., Betts v. Brady, 316 U.S. 455, 473, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942)* (holding that the *Sixth Amendment* required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, but that the *Due Process Clause* required appointment of counsel [***121] in state criminal cases only where "want of counsel . . . result[ed] in a conviction lacking in . . . fundamental fairness"). In more recent years, this Court has "abandoned the notion" that the guarantees in the *Bill of Rights* apply differently when incorporated against the States than they do when applied to the Federal Government. *Ante*, at 17-18 (opinion of the Court) (internal quotation marks omitted). But our cases continue to adhere to the view that a right is incorporated through the *Due Process Clause* only if it is sufficiently "fundamental," [**942] *ante*, at 37, 42-44 (plurality opinion) -- a term the Court has long struggled to define.

While this Court has at times concluded that a right gains "fundamental" status only if it is essential to the American "scheme of ordered liberty" or "'deeply rooted in this Nation's history and tradition,'" [*3062] *ante*, at 19 (plurality opinion) (quoting *Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*), the Court has just as often held that a right warrants *Due Process Clause* protection if it satisfies a far less measurable range of criteria, see *Lawrence v. Texas, 539 U.S. 558, 562, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)* (concluding that the *Due Process Clause* protects "liberty of the person both in its [***122] spatial and in its more transcendent dimensions"). Using the latter approach, the Court has determined that the *Due Process Clause* applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights. See, *e.g., Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905)*; *Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)*; *Lawrence, supra.*

All of this is a legal fiction. The notion that a constitutional provision that guarantees only "process" before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish "fundamental" rights that warrant protection from nonfundamental rights that do not. Today's decision illustrates the point. Replaying a debate that has endured from the inception of the Court's substantive due process jurisprudence, the dissents laud the "flexibility" in this Court's substantive due process doctrine, *post*, at 14 [***123] (STEVENS, J., dissenting); see *post*, at 6-8 (BREYER, J., dissenting), while the plurality makes yet another effort to impose principled restraints on its exercise, see *ante*, at 33-41. But neither side argues that the meaning they attribute to the *Due Process Clause* was consistent with public understanding at the time of its ratification.

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

I cannot accept a theory [***124] of constitutional interpretation that rests on such tenuous footing. This Court's [**943] substantive due process framework fails to account for both the text of the *Fourteenth Amendment* and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle. I believe the original meaning of the *Fourteenth Amendment* offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the *Fourteenth Amendment* is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.

I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system. [*3063] But *stare decisis* is only an "adjunct" of our duty as judges to decide by our best lights what the Constitution means. *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 963, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)* (Rehnquist, C. J., concurring in judgment in part and dissenting in part). It is not "an inexorable command." *Lawrence, supra, at 577, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. Moreover, as judges, we interpret the Constitution one [***125] case or controversy at a time. The question presented in this case is not whether our entire *Fourteenth Amendment* jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here. With the inquiry appropriately narrowed, I believe this case presents an opportunity to reexamine, and begin the process of restoring, the meaning of the *Fourteenth Amendment* agreed upon by those who ratified it.

II

"It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 174, 2 L. Ed. 60 (1803)* (Marshall, C. J.). Because the Court's *Privileges or Immunities Clause* precedents have presumed just that, I set them aside for the moment and begin with the text.

The Privileges or Immunities Clause of the Fourteenth Amendment declares that "[n]o State . . . shall abridge the privileges or immunities of citizens of the United States." In interpreting this language, it is important to recall that constitutional provisions are "'written to be understood by the voters.'" *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 648* (quoting *United States v. Sprague, 282 U.S. 716, 731, 51 S. Ct. 220, 75 L. Ed. 640 (1931))*. [***126] Thus, the objective of this inquiry is to discern what "ordinary citizens" at the time of ratification would have understood the *Privileges or Immunities Clause* to mean. *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 3)*.

A

1

At the time of Reconstruction, the terms "privileges" and "immunities" had an established meaning as synonyms for "rights." The two words, standing alone or paired together, were used interchangeably with the words "rights," "liberties," and "freedoms," and had been since the time of Blackstone. See 1 W. Blackstone, Commentaries *129 (describing the "rights and liberties" of Englishmen as "private immunities" and "civil privileges"). A number of antebellum judicial decisions used the terms in this manner. See, *e.g.*, *Magill v. Brown, 16 F. Cas. 408, 428, F. Cas. No. 8952 (No. 8,952)* (CC ED Pa. 1833) (Baldwin, J.) ("The words 'privileges and immunities' relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places"). In addition, dictionary definitions confirm that the public shared this understanding. See, *e.g.*, N. Webster, An American Dictionary of the English Language 1039 (C. Goodrich & N. Porter rev. 1865) (defining "privilege" [***127] as "a right or immunity not enjoyed by others or by all" and listing among its synonyms the words "immunity," "franchise," "right," and "liberty"); *id.*, at 661 (defining "immunity" as "[f]reedom from an obligation" or "particular privilege"); *id.*, at 1140 (defining "right" as "[p]rivilege or immunity granted by authority"). [2]

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

The fact that a particular interest was designated as a "privilege" or "immunity," [*3064] rather than a "right," "liberty," or "freedom," revealed little about its substance. Blackstone, for example, used the terms "privileges" and "immunities" to describe both the inalienable [***128] rights of individuals and the positive-law rights of corporations. See 1 Commentaries, at *129 (describing "private immunities" as a "*residuum* of natural liberty," and "civil privileges" as those "which society has engaged to provide, in lieu of the natural liberties so given up by individuals" (footnote omitted)); *id.*, at *468 (stating that a corporate charter enables a corporation to "establish rules and orders" that serve as "the privileges and immunities . . . of the corporation"). Writers in this country at the time of Reconstruction followed a similar practice. See, *e.g.*, *Racine & Mississippi R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331, 334 (1868)* (describing agreement between two railroad companies in which they agreed "'to fully merge and consolidate the[ir] capital stock, powers, privileges, immunities and franchises'"); *Hathorn v. Calef, 53 Me. 471, 483-484 (1866)* (concluding that a statute did not "modify any power, privileges, or immunity, pertaining to the franchise of any corporation"). The nature of a privilege or

immunity thus varied depending on the person, group, or entity to whom those rights were assigned. See Lash, The Origins of the *Privileges or Immunities Clause,* Part [***129] I: "Privileges and Immunities" as an Antebellum Term of Art, *98 Geo. L. J. 1241, 1256-1257 (2010)* (surveying antebellum usages of these terms).

2

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

This tradition begins with our country's English roots. Parliament declared the basic liberties of English citizens in a series of documents ranging from the Magna Carta to the Petition [**945] of Right and the English *Bill of Rights*. See 1 B. Schwartz, The *Bill of Rights*: A Documentary History 8-16, 19-21, 41-46 (1971) (hereinafter Schwartz). These fundamental rights, according to the English tradition, belonged to all people but became legally enforceable only when recognized in legal texts, including acts of Parliament and the decisions of common-law judges. See B. Bailyn, The Ideological Origins of the American Revolution 77-79 (1967). These rights included many that later would be set forth in our [***130] Federal *Bill of Rights*, such as the right to petition for redress of grievances, the right to a jury trial, and the right of "Protestants" to "have arms for their defence." English *Bill of Rights* (1689), reprinted in 1 Schwartz 41, 43.

As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen. They consistently claimed the rights of English citizenship in their founding documents, repeatedly referring to these rights as "privileges" and "immunities." For example, a Maryland law provided that

> [*3065] "[A]ll the Inhabitants of this Province being Christians (Slaves excepted) Shall have and enjoy all such *rights liberties immunities priviledges and free customs* within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England . . . ." Md. Act for the Liberties of the People (1639), in *id.,* at 68 (emphasis added). [3]

3 See also, *e.g.*, Charter of Va. (1606), reprinted in 7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3783, 3788 (F. Thorpe ed. 1909) (hereinafter Thorpe) ("DECLAR[ING]" that "all and every the Persons being our Subjects, . . . shall HAVE [***131] and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realm of *England*" (emphasis in original)); Charter of New England (1620), in 3 *id.,* at 1827, 1839 ("[A]ll and every the Persons, beinge our Subjects, . . . shall have and enjoy all Liberties, and ffranchizes, and Immunities of free Denizens and naturall subjects . . . as if they had been abidinge and born within this our Kingdome of England"); Charter of Mass. Bay (1629), in *id.* at 1846, 1856-1857 (guaranteeing that "all and every the Subjects of Us, . . . shall have and enjoy all liberties and Immunities of free and naturall Subjects . . . as yf they and everie of them were borne within the Realme of England"); Grant of the Province of Me. (1639), in *id.,* at 1625, 1635 (guaranteeing "Liberties Francheses and Immunityes of or belonging to any the naturall borne subjects of this our Kingdome of England"); Charter of Carolina (1663), in 5 *id.* at 2743, 2747 (guaranteeing to all subjects "all liberties franchises and priviledges of this our kingdom of England"); Charter of R. I. and Providence Plantations (1663), in 6 *id.,* at 3211, 3220 ("[A]ll and every the subjects of us . [***132] . . shall have and enjoye all libertyes and immunityes of ffree and naturall subjects within any the dominions of us, our heires, or successours, . . . as if they, and every of them, were borne within the realme of England"); Charter of Ga. (1732), in 2 *id.,* at 765, 773 ("[A]ll and every the persons which shall happen to be born within the said province . . . shall have and enjoy all liberties, franchises and immunities of free denizens and natural born subjects, within any of our dominions, to all intents and purposes, as if abiding and born within this our kingdom of Great-Britain").

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

> "*Resolved*, That there are certain essential Rights of the *British* Constitution of Government, which are founded in the Law of God and Nature, and are the

common Rights of Mankind -- Therefore . . . .

"*Resolved,* That no Man can [**946] justly take the Property of another without his Consent: And that upon this *original* Principle [***133] the Right of Representation . . . is evidently founded . . . . *Resolved*, That this *inherent* Right, together with all other, essential *Rights, Liberties, Privileges and Immunities* of the People of *Great Britain,* have been fully confirmed to them by *Magna Charta.*" The Massachusetts Resolves (Oct. 29, 1765), reprinted in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1766, p. 56 (E. Morgan ed. 1959) (some emphasis added). [4]

4 See also, *e.g.,* A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America 174 (1968) (quoting 1774 Georgia resolution declaring that the colony's inhabitants were entitled to "'the same rights, privileges, and immunities with their fellow-subjects in *Great Britain*'" (emphasis in original)); The Virginia Resolves, The Resolutions as Printed in the Journal of the House of Burgesses, reprinted in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1766, at 46, 48 ("[T]he Colonists aforesaid are declared entitled to all Liberties, Privileges, and Immunities of Denizens and natural Subjects, to all Intents and Purposes, as if they had been abiding and born within the Realm of *England*" (emphasis [***134] in original)).

[*3066] In keeping with this practice, the First Continental Congress declared in 1774 that the King had wrongfully denied the colonists "the rights, liberties, and immunities of free and natural-born subjects . . . within the realm of England." 1 Journals of the Continental Congress 1774-1789, p. 68 (1904). In an address delivered to the inhabitants of Quebec that same year, the Congress described those rights as including the "great" "right[s]" of "trial by jury," "Habeas Corpus," and "freedom of the press." Address of the Continental Congress to the Inhabitants of Quebec (1774), reprinted in 1 Schwartz 221-223.

After declaring their independence, the newly formed States replaced their colonial charters with constitutions and state bills of rights, almost all of which guaranteed the same fundamental rights that the former colonists previously had claimed by virtue of their English heritage. See, *e. g.*, Pa. Declaration of Rights (1776), reprinted in 5 Thorpe 3081-3084 (declaring that "all men are born equally free and independent, and have certain natural, inherent and inalienable rights," including the "right [***135] to worship Almighty God according to the dictates of their own consciences" and the "right to bear arms for the defence of themselves and the state"). [5]

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

Several years later, the Founders amended the Constitution to expressly protect many of the same fundamental rights against interference by the Federal Government. Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text. See, *e.g.*, 1 Annals of Cong. 431-432, 436-437, 440-442 (1834) (statement of Rep. Madison) (proposing *Bill of Rights* in the first Congress); The Federalist No. 84, pp. 531-533 (B. Wright ed. 1961) (A. Hamilton); see also *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 657* ("[I]t has always been widely understood that the *Second Amendment*, [***136] like the *First* and *Fourth Amendments*, codified a [**947] *pre-existing* right"). The Court's subsequent decision in *Barron*, however, made plain that the codification of these rights in the Bill made them legally enforceable only against the Federal Government, not the States. See 7 Pet., at 247.

3

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

Article IV, § 2 was derived from a similar clause in the Articles of Confederation, and reflects the dual citizenship the Constitution provided to all Americans after replacing that "league" of separate sovereign States. *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 187, 6 L. Ed.*

23 (1824); see 3 J. Story, Commentaries on the Constitution of the United States § 1800, p. 675 (1833). By virtue of a person's citizenship in a particular State, he was [***137] guaranteed whatever rights and liberties that State's constitution [*3067] and laws made available. Article IV, § 2 vested citizens of each State with an additional right: the assurance that they would be afforded the "privileges and immunities" of citizenship in any of the several States in the Union to which they might travel.

What were the "Privileges and Immunities of Citizens in the several States"? That question was answered perhaps most famously by Justice Bushrod Washington sitting as Circuit Justice in *Corfield v. Coryell, 6 F. Cas. 546, 551-552, F. Cas. No. 3230 (No. 3,230)* (CC ED Pa. 1825). In that case, a Pennsylvania citizen claimed that a New Jersey law prohibiting nonresidents from harvesting oysters from the State's waters violated Article IV, § 2 because it deprived him, as an out-of-state citizen, of a right New Jersey availed to its own citizens. *Id., at 550.* Justice Washington rejected that argument, refusing to "accede to the proposition" that Article IV, § 2 entitled "citizens of the several states . . . to participate in *all* the rights which belong exclusively to the citizens of any other particular state." *Id., at 552* (emphasis added). In his view, Article IV, § 2 did not guarantee equal [***138] access to all public benefits a State might choose to make available to its citizens. See *id., at 552.* Instead, it applied only to those rights "which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments." *Id., at 551* (emphasis added). Other courts generally agreed with this principle. See, *e.g., Abbott v. Bayley, 23 Mass. 89, 92-93 (1827)* (noting that the "privileges and immunities" of citizens in the several States protected by Article IV, § 2 are "qualified and not absolute" because they do not grant a traveling citizen the right of "suffrage or of eligibility to office" in the State to which he travels).

When describing those "fundamental" rights, Justice Washington thought it "would perhaps be more tedious than difficult to enumerate" them all, but suggested that they could "be all comprehended under" a broad list of "general heads," such as "[p]rotection by the government," "the enjoyment of life and liberty, with the [**948] right to acquire and possess property of every kind," "the benefit of the writ of habeas corpus," and the right of access to "the courts of the state," among others. [6] *Corfield, supra, at 551-552.*

> 6 Justice Washington's [***139] complete list was as follows:
>
> "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised." *6 Fed. Cas., at 551-552.*

Notably, Justice Washington did not indicate whether Article IV, § 2 *required* States [***140] to recognize these fundamental rights in their own citizens and thus in sojourning citizens alike, or whether the Clause simply prohibited the States from discriminating against sojourning citizens with respect to whatever fundamental rights state law happened to recognize. On this question, the weight of legal authorities at the time of Reconstruction indicated [*3068] that Article IV, § 2 prohibited States from discriminating against sojourning citizens when recognizing fundamental rights, but did not require States to recognize those rights and did not prescribe their content. The highest courts of several States adopted this view, see, *e.g., Livingston v. Van Ingen, 9 Johns. 507, 561 (N. Y. Sup. Ct. 1812)* (Yates, J.); *id., at 577* (Kent, J.); *Campbell v. Morris, 3 H. & McH. 535, 553-554 (Md. Gen. Ct. 1797)* (Chase, J.), as did several influential treatise-writers, see T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union 15-16, and n.3(1868) (reprint 1972) (describing Article IV, § 2 as designed "to prevent discrimination by the several States against the citizens and public proceedings of other States"); 2 J. Kent, [***141] Commentaries on American Law 35 (11th ed. 1867) (stating that Article IV, § 2 entitles sojourning citizens "to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other"). This Court adopted the same conclusion in a unanimous opinion just one year after the *Fourteenth Amendment* was ratified. See *Paul v. Virginia, 75 U.S. 168, 8 Wall. 168, 180, 19 L. Ed. 357 (1869).*

* * *

The text examined so far demonstrates three points about the meaning of the *Privileges or Immunities Clause* in *§ 1*. First, "privileges" and "immunities" were synonyms for "rights." Second, both the States and the Federal Government had long recognized the inalienable rights of their citizens. Third, Article IV, § 2 of the Constitution protected traveling citizens against state discrimination with respect to the fundamental rights of state citizenship.

Two questions still remain, both provoked by the textual similarity between *§ 1*'s *Privileges or Immunities Clause* and Article IV, § 2. The first involves the nature of the rights at stake: Are the privileges or immunities [**949] of "citizens of the United States" recognized by *§ 1* the same as the privileges and immunities of "citizens [***142] in the several States" to which Article IV, § 2 refers? The second involves the restriction imposed on the States: Does *§ 1*, like Article IV, § 2, prohibit only discrimination with respect to certain rights *if* the State chooses to recognize them, or does it require States to recognize those rights? I address each question in turn.

B

I start with the nature of the rights that *§ 1*'s *Privileges or Immunities Clause* protects. *Section 1* overruled *Dred Scott*'s holding that blacks were not citizens of either the United States or their own State and, thus, did not enjoy "the privileges and immunities of citizens" embodied in the Constitution. *60 U.S. 393, 19 How. at 417, 15 L. Ed. 691*. 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 [***143] of such citizens included individual rights enumerated in the Constitution, including the right to keep and bear arms.

1

Nineteenth-century treaties through which the United States acquired territory from other sovereigns routinely promised inhabitants of the newly acquired territories [*3069] that they would enjoy all of the "rights," "privileges," and "immunities" of United States citizens. See, *e.g.*, Treaty of Amity, Settlement, and Limits, Art. 6, Feb. 22, 1819, 8 Stat. 256-258, T. S. No. 327 (entered into force Feb. 19, 1821) (cession of Florida) ("The inhabitants of the territories which his Catholic Majesty cedes to the United States, by this Treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of *all the privileges, rights, and immunities, of the citizens of the United States*" (emphasis added)). [7] Commentators of the time explained that the rights and immunities of "citizens of the United States" recognized in these treaties "undoubtedly mean[t] those privileges that are common to all citizens of this republic." Marcus, An Examination of the Expediency and Constitutionality [***144] of Prohibiting Slavery in the State of Missouri 17 (1819). It is therefore altogether unsurprising that several of these treaties [**950] identify liberties enumerated in the Constitution as privileges and immunities common to all United States citizens.

> 7 See also Treaty Between the United States of America and the Ottawa Indians of Blanchard's Fork and Roche De Boeuf, June 24, 1862, 12 Stat. 1237 ("The Ottawa Indians of the United Bands of Blanchard's Fork and of Roche de Boeuf, having become sufficiently advanced in civilization, and being desirous of becoming citizens of the United States . . . [after five years from the ratification of this treaty] shall be deemed and declared to be citizens of the United States, to all intents and purposes, and shall be entitled to all the *rights, privileges, and immunities of such citizens*" (emphasis added)); Treaty Between the United States of America and Different Tribes of Sioux Indians, Art. VI, April 29, 1868, 15 Stat. 637 ("[A]ny Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the *privileges and immunities of such* [***145] *citizens*" (emphasis added)).

For example, the Louisiana Cession Act of 1803, which codified a treaty between the United States and France culminating in the Louisiana Purchase, provided that

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyments of *all the rights, advantages and immunities of citizens of the United States;* and in the mean time they shall be maintained and protected in *the free enjoyment of their liberty, property and the religion which they profess.*" Treaty Between the United States of America and the French Repub-

lic, Art. III, Apr. 30, 1803, 8 Stat. 202, T. S. No. 86 (emphasis added). [8]

8 Subsequent treaties contained similar guarantees that the inhabitants of the newly acquired territories would enjoy the freedom to exercise certain constitutional rights. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Art. IX, Feb. 2, 1848, 9 Stat. 930, T. S. No. 207 (cession of Texas) (declaring that inhabitants of the Territory were entitled "to the enjoyment of all the rights of citizens of the [***146] United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction"); Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russians to the United States of America, Art. III, Mar. 30, 1867, 15 Stat. 542, T. S. No. 301 (June 20, 1867) (cession of Alaska) ("The inhabitants of the ceded territory, . . . if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion").

[*3070] The Louisiana Cession Act reveals even more about the privileges and immunities of United States citizenship because it provoked an extensive public debate on the meaning of that term. In 1820, when the Missouri Territory (which the United States acquired through the Cession Act) sought to enter the Union as a new State, a debate ensued [***147] over whether to prohibit slavery within Missouri as a condition of its admission. Some congressmen argued that prohibiting slavery in Missouri would deprive its inhabitants of the "privileges and immunities" they had been promised by the Cession Act. See, *e.g.*, 35 Annals of Cong. 1083 (1855) (remarks of Kentucky Rep. Hardin). But those who opposed slavery in Missouri argued that the right to hold slaves was merely a matter of state property law, not one of the privileges and immunities of United States citizenship guaranteed by the Act. [9]

9 See, *e.g.*, Speech of Mr. Joseph Hemphill (Pa.) on the Missouri Question in the House of the Representatives 16 (1820), as published in pamphlet form and reprinted in 22 Moore Pamphlets, p. 1 ("If the right to hold slaves is a federal right and attached merely to citizenship of the United States, [then slavery] could maintain itself against state authority, and on this principle the owner might take his slaves into any state he pleased, in defiance of the state laws, but this would be contrary to the constitution"); see also Lash, The Origins of the *Privileges or Immunities Clause,* Part I: "Privileges and Immunities" as an Antebellum Term of Art, *98 Geo. L. J. 1241, 1288-1290 (2010)* [***148] (collecting other examples).

Daniel Webster was among the leading proponents of the antislavery position. In his "Memorial to Congress," Webster argued that "[t]he rights, advantages and immunities here spoken of [in the Cession Act] [**951] must . . . be such as are recognized or communicated by the Constitution of the United States," not the "rights, advantages and immunities, derived exclusively from the *State* governments . . . ." D. Webster, A Memorial to the Congress of the United States on the Subject of Restraining the Increase of Slavery in New States to be Admitted into the Union 15 (Dec. 15, 1819) (emphasis added). "The obvious meaning" of the Act, in Webster's view, was that "*the rights derived under the federal Constitution* shall be enjoyed by the inhabitants of [the territory]." *Id.*, at 15-16 (emphasis added). In other words, Webster articulated a distinction between the rights of United States citizenship and the rights of state citizenship, and argued that the former included those rights "recognized or communicated by the Constitution." Since the right to hold slaves was not mentioned in the Constitution, it was not a right of federal citizenship.

Webster and his allies ultimately [***149] lost the debate over slavery in Missouri and the territory was admitted as a slave State as part of the now-famous Missouri Compromise. Missouri Enabling Act of March 6, 1820, ch. 22, § 8, 3 Stat. 548. But their arguments continued to inform public understanding of the privileges and immunities of United States citizenship. In 1854, Webster's Memorial was republished in a pamphlet discussing the Nation's next major debate on slavery -- the proposed repeal of the Missouri Compromise through the Kansas-Nebraska Act, see The Nebraska Question: Comprising Speeches in the United States Senate: Together with the History of the Missouri Compromise 9-12 (1854). It was published again in 1857 in a collection of famous American speeches. See The Political Text-Book, or Encyclopedia: Containing Everything Necessary for the Reference of the Politicians and Statesmen of the United States 601-604 (M. Cluskey ed. 1857); see also Lash, *98 Geo. L. J., at 1294-1296* (describing Webster's arguments and their influence).

[*3071] 2

Evidence from the political branches in the years leading to the *Fourteenth Amendment's* adoption demonstrates broad public understanding that the privileges and immunities of United States [***150] citizenship included rights set forth in the Constitution, just as Webster and his allies had argued. In 1868, President Andrew Johnson issued a proclamation granting amnesty to former Confederates, guaranteeing "to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason . . . with restoration of *all rights, privileges, and immunities under the Constitution* and the laws which have been made in pursuance thereof." 15 Stat. 712.

Records from the 39th Congress further support this understanding.

a

After the Civil War, Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union. See Cong. Globe, 39th Cong., 1st Sess., 6, 30 (1865) (hereinafter 39th Cong. Globe); M. Curtis, No State Shall Abridge: The *Fourteenth Amendment* and the *Bill of Rights* 57 (1986) (hereinafter Curtis). That Committee would ultimately [**952] recommend the adoption of the *Fourteenth Amendment*, justifying its recommendation by submitting a report to Congress that extensively catalogued [***151] the abuses of civil rights in the former slave States and argued that "adequate security for future peace and safety . . . can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic." See Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., p. 15 (1866); H. R. Rep. No. 30, 39th Cong., 1st Sess., p. XXI (1866).

As the Court notes, the Committee's Report "was widely reprinted in the press and distributed by members of the 39th Congress to their constituents." *Ante*, at 24; B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 264-265 (1914) (noting that 150,000 copies of the Report were printed and that it was widely distributed as a campaign document in the election of 1866). In addition, newspaper coverage suggests that the wider public was aware of the Committee's work even before the Report was issued. For example, the Fort Wayne Daily Democrat (which appears to have been unsupportive of the Committee's work) paraphrased a motion instructing the Committee to

> "enquire into [the] expediency of amending the Constitution of the United States so [***152] as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation all the guarantees contained in *that instrument*." The Nigger Congress!, Fort Wayne Daily Democrat, Feb. 1, 1866, p. 4 (emphasis added).

b

Statements made by Members of Congress leading up to, and during, the debates on the *Fourteenth Amendment* point in the same direction. The record of these debates has been combed before. See *Adamson v. California, 332 U.S. 46, 92-110, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947)* (Appendix to dissenting opinion of Black, J.) (concluding that the debates support the conclusion that *§ 1* was understood to incorporate the *Bill of Rights* against the States); *ante*, at 14, n. 9, 26-27, n. 23, (opinion of the Court) (counting the debates among other evidence that *§ 1* applies the *Second Amendment* against the States). Before considering that record [*3072] here, it is important to clarify its relevance. When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted. Statements by legislators can assist in this process to the extent they demonstrate the manner in which the public used or understood a particular [***153] word or phrase. They can further assist to the extent there is evidence that these statements were disseminated to the public. In other words, this evidence is useful not because it demonstrates what the draftsmen of the text may have been thinking, but only insofar as it illuminates what the public understood the words chosen by the draftsmen to mean.

(1)

Three speeches stand out as particularly significant. Representative John Bingham, the principal draftsman of *§ 1*, delivered a speech on the floor of the House in February 1866 introducing his first draft of the provision. [**953] Bingham began by discussing *Barron* and its holding that the *Bill of Rights* did not apply to the States. He then argued that a constitutional amendment was necessary to provide "an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person." 39th Cong. Globe 1089-1090 (1866). Bingham emphasized that *§ 1* was designed "to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce [***154] the *bill of rights* as it

stands in the Constitution today. It 'hath that extent -- no more.'" *Id.*, at 1088.

Bingham's speech was printed in pamphlet form and broadly distributed in 1866 under the title, "One Country, One Constitution, and One People," and the subtitle, "In Support of the Proposed Amendment to Enforce the *Bill of Rights*." [10] Newspapers also reported his proposal, with the New York Times providing particularly extensive coverage, including a full reproduction of Bingham's first draft of *§ 1* and his remarks that a constitutional amendment to "enforc[e]" the "immortal *bill of rights*" was "absolutely essential to American nationality." N. Y. Times, Feb. 27, 1866, p. 8.

> 10 One Country, One Constitution, and One People: Speech of Hon. John A. Bingham, of Ohio, In the House of Representatives, February 28, 1866, In Support of the Proposed Amendment to Enforce the *Bill of Rights* (Cong. Globe). The pamphlet was published by the official reporter of congressional debates, and was distributed presumably pursuant to the congressional franking privilege. See B. Wildenthal, Nationalizing the *Bill of Rights*: Revisiting the Original Understanding of the *Fourteenth Amendment* in 1866-67, [***155] *68 Ohio St. L. J. 1509, 1558, n. 167 (2007)* (hereinafter Wildenthal).

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

> 11 The full text of Bingham's first draft of *§ 1* provided as follows:
>
> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." 39th Cong. Globe 1088.

That draft was met with objections, which the Times covered extensively. A [*3073] front-page article hailed the "Clear and Forcible Speech" by Representative Robert Hale against the draft, explaining -- and endorsing -- Hale's view that Bingham's proposal would "confer upon Congress all the rights and power of legislation [***156] now reserved to the States" and would "in effect utterly obliterate State rights and State authority over their own internal affairs." [12] N. Y. Times, Feb. 28, 1866, p. 1.

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

Critically, Hale did *not* object to the draft insofar as it purported to protect [**954] constitutional liberties against state interference. Indeed, Hale stated that he believed (incorrectly in light of *Barron*) that individual rights enumerated in the Constitution were already enforceable against the States. See 39th Cong. Globe 1064 ("I have, somehow or other, gone along with the impression that there is that [***157] sort of protection thrown over us in some way, whether with or without the sanction of a judicial decision that we are so protected"); see N. Y. Times, Feb. 28, 1866, at 1. Hale's misperception was not uncommon among members of the Reconstruction generation. See *infra*, at 38-40. But that is secondary to the point that the Times' coverage of this debate over *§ 1*'s meaning suggests public awareness of its main contours -- *i.e.*, that *§ 1* would, at a minimum, enforce constitutionally enumerated rights of United States citizens against the States.

Bingham's draft was tabled for several months. In the interim, he delivered a second well-publicized speech, again arguing that a constitutional amendment was required to give Congress the power to enforce the *Bill of Rights* against the States. That speech was printed in pamphlet form, see Speech of Hon. John A. Bingham, of Ohio, on the Civil Rights Bill, Mar. 9, 1866 (Cong. Globe); see 39th Cong. Globe 1837 (remarks of Rep. Lawrence) (noting that the speech was "extensively published"), and the New York Times covered the speech on its front page. Thirty-Ninth Congress, N. Y. Times, Mar. 10, 1866, p. 1.

By the time the debates on the *Fourteenth Amendment* [***158] resumed, Bingham had amended his draft of *§ 1* to include the text of the *Privileges or Immunities Clause* that was ultimately adopted. Senator Jacob Howard introduced the new draft on the floor of the Senate in the third speech relevant here. Howard explained that the Constitution recognized "a mass of privileges, immunities, and rights, some of them secured by