the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution," and that "there is no power given in the Constitution to enforce and to carry out any of these guarantees" against the States. 39th Cong. Globe 2765. Howard then stated that "the great object" of *§ 1* was to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.*, at 2766. *Section 1*, he indicated, imposed "a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States." *Id.*, at 2765.

In describing these rights, Howard explained that they included "the privileges [*3074] and immunities spoken of" in Article IV, § 2. *Id.*,at 2765. Although he did not catalogue the precise "nature" or "extent" [***159] of those rights, he thought "Corfield *v.* Coryell" provided a useful description. Howard then submitted that

> "[t]o these privileges and immunities, whatever they may be -- . . . should be added *the personal rights guarantied and secured by the first eight amendments of the Constitution*; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress [**955] of grievances, [and] . . . *the right to keep and to bear arms*." *Ibid.* (emphasis added).

News of Howard's speech was carried in major newspapers across the country, including the New York Herald, see N. Y. Herald, May 24, 1866, p. 1, which was the best-selling paper in the Nation at that time, see A. Amar, The *Bill of Rights*: Creation and Reconstruction 187 (1998) (hereinafter Amar). [13] The New York Times carried the speech as well, reprinting a lengthy excerpt of Howard's remarks, including the statements quoted above. N. Y. Times, May 24, 1866, p. 1. The following day's Times editorialized on Howard's speech, predicting that "[t]o this, the first section of the amendment, the Union party throughout the country will yield a ready acquiescence, and the South could offer [***160] no justifiable resistance," suggesting that Bingham's narrower second draft had not been met with the same objections that Hale had raised against the first. N. Y. Times, May 25, 1866, p. 4.

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

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

(2)

When read against this backdrop, the civil rights legislation adopted by the 39th Congress in 1866 further supports this view. Between passing the *Thirteenth Amendment* -- which outlawed slavery alone -- and the *Fourteenth Amendment*, Congress passed two significant [***161] pieces of legislation. The first was the Civil Rights Act of 1866, which provided that "all persons born in the United States" were "citizens of the United States" and that "such citizens, of every race and color, . . . shall have the same right" to, among other things, "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Ch. 31, § 1, 14 Stat. 27.

Both proponents and opponents of this Act described it as providing the "privileges" of citizenship to freedmen, and defined those privileges to include constitutional rights, such as the right to keep and bear arms. See 39th Cong. Globe 474 (remarks of Sen. Trumbull) (stating that the "the late slaveholding States" had enacted laws "depriving persons of African descent of privileges which are essential to freemen," including "prohibit[ing] any negro or mulatto from having fire-arms" and stating that "[t]he purpose of the bill under consideration is to destroy all these discriminations"); *id., at 1266-1267* (remarks [*3075] of Rep. Raymond) (opposing the Act, but recognizing that to "[m]ake a colored man a citizen of the United States" would guarantee to him, *inter alia*, "a defined [***162] *status* . . . a right to defend himself and his wife and children; a right to bear arms").

Three months later, Congress passed the Freedmen's Bureau Act, which also entitled all citizens to the "full and equal benefit of all laws and [**956] proceedings concerning personal liberty" and "personal security." Act of July 16, 1866, ch. 200, § 14, 14 Stat. 176. The Act stated expressly that the rights of personal liberty and security protected by the Act "includ[ed] the constitutional right to bear arms." *Ibid.*

(3)

There is much else in the legislative record. Many statements by Members of Congress corroborate the view that the *Privileges or Immunities Clause* enforced constitutionally enumerated rights against the States. See Curtis 112 (collecting examples). I am not aware of any statement that directly refutes that proposition. That said, the record of the debates -- like most legislative history -- is less than crystal clear. In particular, much ambiguity derives from the fact that at least several Members described *§ 1* as protecting the privileges and immunities of citizens "in the several States," harkening back to Article IV, § 2. See *supra*, at 28-29 (describing Sen. Howard's speech). These statements [***163] can be read to support the view that the *Privileges or Immunities Clause* protects some or all the fundamental rights of "citizens" described in *Corfield*. They can also be read to support the view that the *Privileges or Immunities Clause*, like Article IV, § 2, prohibits only state discrimination with respect to those rights it covers, but does not deprive States of the power to deny those rights to all citizens equally.

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

3

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

Some of these interpretations come from Members [***164] of Congress. During an 1871 debate on a bill to enforce the *Fourteenth Amendment*, Representative Henry Dawes listed the Constitution's first eight Amendments, including "the right to keep and bear arms," before explaining that after the Civil War, the country "gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens" who formerly were slaves. Cong. Globe, 42d Cong., 1st Sess., 475-476 (1871). "It is all these," Dawes explained, "which are comprehended in the words 'American citizen.'" *Ibid.*; see also *id.*, at 334 (remarks of Rep. Hoar) (stating that the *Privileges or Immunities Clause* referred to those rights "declared to belong to the citizen by the Constitution itself"). Even opponents of *Fourteenth Amendment* enforcement legislation acknowledged that the *Privileges or Immunities Clause* [*3076] protected constitutionally enumerated individual rights. See 2 Cong. Rec. 384-385 (1874) (remarks of Rep. Mills) (opposing enforcement law, but acknowledging, in referring to the *Bill of Rights* , [**957] that "[t]hese *first amendments* and some provisions of the Constitution of like import embrace the 'privileges and [***165] immunities' of citizenship as set forth in article 4, section 2 of the Constitution *and in the fourteenth amendment*" (emphasis added)); see Curtis 166-170 (collecting examples).

Legislation passed in furtherance of the *Fourteenth Amendment* demonstrates even more clearly this understanding. For example, Congress enacted the Civil Rights Act of 1871, 17 Stat. 13, which was titled in pertinent part "An Act to enforce the Provisions of the *Fourteenth Amendment to the Constitution of the United States*," and which is codified in the still-existing *42 U.S.C. § 1983*. That statute prohibits state officials from depriving citizens of "any rights, privileges, or immunities *secured by the Constitution*." Rev. Stat. 1979, *42 U.S.C. § 1983* (emphasis added). Although the Judiciary ignored this provision for decades after its enactment, this Court has come to interpret the statute, unremarkably in light of its text, as protecting constitutionally enumerated rights. *Monroe v. Pape, 365 U.S. 167, 171, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).*

A Federal Court of Appeals decision written by a future Justice of this Court adopted the same understanding of the *Privileges or Immunities Clause*. See, *e.g.*, *United States v. Hall, 26 F. Cas. 79, 82, F. Cas. No. 15282 (No. 15,282)* [***166] (CC SD Ala. 1871) (Woods, J.) ("We think, therefore, that the . . . rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States"). In addition, two of the era's major constitutional treatises reflected the understanding that *§ 1* would protect constitutionally enumerated rights from state abridgment. [14] A third such treatise unambiguously indicates that the *Privileges or Immunities Clause* accomplished this task. G. Paschal, The Constitution of the United States 290 (1868) (explaining that the rights listed in *§ 1* had "already been guarantied" by Article IV and the *Bill of Rights*, but that "[t]he new feature declared" by *§ 1* was that these rights, "which had been construed to apply only to the national government, are thus imposed upon the States").

14 See J. Pomeroy, An Introduction to the Constitutional Law of the United States 155-156 (E. Bennett ed. 1886) (describing *§ 1*, which the country was then still considering, as a "needed" "remedy" for *Barron ex rel. Tiernan v. Mayor of*

Baltimore, 32 U.S. 243, 7 Pet. 243, 8 L. Ed. 672 (1833), which held that the *Bill of Rights* was not enforceable against the States); [***167] T. Farrar, Manual of the Constitution of the United States of America 58-59, 145-146, 395-397 (1867) (reprint 1993); *id.*, at 546 (3d ed. 1872) (describing the *Fourteenth Amendment* as having "swept away" the "decisions of many courts" that "the popular rights guaranteed by the Constitution are secured only against [the federal] government").

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

> "[T]he *fourteenth amendment* changes all that theory, and lays the same restriction upon the States that before lay upon the Congress of the United States -- that, as Congress heretofore could not interfere with the right of the citizen to keep and bear arms, now, after the adoption of the *fourteenth amendment*, the State cannot interfere with the right of the citizen to keep and bear arms. The right to keep [**958] and bear arms is included in the *fourteenth amendment*, [*3077] under 'privileges and immunities.'" Proceedings in the Ku Klux Trials at Columbia, S. C., in the United States Circuit Court, November Term, 1871, p. 147 (1872).

* * *

This evidence plainly shows that the ratifying public understood [***168] the *Privileges or Immunities Clause to* protect constitutionally enumerated rights, including the right to keep and bear arms. As the Court demonstrates, there can be no doubt that *§ 1* was understood to enforce the *Second Amendment* against the States. See *ante*, at 22-33. In my view, this is because the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the *Privileges or Immunities Clause*.

C

The next question is whether the *Privileges or Immunities Clause* merely prohibits States from discriminating among citizens if they recognize the *Second Amendment's* right to keep and bear arms, or whether the Clause requires States to recognize the right. The municipal respondents, Chicago and Oak Park, argue for the former interpretation. They contend that the *Second Amendment*, as applied to the States through the Fourteenth, authorizes a State to impose an outright ban on handgun possession such as the ones at issue here so long as a State applies it to all citizens equally. [15] The Court explains why this antidiscrimination-only reading of *§ 1* as a whole is "implausible." *Ante*, at 31 (citing Brief for Municipal Respondents 64). I agree, but because [***169] I think it is the *Privileges or Immunities Clause* that applies this right to the States, I must explain why this Clause in particular protects against more than just state discrimination, and in fact establishes a minimum baseline of rights for all American citizens.

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

1

I begin, again, with the text. The *Privileges or Immunities Clause* opens with the command that "*No State shall*" abridge [***170] the privileges or immunities of citizens of the United States. *Amdt. 14, § 1* (emphasis added). The very same phrase opens Article I, § 10 of the Constitution, which prohibits the States from "pass[ing] any Bill of Attainder" or "ex post facto Law," among other things. Article I, § 10 is one of the few constitutional provisions that limits state authority. In *Barron*, when Chief Justice Marshall interpreted the *Bill of Rights* as lacking "plain and intelligible language" restricting state power to infringe upon individual liberties, he pointed to Article I, § 10 as an example of text that would have accomplished that task. 7 Pet., at 250. Indeed, Chief Justice Marshall would later describe Article I, § 10 [**959] as "a *bill of rights* for the people of each state." *Fletcher v. Peck, 10 U.S. 87, 6 Cranch 87, 138, 3 L. Ed. 162 (1810)*. Thus, the fact that the *Privileges or Immunities Clause* uses the command "[n]o State shall" -- which Article IV, § 2 [*3078] does not -- strongly suggests that the former imposes a greater restriction on state power than the latter.

This interpretation is strengthened when one considers that the *Privileges or Immunities Clause* uses the verb "abridge," rather than "discriminate," to describe the limit [***171] it imposes on state authority. The Webster's dictionary in use at the time of Reconstruction defines the word "abridge" to mean "[t]o deprive; to cut off; . . . as, to *abridge* one of his rights." Webster, An American Dictionary of the English Language, at 6. The Clause is thus best understood to impose a limitation on state power to infringe upon pre-existing substantive rights. It raises no indication that the Framers of the Clause used the word "abridge" to prohibit only discrimination.

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

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the States in which they reside, and the Citizens of each State shall be entitled to all *the privileges* [***172] *and immunities of citizens in the several States*." Draft reprinted in 1 Documentary History of Reconstruction 240 (W. Fleming ed. 1950) (hereinafter Fleming).

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

2

The argument that the *Privileges or Immunities Clause* prohibits no more than discrimination often is followed by a claim that public discussion of the Clause, and of *§ 1* generally, was not extensive. Because of this, the argument goes, *§ 1* must not have been understood to accomplish such a significant task as subjecting States to federal enforcement [***173] of a minimum baseline of rights. That argument overlooks critical aspects of the Nation's history that underscored the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States, including the right to keep and bear arms.

[**960] a

I turn first to public debate at the time of ratification. It is true that the congressional debates over *§ 1* were relatively brief. It is also true that there is little evidence of extensive debate in the States. Many state legislatures did not keep records of their debates, and the few records that do exist reveal only modest discussion. See Curtis 145. These facts are not surprising.

First, however consequential we consider the question today, the nationalization of constitutional rights was not the most [*3079] controversial aspect of the *Fourteenth Amendment* at the time of its ratification. The Nation had just endured a tumultuous civil war, and *§§ 2*, *3*, and *4* -- which reduced the representation of States that denied voting rights to blacks, deprived most former Confederate officers of the power to hold elective office, and required States to disavow Confederate war debts -- were far more polarizing and consumed far [***174] more political attention. See Wildenthal 1600; Hardy, Original Popular Understanding of the *Fourteenth Amendment* as Reflected in the Print Media of 1866-1868, *30 Whittier L. Rev. 695, 699 (2009)*.

Second, the congressional debates on the *Fourteenth Amendment* reveal that many representatives, and probably many citizens, believed that the *Thirteenth Amendment*, the 1866 Civil Rights legislation, or some combination of the two, had already enforced constitutional rights against the States. Justice Black's dissent in *Adamson* chronicles this point in detail. *332 U.S., at 107-108, 67 S. Ct. 1672, 91 L. Ed. 1903* (Appendix to dissenting opinion). Regardless of whether that understanding was accurate as a matter of constitutional law, it helps to explain why Congressmen had little to say during the debates about *§ 1*. See *ibid.*

Third, while *Barron* made plain that the *Bill of Rights* was not legally enforceable against the States, see *supra*, at 2, the significance of that holding should not be overstated. Like the Framers, see *supra*, at 14-15, many 19th-century Americans understood the *Bill of Rights* to declare inalienable rights that pre-existed all government. Thus, even though the *Bill of Rights* technically applied only to the [***175] Federal Government, many believed that it declared rights that no legitimate government could abridge.

Chief Justice Henry Lumpkin's decision for the Georgia Supreme Court in *Nunn v. State, 1 Ga. 243 (1846)*, illustrates this view. In assessing state power to regulate firearm possession, Lumpkin wrote that he was "aware that it has been decided, that [the *Second Amendment*], like other amendments adopted at the same time, is a restriction upon the government of the United States, and does not extend to the individual States." *Id., at 250*. But he still considered the right to keep and bear arms as "an unalienable right, which lies at the bottom of every free government," and thus found the States bound to honor it. *Ibid.* Other state courts adopted similar positions with respect to the right to keep and bear arms and other enumerated rights. [16] Some courts even suggested that the protections in the *Bill of Rights* were legally enforceable [**961] against the States, *Barron* notwithstanding. [17] A prominent treatise of the era took the same position. W. Rawle, A View of the Constitution of the United States of America 124-125 (2d ed. 1829) (reprint 2009) (arguing that certain of the first eight Amendments [***176] "appl[y] to the state legislatures" because those Amendments "form parts of the declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them"); *id.*, at 125-126 (describing the *Second Amendment* "right of the people to keep and bear arms" as "a restraint on both" Congress and the States); see also *Heller, 554 U.S., at __,* [*3080] *128 S. Ct. 2783, 171 L. Ed. 2d 637, 666* (describing Rawle's treatise as "influential"). Certain abolitionist leaders adhered to this view as well. Lysander Spooner championed the popular abolitionist argument that slavery was inconsistent with constitutional principles, citing as evidence the fact that it deprived black Americans of the "natural right of all men 'to keep and bear arms' for their personal defence," which he believed the Constitution "prohibit[ed] both Congress and the State governments from infringing." L. Spooner, The Unconstitutionality of Slavery 98 (1860).

16 See, *e.g.*, *Raleigh & Gaston R. Co. v. Davis, 19 N. C. 451, 458-462 (1837)* (right to just compensation for government taking of property); *Rohan v. Swain, 59 Mass. 281, 285, 5 Cush. 281 (1850)* (right to be secure from unreasonable government searches and seizures); *State v. Buzzard, 4 Ark. 18, 28 (1842)* [***177] (right to keep and bear arms); *State v. Jumel, 13 La. Ann. 399, 400 (1858)* (same); *Cockrum v. State, 24 Tex. 394, 401-404 (1859)* (same).

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

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

b

In the contentious years [***178] leading up to the Civil War, those who sought to retain the institution of slavery found that to do so, it was necessary to eliminate more and more of the basic liberties of slaves, free blacks, and white abolitionists. Congressman Tobias Plants explained that slaveholders "could not hold [slaves] safely where dissent was permitted," so they decided that "all dissent must be suppressed by the strong hand of power." 39th Cong. Globe 1013. The measures they used were ruthless, repressed virtually every right recognized in the Constitution, and demonstrated that preventing only discriminatory state firearms restrictions would have been a hollow assurance for liberty. Public reaction indicates that the American people understood this point.

The overarching goal of pro-slavery forces was to repress the spread of [**962] abolitionist thought and the concomitant risk of a slave rebellion. Indeed, it is difficult to overstate the extent to which fear of a slave uprising gripped slaveholders and dictated the acts of Southern legislatures. Slaves and free blacks represented a substantial percentage of the population and posed a severe threat to Southern order if they were not kept in their place. According [***179] to the 1860 Census, slaves represented one quarter or more of the population in 11 of the 15 slave States, nearly half the population in Alabama, Florida, Georgia, and Louisiana, and *more* than 50% of the population in Mississippi and South Carolina. Statistics of the United States (Including Mortality, Property, &c.,) in 1860, The Eighth Census 336-350 (1866).

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

was foiled, leading to the swift arrest of 130 blacks, and the execution of 37, including Vesey. *Id.*, at 271. Still, slaveowners took notice -- it was reportedly feared that as many as 6,600 to 9,000 slaves and free blacks were involved in the plot. *Id.*, at 272. A few years later, [*3081] the fear of rebellion was realized. An uprising led by Nat Turner took the lives of at least 57 whites before it was suppressed. *Id.*, at 300-302.

The fear generated by these and [***180] other rebellions led Southern legislatures to take particularly vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense. Teaching slaves to read (even the Bible) was a criminal offense punished severely in some States. See K. Stampp, The Peculiar Institution: Slavery in the Ante-bellum South 208, 211 (1956). Virginia made it a crime for a member of an "abolition" society to enter the State and argue "that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery." 1835-1836 Va. Acts ch. 66, p. 44. Other States prohibited the circulation of literature denying a master's right to property in his slaves and passed laws requiring postmasters to inspect the mails in search of such material. C. Eaton, The Freedom-of-Thought Struggle in the Old South 118-143, 199-200 (1964).

Many legislatures amended their laws prohibiting slaves from carrying firearms [18] to apply the prohibition to free blacks as well. See, *e.g.*, Act of Dec. 23, 1833, § 7, 1833 Ga. Acts pp. 226, 228 (declaring that "it [***181] shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatever"); H. Aptheker, Nat Turner's Slave Rebellion 74-76, 83-94 (1966) (discussing similar Maryland and Virginia statutes); see also Act of Mar. 15, 1852, ch. 206, 1852 Miss. Laws p. 328 (repealing laws allowing free blacks to obtain firearms licenses); Act of Jan. 31, 1831, 1831 Fla. Acts p. 30 (same). Florida made it the "duty" of white citizen "patrol[s] to search negro houses or other suspected [**963] places, for fire arms." Act of Feb. 17, 1833, ch. 671, 1833 Fla. Acts pp. 26, 30. If they found any firearms, the patrols were to take the offending slave or free black "to the nearest justice of the peace," whereupon he would be "severely punished" by "whipping on the bare back, not exceeding thirty-nine lashes," unless he could give a "plain and satisfactory" explanation of how he came to possess the gun. *Ibid.*

> 18 See, *e.g.*, Black Code, ch. 33, § 19, 1806 La. Acts pp. 160, 162 (prohibiting slaves from using firearms unless they were authorized by their master to hunt within the boundaries of his plantation); Act of Dec. 18, 1819, 1819 S. C. Acts pp. 29, 31 (same); An Act [***182] Concerning Slaves, § 6, 1840 Tex. Laws pp. 42-43 (making it unlawful for "any slave to own firearms of any description").

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

c

After the Civil War, Southern anxiety about an uprising among the newly freed slaves peaked. As Representative Thaddeus Stevens is reported to have said, "[w]hen it was first proposed to free the slaves, and arm the blacks, did not half the nation tremble? The prim conservatives, [*3082] the snobs, and the male [***183] waiting-maids in Congress, were in hysterics." K. Stampp, The Era of Reconstruction, 1865-1877, p. 104 (1965) (hereinafter Era of Reconstruction).

As the Court explains, this fear led to "systematic efforts" in the "old Confederacy" to disarm the more than 180,000 freedmen who had served in the Union Army, as well as other free blacks. See *ante*, at 23. Some States formally prohibited blacks from possessing firearms. *Ante,* at 23-24 (quoting 1865 Miss. Laws p. 165, § 1, reprinted in 1 Fleming 289). Others enacted legislation prohibiting blacks from carrying firearms without a license, a restriction not imposed on whites. See, *e.g.*, La. Statute of 1865, reprinted in *id.,* at 280. Additionally, "[t]hroughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves." *Ante*, at 24.

As the Court makes crystal clear, if the *Fourteenth Amendment* "had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African-Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers." *Ante,* [***184] at 32. In the years following the Civil War, a law banning firearm possession outright "would have been nondiscriminatory only in the formal sense," for it would have "left firearms in the hands of the militia and local peace officers." *Ibid.*

Evidence suggests that the public understood this at the time the *Fourteenth Amendment* was ratified. The publicly circulated Report of the Joint Committee on Reconstruction extensively detailed these abuses, see *ante,* at 23-24 (collecting examples), and statements by citizens indicate that they looked [**964] to the Committee to provide a federal solution to this problem, see, *e.g.*, 39th Cong. Globe 337 (remarks of Rep. Sumner) (introducing "a memorial from the colored citizens of the State of South Carolina" asking for, *inter alia*, "constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press").

One way in which the Federal Government responded was to issue military orders countermanding Southern arms legislation. See, *e.g.*, Jan. 17, 1866, order from Major General D. E. Sickles, reprinted in E. McPherson, The Political History of the United States of America During the Period of Reconstruction [***185] 37 (1871) ("The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed"). The significance of these steps was not lost on those they were designed to protect. After one such order was issued, The Christian Recorder, published by the African Methodist Episcopal Church, published the following editorial:

> "'We have several times alluded to the fact that the Constitution of the United States, guaranties to every citizen the right to keep and bear arms. . . . All men, without the distinction of color, have the right to keep arms to defend their homes, families, or themselves.'
>
> "We are glad to learn that [the] Commissioner for this State . . . has given freedmen to understand that they have as good a right to keep fire arms as any other citizens. The Constitution of the United States is the supreme law of the land, and we will be governed by that at present." Right to Bear Arms, Christian Recorder (Phila.), Feb. 24, 1866, pp. 29-30.

The same month, The Loyal Georgian carried a letter to the editor asking "Have colored persons a right to own and carry [*3083] fire arms? -- A Colored Citizen." The editors responded as follows:

> "Almost every day, we are asked [***186] questions similar to the above. We answer *certainly* you have the *same* right to own and carry fire arms that *other* citizens have. You are not only free but citizens of the United States and, as such, entitled to the same privileges granted to other citizens by the Constitution of the United States.
>
> . . . . .
>
> ". . . Article *II, of the amendments to the Constitution of the United States*, gives the people the right to bear arms and states that this right shall not be infringed. . . . All men, without distinction of color, have the right to keep arms to defend their homes, families or themselves." Letter to the Editor, Loyal Georgian (Augusta), Feb. 3, 1866, p. 3.

These statements are consistent with the arguments of abolitionists during the antebellum era that slavery, and the slave States' efforts to retain it, violated the constitutional rights of individuals -- rights the abolitionists described as among the privileges and immunities of citizenship. See, *e.g.*, J. Tiffany, Treatise on the Unconstitutionality of American Slavery 56 (1849) (reprint 1969) ("pledg[ing] . . . to see that all the rights, privileges, and immunities, granted by the constitution of the United States, are extended [***187] to all"); *id.*, at 99 (describing the "right to keep and bear arms" as one of those rights secured by "the constitution of the United States"). The problem abolitionists [**965] sought to remedy was that, under *Dred Scott*, blacks were not entitled to the privileges and immunities of citizens under the Federal Constitution and that, in many States, whatever inalienable rights state law recognized did not apply to blacks. See, *e.g.*, *Cooper v. Savannah, 4 Ga. 68, 72 (1848)* (deciding, just two years after Chief Justice Lumpkin's opinion in *Nunn* recognizing the right to keep and bear arms, see *supra*, at 39, that "[f]ree persons of color have never been recognized here as citizens; they are not entitled to bear arms").

Section 1 guaranteed the rights of citizenship in the United States and in the several States without regard to race. But it was understood that liberty would be assured little protection if *§ 1* left each State to decide which privileges or immunities of United States citizenship it would protect. As Frederick Douglass explained before *§ 1*'s adoption, "the Legislatures of the South can take from him the right to keep and bear arms, as they can -- they would not allow a negro to walk [***188] with a cane where I came from, they would not allow five of them to assemble together." In What New Skin Will the Old Snake Come Forth? An Address Delivered in New York, New York, May 10, 1865, reprinted in 4 The Frederick

Douglass Papers 79, 83-84 (J. Blassingame & J. McKivigan eds., 1991) (footnote omitted). "Notwithstanding the provision in the Constitution of the United States, that the right to keep and bear arms shall not be abridged," Douglass explained that "the black man has never had the right either to keep or bear arms." *Id.*, at 84. Absent a constitutional amendment to enforce that right against the States, he insisted that "the work of the Abolitionists [wa]s not finished." *Ibid.*

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

19 I conclude that the right to keep and bear arms applies to the States through the *Privileges or Immunities Clause*, which recognizes the rights of United States [***189] "citizens." The plurality concludes that the right applies to the States through the *Due Process Clause*, which covers all "person[s]." Because this case does not involve a claim brought by a noncitizen, I express no view on the difference, if any, between my conclusion and the plurality's with respect to the extent to which the States may regulate firearm possession by noncitizens.

[*3084] III

My conclusion is contrary to this Court's precedents, which hold that the *Second Amendment* right to keep and bear arms is not a privilege of United States citizenship. See *Cruikshank, 92 U.S., at 548-549, 551-553, 23 L. Ed. 588*. I must, therefore, consider whether *stare decisis* requires retention of those precedents. As mentioned at the outset, my inquiry is limited to the right at issue here. Thus, I do not endeavor to decide in this case whether, or to what extent, the *Privileges or Immunities Clause* applies any other rights enumerated in the Constitution against the States. [20] Nor do I suggest that the *stare decisis* considerations surrounding [**966] the application of the right to keep and bear arms against the States would be the same as those surrounding another right protected by the *Privileges or Immunities Clause*. I [***190] consider *stare decisis* only as it applies to the question presented here.

20 I note, however, that I see no reason to assume that the constitutionally enumerated rights protected by the *Privileges or Immunities Clause* should consist of all the rights recognized in the *Bill of Rights* and no others. Constitutional provisions outside the *Bill of Rights* protect individual rights, see, *e.g.*, Art. I, § 9, cl. 2 (granting the "Privilege of the Writ of Habeas Corpus"), and there is no obvious evidence that the Framers of the *Privileges or Immunities Clause* meant to exclude them. In addition, certain *Bill of Rights* provisions prevent federal interference in state affairs and are not readily construed as protecting rights that belong to individuals. The *Ninth* and *Tenth Amendments* are obvious examples, as is the *First Amendment's Establishment Clause*, which "does not purport to protect individual rights." *Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 50, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)* (THOMAS, J., concurring in judgment); see Amar 179-180.

A

This inquiry begins with the *Slaughter-House Cases*. There, this Court upheld a Louisiana statute granting a monopoly on livestock butchering in and around the city of New Orleans [***191] to a newly incorporated company. *83 U.S. 36, 16 Wall. 36, 21 L. Ed. 394*. Butchers excluded by the monopoly sued, claiming that the statute violated the *Privileges or Immunities Clause* because it interfered with their right to pursue and "exercise their trade." *Id., at 60, 16 Wall. 36, 21 L. Ed. 394*. This Court rejected the butchers' claim, holding that their asserted right was not a privilege or immunity of American citizenship, but one governed by the States alone. The Court held that the *Privileges or Immunities Clause* protected only rights of *federal* citizenship -- those "which owe their existence to the Federal government, its National character, its Constitution, or its laws," *id., at 79, 16 Wall. 36, 21 L. Ed. 394* -- and did not protect *any* of the rights of state citizenship, *id., at 74, 16 Wall. 36, 21 L. Ed. 394*. In other words, the Court defined the two sets of rights as mutually exclusive.

After separating these two sets of rights, the Court defined the rights of state citizenship as "embrac[ing] nearly every civil right for the establishment and protection of which organized government is instituted" -- that is, all those rights listed in *Corfield. 83 U.S. 36, 16 Wall., at 76, 21 L. Ed. 394* (referring to "those rights" that "Judge Washington" described). That left very few rights of [*3085] federal citizenship for [***192] the *Privileges or Immunities Clause* to protect. The Court suggested a handful of possibilities, such as the "right of free access to [federal] seaports," protection of the Federal Government while traveling "on the high seas," and even two rights listed in the Constitution. *Id., at 79, 16 Wall. 36, 21 L. Ed. 394* (noting "[t]he right to peaceably assemble" and "the privilege of the writ of *habeas corpus*"); see *supra*, at 4. But its decision to interpret the rights of state and federal citizenship as mutually exclusive led the Court in future cases to conclude that constitutionally enumerated rights were excluded from the

Privileges or Immunities Clause's scope. See *Cruikshank, supra.*

I reject that understanding. There was no reason to interpret the *Privileges or Immunities Clause* as putting the Court to the extreme choice of interpreting the "privileges and immunities" of federal citizenship to mean either all those rights listed in *Corfield*, or almost no rights at all. *83 U.S. 36, 16 Wall., at 76, 21 L. Ed. 394.* The record is scant that the public understood the Clause to make the Federal Government "a perpetual censor upon all legislation of the States" as the [**967] *Slaughter-House* majority feared. *Id., at 78, 16 Wall. 36, 21 L. Ed. 394.* For one thing, *Corfield* listed the [***193] "elective franchise" as one of the privileges and immunities of "citizens of the several states," *6 F. Cas., at 552*, yet Congress and the States still found it necessary to adopt the *Fifteenth Amendment* -- which protects "[t]he right of citizens of the United States to vote" -- two years after the *Fourteenth Amendment's* passage. If the *Privileges or Immunities Clause* were understood to protect every conceivable civil right from state abridgment, the *Fifteenth Amendment* would have been redundant.

The better view, in light of the States and Federal Government's shared history of recognizing certain inalienable rights in their citizens, is that the privileges and immunities of state and federal citizenship overlap. This is not to say that the privileges and immunities of state and federal citizenship are the same. At the time of the *Fourteenth Amendment's* ratification, States performed many more functions than the Federal Government, and it is unlikely that, simply by referring to "privileges or immunities," the Framers of *§ 1* meant to transfer every right mentioned in *Corfield* to congressional oversight. As discussed, "privileges" and "immunities" were understood only as synonyms for "rights." [***194] See *supra*, at 9-11. It was their attachment to a particular group that gave them content, and the text and history recounted here indicate that the rights of United States citizens were not perfectly identical to the rights of citizens "in the several States." Justice Swayne, one of the dissenters in *Slaughter-House*, made the point clear:

> "The citizen of a State has the *same* fundamental rights as a citizen of the United States, *and also certain others*, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection." *83 U.S. 36, 16 Wall., at 126, 21 L. Ed. 394* (emphasis added).

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

A separate question is whether the privileges and immunities of American [***195] citizenship include any rights besides those enumerated in the Constitution. The four [*3086] dissenting Justices in *Slaughter-House* would have held that the *Privileges or Immunities Clause* protected the unenumerated right that the butchers in that case asserted. See *id., at 83, 16 Wall. 36, 21 L. Ed. 394* (Field, J., dissenting); *id., at 111, 16 Wall. 36, 21 L. Ed. 394* (Bradley, J., dissenting); *id., at 124, 16 Wall. 36, 21 L. Ed. 394* (Swayne, J., dissenting). Because this case does not involve an unenumerated right, it is not necessary to resolve the question whether the Clause protects such rights, or whether the Court's judgment in *Slaughter-House* was correct.

Still, it is argued that the mere possibility that the *Privileges or Immunities Clause* may enforce unenumerated rights against the States creates "'special hazards'" that should prevent this Court from returning to [**968] the original meaning of the Clause. [21] *Post*, at 3 (STEVENS, J., dissenting). Ironically, the same objection applies to the Court's substantive due process jurisprudence, which illustrates the risks of granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts. But I see no reason to assume that such hazards apply to the [***196] *Privileges or Immunities Clause.* The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited. See, *e.g.*, Art. I, § 8, cl. 18 (Necessary and Proper Clause); *Amdt. 8* (*Cruel and Unusual Punishments Clause*). When the inquiry focuses on what the ratifying era understood the *Privileges or Immunities Clause* to mean, interpreting it should be no more "hazardous" than interpreting these other constitutional provisions by using the same approach. To be sure, interpreting the *Privileges or Immunities Clause* may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer. I believe those questions are more worthy of this Court's attention -- and far more likely to yield discernable answers -- than the

substantive due process questions the Court has for years created on its own, with neither textual nor historical support.

> 21 To the extent JUSTICE STEVENS is concerned that reliance on [***197] the *Privileges or Immunities Clause* may invite judges to "write their personal views of appropriate public policy into the Constitution," *post*, at 3 (internal quotation marks omitted), his celebration of the alternative -- the "flexibility," "transcend[ence]," and "dynamism" of substantive due process -- speaks for itself, *post*, at 14-15, 20.

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

B

Three years after *Slaughter-House*, the Court in *Cruikshank* squarely held that the right to keep and bear arms was not a privilege of American citizenship, thereby overturning the convictions of militia members responsible for the brutal Colfax Massacre. See *supra*, at 4-5. *Cruikshank* is not a precedent entitled to any respect. The flaws in its interpretation of the *Privileges or Immunities Clause* are made evident by the preceding evidence of its original meaning, and I would reject the holding on that basis alone. [***198] But, the consequences of *Cruikshank* warrant mention as well.

[*3087] *Cruikshank*'s holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery. Without federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were [**969] tragically successful in waging a campaign of terror against the very people the *Fourteenth Amendment* had just made citizens.

Take, for example, the Hamburg Massacre of 1876. There, a white citizen militia sought out and murdered a troop of black militiamen for no other reason than that they had dared to conduct a celebratory Fourth of July parade through their mostly black town. The white militia commander, "Pitchfork" Ben Tillman, later described this massacre with pride: "[T]he leading white men of Edgefield" had decided "to seize the first opportunity that the negroes might offer them to provoke a riot and teach the negroes a lesson [***199] by having the whites demonstrate their superiority by killing as many of them as was justifiable." S. Kantrowitz, Ben Tillman & the Reconstruction of White Supremacy 67 (2000) (ellipsis, brackets, and internal quotation marks omitted). None of the perpetrators of the Hamburg murders was ever brought to justice. [22]

> 22 Tillman went on to a long career as South Carolina's Governor and, later, United States Senator. Tillman's contributions to campaign finance law have been discussed in our recent cases on that subject. See *Citizens United v. Federal Election Comm'n, 558 U.S. ___, ___, 130 S. Ct. 876, 175 L. Ed. 2d 753 (slip. op., at 2, 42, 56, 87) (2010)* (STEVENS, J., dissenting) (discussing at length the Tillman Act of 1907, 34 Stat. 864). His contributions to the culture of terrorism that grew in the wake of *Cruikshank* had an even more dramatic and tragic effect.

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

Although Congress enacted legislation to suppress these activities, [23] Klan tactics remained a constant presence in the lives of Southern blacks for decades. Between 1882 and 1968, there were at least 3,446 reported lynchings of blacks in the South. Cottrol 351-352. They were tortured and killed for a wide array of alleged crimes, without even the slightest hint of due process. Emmit Till, for example, was killed in 1955 for allegedly whistling at a white woman. S. Whitfield, A Death in the Delta: The Story of Emmett Till 15-31 (1988). The fates of other targets of mob violence were equally depraved. See, *e.g.*, Lynched Negro and Wife Were First Mutilated, Vicksburg (Miss.) Evening Post, Feb. 8, 1904, reprinted in R. Ginzburg, 100 Years [*3088] of Lynchings 63 (1988); Negro Shot Dead for Kissing His White Girlfriend, Chi. Defender, Feb. 31, 1915, in *id.*, at 95 [***201] (reporting incident in Florida); La. Negro Is Burned Alive Screaming "I Didn't Do It," Cleveland Gazette, Dec. 13, 1914, in *id.*, at 93 (reporting incident in Louisiana).

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

The use of firearms for self-defense was often the only way black citizens [**970] could protect themselves from mob violence. As Eli Cooper, one target of such violence, is said to have explained, "'[t]he Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.'" Church Burnings Follow Negro Agitator's Lynching, Chicago Defender, Sept. 6, 1919, in *id.*, at 124. Sometimes, as in Cooper's case, self-defense did not succeed. He was dragged from his home by a mob and killed as his wife looked on. *Ibid.* But at other times, the use of firearms allowed targets of mob violence to survive. One man recalled the night during his childhood when his father stood armed at a jail until [***202] morning to ward off lynchers. See Cottrol, 354. The experience left him with a sense, "not 'of powerlessness, but of the "possibilities of salvation"' " that came from standing up to intimidation. *Ibid.*

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

* * *

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

DISSENT BY: STEVENS; BREYER

DISSENT

JUSTICE STEVENS, dissenting.

In *District of Columbia v. Heller, 554 U.S. ___, ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 647 (2008)*), the Court answered the question whether a federal enclave's "prohibition on the possession of usable [***203] handguns in the home violates the *Second Amendment to the Constitution*." The question we should be answering in this case is whether the Constitution "guarantees individuals a fundamental right," enforceable against the States, "to possess a functional, personal firearm, including a handgun, within the home." Complaint P34, App. 23. That is a different -- and more difficult -- inquiry than asking if the *Fourteenth Amendment* "incorporates" the *Second Amendment*. The so-called incorporation question was squarely and, in my view, correctly resolved in the late 19th century. [1]

1 See *United States v. Cruikshank, 92 U.S. 542, 553, 23 L. Ed. 588 (1876)*; *Presser v. Illinois, 116 U.S. 252, 265, 6 S. Ct. 580, 29 L. Ed. 615 (1886)*; *Miller v. Texas, 153 U.S. 535, 538, 14 S. Ct. 874, 38 L. Ed. 812 (1894)*. This is not to say that I agree with all other aspects of these decisions.

Before the District Court, petitioners focused their pleadings on the special considerations raised by domestic possession, which they identified as the core of their asserted right. In support of their claim that the city of Chicago's handgun ban violates the Constitution, they now rely primarily on the *Privileges or Immunities Clause* of the *Fourteenth Amendment*. See Brief for Petitioners 9-65. [***204] They rely [*3089] secondarily on the *Due Process Clause* of that Amendment. See *id.*, at 66-72. Neither submission requires the Court to express an opinion on whether the *Fourteenth Amendment* places any limit on the power of [**971] States to regulate possession, use, or carriage of firearms outside the home.

I agree with the plurality's refusal to accept petitioners' primary submission. *Ante*, at 10. Their briefs marshal an impressive amount of historical evidence for their argument that the Court interpreted the *Privileges or Immunities Clause* too narrowly in the *Slaughter-House Cases, 83 U.S. 36, 16 Wall. 36, 21 L. Ed. 394 (1873)*. But the original meaning of the Clause is not as clear as they suggest [2] -- and not nearly as clear as it would need to be to dislodge 137 years of precedent. The burden is severe for those who seek radical change in such an established body of constitutional doctrine. [3] Moreover, the suggestion that invigorating the *Privileges or Immunities Clause* will reduce judicial discretion, see Reply Brief for Petitioners 22, n. 8, 26; Tr. of Oral Arg. 64-65, strikes me as implausible, if not exactly backwards. "For the very reason that it has so long remained a clean slate, a revitalized *Privileges or Immunities Clause* [***205] holds special hazards for judges who are mindful that their proper task is not to write their personal views of appropriate public policy into the Constitution." [4]

2 Cf., *e.g.*, Currie, The Reconstruction Congress, *75 U. Chi. L. Rev. 383, 406 (2008)* (finding

"some support in the legislative history for no fewer than four interpretations" of the *Privileges or Immunities Clause*, two of which contradict petitioners' submission); Green, The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application, *19 Geo. Mason U. Civ. Rights L. J. 219, 255-277 (2009)* (providing evidence that the Clause was originally conceived of as an antidiscrimination measure, guaranteeing equal rights for black citizens); Rosenthal, The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation, *18 J. Contemporary Legal Issues 361 (2009)* (detailing reasons to doubt that the Clause was originally understood to apply the *Bill of Rights* to the States); Hamburger, Privileges or Immunities, 105 Nw. U. L. Rev. (forthcoming 2011), online at http://ssrn.com/abstract=1557870 (as visited June 25, 2010, and available in Clerk of Court's case file) [***206] (arguing that the Clause was meant to ensure freed slaves were afforded "the Privileges and Immunities" specified in *Article IV, § 2, cl. 1 of the Constitution*). Although he urges its elevation in our doctrine, JUSTICE THOMAS has acknowledged that, in seeking to ascertain the original meaning of the *Privileges or Immunities Clause*, "[l]egal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873." *Saenz v. Roe, 526 U.S. 489, 522, n. 1, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999)* (dissenting opinion); accord, *ante*, at 10 (plurality opinion).

3 It is no secret that the desire to "displace" major "portions of our equal protection and substantive due process jurisprudence" animates some of the passion that attends this interpretive issue. *Saenz, 526 U.S., at 528* (THOMAS, J., dissenting).

4 Wilkinson, The Fourteenth Amendment Privileges or Immunities Clause, 12 Harv. J. L. & Pub. Pol'y 43, 52 (1989). Judge Wilkinson's point is broader than the privileges or immunities debate. As he observes, "there may be more structure imposed by provisions subject to generations of elaboration and refinement than by a provision in its pristine state. The fortuities of uneven constitutional [***207] development must be respected, not cast aside in the illusion of reordering the landscape anew." *Id.*, at 51-52; see also *Washington v. Glucksberg, 521 U.S. 702, 759, n. 6, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)* (Souter, J., concurring in judgment) (acknowledging that, "[t]o a degree," the *Slaughter-House* "decision may have led the Court to look to the *Due Process Clause* as a source of substantive rights").

I further agree with the plurality that there are weighty arguments supporting petitioners' second submission, insofar as [*3090] it concerns the possession of firearms for lawful self-defense in the home. But these arguments are less compelling than the plurality suggests; they are much less compelling when applied outside the home; and their validity does not depend on the Court's holding in *Heller*. For that holding sheds no light on the meaning of the *Due Process Clause of the Fourteenth Amendment*. Our decisions construing that Clause to render [**972] various procedural guarantees in the *Bill of Rights* enforceable against the States likewise tell us little about the meaning of the word "liberty" in the Clause or about the scope of its protection of nonprocedural rights.

This is a substantive due process case.

I

Section 1 of the Fourteenth Amendment [***208] decrees that no State shall "deprive any person of life, liberty, or property, without due process of law." The Court has filled thousands of pages expounding that spare text. As I read the vast corpus of substantive due process opinions, they confirm several important principles that ought to guide our resolution of this case. The principal opinion's lengthy summary of our "incorporation" doctrine, see *ante*, at 5-9, 11-19 (majority opinion), 10-11 (plurality opinion), and its implicit (and untenable) effort to wall off that doctrine from the rest of our substantive due process jurisprudence, invite a fresh survey of this old terrain.

Substantive Content

The first, and most basic, principle established by our cases is that the rights protected by the *Due Process Clause* are not merely procedural in nature. At first glance, this proposition might seem surprising, given that the Clause refers to "process." But substance and procedure are often deeply entwined. Upon closer inspection, the text can be read to "impos[e] nothing less than an obligation to give substantive content to the words 'liberty' and 'due process of law,'" *Washington v. Glucksberg, 521 U.S. 702, 764, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)* (Souter, J., [***209] concurring in judgment), lest superficially fair procedures be permitted to "destroy the enjoyment" of life, liberty, and property, *Poe v. Ullman, 367 U.S. 497, 541, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961)* (Harlan, J., dissenting), and the Clause's prepositional modifier be permitted to swallow its primary command. Procedural guarantees are hollow unless linked to substantive inter-

ests; and no amount of process can legitimize some deprivations.

I have yet to see a persuasive argument that the Framers of the *Fourteenth Amendment* thought otherwise. To the contrary, the historical evidence suggests that, at least by the time of the Civil War if not much earlier, the phrase "due process of law" had acquired substantive content as a term of art within the legal community. [5] This understanding is consonant [*3091] with the venerable "notion [**973] that governmental authority has implied limits which preserve private autonomy," [6] a notion which predates the founding and which finds reinforcement in the *Constitution's Ninth Amendment*, see *Griswold v. Connecticut, 381 U.S. 479, 486-493, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)* (Goldberg, J., concurring). [7] The *Due Process Clause* cannot claim to be the source of our basic freedoms -- no legal document ever could, see *Meachum v. Fano, 427 U.S. 215, 230, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976)* [***210] (STEVENS, J., dissenting) -- but it stands as one of their foundational guarantors in our law.

5 See, *e.g.*, Ely, The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, *16 Const. Commentary 315, 326-327 (1999)* (concluding that founding-era "American statesmen accustomed to viewing due process through the lens of [Sir Edward] Coke and [William] Blackstone could [not] have failed to understand due process as encompassing substantive as well as procedural terms"); Gedicks, An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the *Fifth Amendment*, *58 Emory L. J. 585, 594 (2009)* (arguing "that one widely shared understanding of the *Due Process Clause of the Fifth Amendment* in the late eighteenth century encompassed judicial recognition and enforcement of unenumerated substantive rights"); Maltz, *Fourteenth Amendment* Concepts in the Antebellum Era, 32 Am. J. Legal Hist. 305, 317-318 (1988) (explaining that in the antebellum era a "substantial number of states," as well as antislavery advocates, "imbued their [constitutions'] respective *due process clauses* with a substantive content"); Tribe, Taking Text and Structure [***211] Seriously: Reflections on Free-Form Method in Constitutional Interpretation, *108 Harv. L. Rev. 1221, 1297, n. 247 (1995)* ("[T]he *historical* evidence points strongly toward the conclusion that, at least by 1868 even if not in 1791, any state legislature voting to ratify a constitutional rule banning government deprivations of 'life, liberty, or property, without due process of law' would have understood that ban as having substantive as well as procedural content, given that era's premise that, to qualify as 'law,' an enactment would have to meet substantive requirements of rationality, non-oppressiveness, and evenhandedness"); see also Stevens, The Third Branch of Liberty, *41 U. Miami L. Rev. 277, 290 (1986)* ("In view of the number of cases that have given substantive content to the term liberty, the burden of demonstrating that this consistent course of decision was unfaithful to the intent of the Framers is surely a heavy one").

6 1 L. Tribe, American Constitutional Law § 8-1, p. 1335 (3d ed. 2000).

7 The *Ninth Amendment* provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

If text and history are [***212] inconclusive on this point, our precedent leaves no doubt: It has been "settled" for well over a century that the *Due Process Clause* "applies to matters of substantive law as well as to matters of procedure." *Whitney v. California, 274 U.S. 357, 373, 47 S. Ct. 641, 71 L. Ed. 1095 (1927)* (Brandeis, J., concurring). Time and again, we have recognized that in the *Fourteenth Amendment* as well as the *Fifth*, the "*Due Process Clause* guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Glucksberg, 521 U.S., at 719, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.* "The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)* (opinion of O'Connor, J., joined by Rehnquist, C. J., and GINSBURG and BREYER, JJ.) (quoting *Glucksberg, 521 U.S., at 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*). Some of our most enduring precedents, accepted today by virtually everyone, were substantive due process decisions. See, *e.g., Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)* (recognizing due-process- as well as equal-protection-based right to marry person of another race); *Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S. Ct. 693, 98 L. Ed. 884 (1954)* [***213] (outlawing racial segregation in District of Columbia public schools); *Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)* (vindicating right of parents to direct upbringing and education of their children); *Meyer v. Nebraska, 262 U.S. 390, 399-403, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)* (striking down prohibition on teaching of foreign languages).

Liberty

The second principle woven through our cases is that substantive due process is fundamentally a matter of personal liberty. For it is the liberty clause of the *Fourteenth Amendment* [**974] [*3092] that grounds our most important holdings in this field. It is the liberty clause that enacts the Constitution's "promise" that a measure of dignity and self-rule will be afforded to all persons. *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)*. It is the liberty clause that reflects and renews "the origins of the American heritage of freedom [and] the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." *Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 720 (CA7 1975)* (Stevens, J.). Our substantive due process cases have episodically invoked values such as [***214] privacy and equality as well, values that in certain contexts may intersect with or complement a subject's liberty interests in profound ways. But as I have observed on numerous occasions, "most of the significant [20th-century] cases raising *Bill of Rights* issues have, in the final analysis, actually interpreted the word 'liberty' in the *Fourteenth Amendment*." [8]

> 8 Stevens, The *Bill of Rights*: A Century of Progress, *59 U. Chi. L. Rev. 13, 20 (1992)*; see *Fitzgerald, 523 F.2d at 719-720*; Stevens, *41 U. Miami L. Rev., at 286-289*; see also Greene, The So-Called Right to Privacy, *43 U. C. D. L. Rev. 715, 725-731 (2010)*.

It follows that the term "incorporation," like the term "unenumerated rights," is something of a misnomer. Whether an asserted substantive due process interest is explicitly named in one of the first eight Amendments to the Constitution or is not mentioned, the underlying inquiry is the same: We must ask whether the interest is "comprised within the term liberty." *Whitney, 274 U.S., at 373, 47 S. Ct. 641, 71 L. Ed. 1095* (Brandeis, J., concurring). As the second Justice Harlan has shown, ever since the Court began considering the applicability of the *Bill of Rights* to the States, "the Court's usual approach [***215] has been to ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments." *Malloy v. Hogan, 378 U.S. 1, 24, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)* (dissenting opinion); see also Frankfurter, Memorandum on "Incorporation" of the *Bill of Rights* into the *Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746, 747-750 (1965). In the pathmarking case of *Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925)*, for example, both the majority and dissent evaluated petitioner's free speech claim not under the *First Amendment* but as an aspect of "the fundamental personal rights and 'liberties' protected by the *due process clause of the Fourteenth Amendment* from impairment by the States." [9]

> 9 See also *Gitlow, 268 U.S., at 672, 45 S. Ct. 625, 69 L. Ed. 1138* (Holmes, J., dissenting) ("The general principle of free speech, it seems to me, must be taken to be included in the *Fourteenth Amendment*, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States"). Subsequent [***216] decisions repeatedly reaffirmed that persons hold free speech rights against the States on account of the *Fourteenth Amendment's* liberty clause, not the *First Amendment per se*. See, *e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 466, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)*; *Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)*; *Thornhill v. Alabama, 310 U.S. 88, 95, 60 S. Ct. 736, 84 L. Ed. 1093, and n. 7 (1940)*; see also *McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336, n. 1, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995)* ("The term 'liberty' in the *Fourteenth Amendment to the Constitution* makes the *First Amendment* applicable to the States"). Classic opinions written by Justice Cardozo and Justice Frankfurter endorsed the same basic approach to "incorporation," with the *Fourteenth Amendment* taken as a distinct source of rights independent from the first eight Amendments. *Palko v. Connecticut, 302 U.S. 319, 322-328, 58 S. Ct. 149, 82 L. Ed. 288 (1937)* (opinion for the Court by Cardozo, J.); *Adamson v. California, 332 U.S. 46, 59-68, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947)* (Frankfurter, J., concurring).

[*3093] In his own classic opinion in *Griswold,* [**975] *381 U.S., at 500, 85 S. Ct. 1678, 14 L. Ed. 2d 510* (concurring in judgment), Justice Harlan memorably distilled these precedents' lesson: "While the relevant inquiry may be aided by resort to one or more of the provisions of the *Bill of Rights*, [***217] it is not dependent on them or any of their radiations. The *Due Process Clause of the Fourteenth Amendment* stands . . . on its own bottom." [10] Inclusion in the *Bill of Rights* is neither necessary nor sufficient for an interest to be judicially enforceable under the *Fourteenth Amendment*. This Court's "'selective incorporation'" doctrine, *ante*, at 15, is not simply "related" to substantive due process, *ante*, at 19; it is a subset thereof.

10 See also *Wolf v. Colorado, 338 U.S. 25, 26, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949)* ("The notion that the 'due process of law' guaranteed by the *Fourteenth Amendment* is shorthand for the first eight amendments of the Constitution . . . has been rejected by this Court again and again, after impressive consideration. . . . The issue is closed"). *Wolf*'s holding on the exclusionary rule was overruled by *Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961)*, but the principle just quoted has never been disturbed. It is notable that *Mapp*, the case that launched the modern "doctrine of *ad hoc*," "'jot-for-jot'" incorporation, *Williams v. Florida, 399 U.S. 78, 130-131, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970)* (Harlan, J., concurring in result), expressly held "that the exclusionary rule is an essential part of both the *Fourth and Fourteenth Amendments*." [***218] *367 U.S., at 657, 81 S. Ct. 1684, 6 L. Ed. 2d 1081* (emphasis added).

Federal/State Divergence

The third precept to emerge from our case law flows from the second: The 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*. As drafted, the *Bill of Rights* directly constrained only the Federal Government. See *Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 7 Pet. 243, 8 L. Ed. 672 (1833)*. Although the enactment of the *Fourteenth Amendment* profoundly altered our legal order, it "did not unstitch the basic federalist pattern woven into our constitutional fabric." *Williams v. Florida, 399 U.S. 78, 133, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970)* (Harlan, J., concurring in result). Nor, for that matter, did it expressly alter the *Bill of Rights*. The Constitution still envisions a system of divided sovereignty, still "establishes a federal republic where local differences are to be cherished as elements of liberty" in the vast run of cases, *National Rifle Assn. of Am. Inc. v. Chicago, 567 F.3d 856, 860 (CA7 2009)* (Easterbrook, C. J.), still allocates a general "police power . . . to the States [***219] and the States alone," *United States v. Comstock, 560 U.S. ___, ___, 130 S. Ct. 1949; 176 L. Ed. 2d 878, 902 (2010)* (KENNEDY, J., concurring in judgment). Elementary considerations of constitutional text and structure suggest there may be legitimate reasons to hold state governments to different standards than the Federal Government in certain areas. [11]

11 I can hardly improve upon the many passionate defenses of this position that Justice Harlan penned during his tenure on the Court. See *Williams, 399 U.S., at 131, n. 14, 90 S. Ct. 1893, 26 L. Ed. 2d 446* (opinion concurring in result) (cataloguing opinions).

[**976] It is true, as the Court emphasizes, *ante*, at 15-19, that we have made numerous provisions of the *Bill of Rights* fully applicable to the States. It is settled, for [*3094] instance, that the Governor of Alabama has no more power than the President of the United States to authorize unreasonable searches and seizures. *Ker v. California, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963)*. But we have never accepted a "total incorporation" theory of the *Fourteenth Amendment*, whereby the Amendment is deemed to subsume the provisions of the *Bill of Rights* en masse. See *ante*, at 15. And we have declined to apply several provisions to the States in any measure. See, *e.g., Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961 (1916)* [***220] (*Seventh Amendment*); *Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884)* (*Grand Jury Clause*). We have, moreover, resisted a uniform approach to the *Sixth Amendment's* criminal jury guarantee, demanding 12-member panels and unanimous verdicts in federal trials, yet not in state trials. See *Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972)* (plurality opinion); *Williams, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446*. In recent years, the Court has repeatedly declined to grant certiorari to review that disparity. [12] While those denials have no precedential significance, they confirm the proposition that the "incorporation" of a provision of the *Bill of Rights* into the *Fourteenth Amendment* does not, in itself, mean the provision must have precisely the same meaning in both contexts.

12 See, *e.g.*, Pet. for Cert. in *Bowen* v. *Oregon*, O. T. 2009, No. 08-1117, p. i, cert. denied, *558 U.S. ___, 130 S. Ct. 52, 175 L. Ed. 2d 21 (2009)* (request to overrule *Apodaca*); Pet. for Cert. in *Lee* v. *Louisiana*, O. T. 2008, No. 07-1523, p. i, cert. denied, *555 U.S. ___, 129 S. Ct. 130, 172 L. Ed. 2d 37 (2008)* (same); Pet. for Cert. in *Logan* v. *Florida*, O. T. 2007, No. 07-7264, pp. 14-19, cert. denied, *552 U.S. 1189, 128 S. Ct. 1222, 170 L. Ed. 2d 76 (2008)* (request to overrule *Williams*).

It is true, as well, that during the 1960's the Court decided a number of cases [***221] involving procedural rights in which it treated the *Due Process Clause* as if it transplanted language from the *Bill of Rights* into the *Fourteenth Amendment*. See, *e.g., Benton v. Maryland, 395 U.S. 784, 795, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)* (*Double Jeopardy Clause*); *Pointer v. Texas, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)*

(*Confrontation Clause*). "Jot-for-jot" incorporation was the norm in this expansionary era. Yet at least one subsequent opinion suggests that these precedents require perfect state/federal congruence only on matters "'at the core'" of the relevant constitutional guarantee. *Crist v. Bretz, 437 U.S. 28, 37, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978)*; see also *id., at 52-53, 98 S. Ct. 2156, 57 L. Ed. 2d 24* (Powell, J., dissenting). In my judgment, this line of cases is best understood as having concluded that, to ensure a criminal trial satisfies essential standards of fairness, some procedures should be the same in state and federal courts: The need for certainty and uniformity is more pressing, and the margin for error slimmer, when criminal justice is at issue. That principle has little relevance to the question whether a *non*procedural rule set forth in the *Bill of Rights* qualifies as an aspect of the liberty protected by the *Fourteenth Amendment*.

Notwithstanding some overheated [***222] dicta in *Malloy, 378 U.S., at 10-11, 84* [**977] *S. Ct. 1489, 12 L. Ed. 2d 653*, it is therefore an overstatement to say that the Court has "abandoned," *ante*, at 16, 17 (majority opinion), 39 (plurality opinion), a "two-track approach to incorporation," *ante*, at 37 (plurality opinion). The Court moved away from that approach in the area of criminal procedure. But the *Second Amendment* differs in fundamental respects from its neighboring provisions in the *Bill of Rights*, as I shall explain in Part V, *infra;* [*3095] and if some 1960's opinions purported to establish a general method of incorporation, that hardly binds us in this case. The Court has not hesitated to cut back on perceived Warren Court excesses in more areas than I can count.

I do not mean to deny that there can be significant practical, as well as esthetic, benefits from treating rights symmetrically with regard to the State and Federal Governments. Jot-for-jot incorporation of a provision may entail greater protection of the right at issue and therefore greater freedom for those who hold it; jot-for-jot incorporation may also yield greater clarity about the contours of the legal rule. See *Johnson v. Louisiana, 406 U.S. 356, 384-388, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)* (Douglas, J., dissenting); *Pointer, 380 U.S., at 413-414, 85 S. Ct. 1065, 13 L. Ed. 2d 923* [***223] (Goldberg, J., concurring). In a federalist system such as ours, however, this approach can carry substantial costs. When a federal court insists that state and local authorities follow its dictates on a matter not critical to personal liberty or procedural justice, the latter may be prevented from engaging in the kind of beneficent "experimentation in things social and economic" that ultimately redounds to the benefit of all Americans. *New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932)* (Brandeis, J., dissenting). The costs of federal courts' imposing a uniform national standard may be especially high when the relevant regulatory interests vary significantly across localities, and when the ruling implicates the States' core police powers.

Furthermore, there is a real risk that, by demanding the provisions of the *Bill of Rights* apply identically to the States, federal courts will cause those provisions to "be watered down in the needless pursuit of uniformity." *Duncan v. Louisiana, 391 U.S. 145, 182, n. 21, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)* (Harlan, J., dissenting). When one legal standard must prevail across dozens of jurisdictions with disparate needs and customs, courts will often settle on a relaxed standard. [***224] This watering-down risk is particularly acute when we move beyond the narrow realm of criminal procedure and into the relatively vast domain of substantive rights. So long as the requirements of fundamental fairness are always and everywhere respected, it is not clear that greater liberty results from the jot-for-jot application of a provision of the *Bill of Rights* to the States. Indeed, it is far from clear that proponents of an individual right to keep and bear arms ought to celebrate today's decision. [13]

13 The vast majority of States already recognize a right to keep and bear arms in their own constitutions, see Volokh, State Constitutional Rights to Keep and Bear Arms, *11 Tex. Rev. L. & Pol. 191 (2006)* (cataloguing provisions); Brief for Petitioners 69 (observing that "[t]hese *Second Amendment* analogs are effective and consequential"), but the States vary widely in their regulatory schemes, their traditions and cultures of firearm use, and their problems relating to gun violence. If federal and state courts must harmonize their review of gun-control laws under the *Second Amendment*, the resulting jurisprudence may prove significantly more deferential to those laws than the *status* [***225] *quo ante*. Once it has been established that a single legal standard must govern nationwide, federal courts will face a profound pressure to reconcile that standard with the diverse interests of the States and their long history of regulating in this sensitive area. Cf. *Williams, 399 U.S., at 129-130, 90 S. Ct. 1893, 26 L. Ed. 2d 446* (Harlan, J., concurring in result) (noting "'backlash'" potential of jot-for-jot incorporation); Grant, Felix Frankfurter: A Dissenting Opinion, 12 UCLA L. Rev. 1013, 1038 (1965) ("If the Court will not reduce the requirements of the *fourteenth amendment* below the federal gloss that now overlays the *Bill of Rights*, then it will have to reduce that gloss to the point where the states can live with it"). *Amici* argue persuasively that, post-"incorporation," federal courts will have little choice but to fix a highly flexible standard of review if they are to avoid leaving

federalism and the separation of powers -- not to mention gun policy -- in shambles. See Brief for Brady Center to Prevent Gun Violence et al. as *Amici Curiae* (hereinafter Brady Center Brief).

[*3096] [**978] II

So far, I have explained that substantive due process analysis generally requires us to consider the term "liberty" in the *Fourteenth Amendment*, [***226] and that this inquiry may be informed by but does not depend upon the content of the *Bill of Rights*. How should a court go about the analysis, then? Our precedents have established, not an exact methodology, but rather a framework for decisionmaking. In this respect, too, the Court's narrative fails to capture the continuity and flexibility in our doctrine.

The basic inquiry was described by Justice Cardozo more than 70 years ago. When confronted with a substantive due process claim, we must ask whether the allegedly unlawful practice violates values "implicit in the concept of ordered liberty." *Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937)*. [14] If the practice in question lacks any "oppressive and arbitrary" character, if judicial enforcement of the asserted right would not materially contribute to "a fair and enlightened system of justice," then the claim is unsuitable for substantive due process protection. *Id., at 327, 325, 58 S. Ct. 149, 82 L. Ed. 288*. Implicit in Justice Cardozo's test is a recognition that the postulates of liberty have a universal character. Liberty claims that are inseparable from the customs that prevail in a certain region, the idiosyncratic expectations of a certain group, or the personal [***227] preferences of their champions, may be valid claims in some sense; but they are not of constitutional stature. Whether conceptualized as a "rational continuum" of legal precepts, *Poe, 367 U.S., at 543, 81 S. Ct. 1752, 6 L. Ed. 2d 989* (Harlan, J., dissenting), or a seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and the particular.

14 Justice Cardozo's test itself built upon an older line of decisions. See, *e.g., Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 237, 17 S. Ct. 581, 41 L. Ed. 979 (1897)* (discussing "limitations on [state] power, which grow out of the essential nature of all free governments [and] implied reservations of individual rights, . . . and which are respected by all governments entitled to the name" (internal quotation marks omitted)).

Justice Cardozo's test undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy. In addition to other constraints I will soon discuss, see Part III, *infra*, historical and empirical data of various kinds ground the analysis. Textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific [**979] and [***228] professional developments, practices of other civilized societies, [15] and, above all else, the "'traditions and conscience of our people,'" *Palko, 302 U.S., at 325, 58 S. Ct. 149, 82 L. Ed. 288* (quoting *Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934))*, are critical variables. They can provide evidence about which rights really are vital to ordered liberty, as well as a spur to judicial action.

15 See *Palko, 302 U.S., at 326, n. 3, 58 S. Ct. 149, 82 L. Ed. 288*; see also, *e.g., Lawrence v. Texas, 539 U.S. 558, 572-573, 576-577, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)*; *Glucksberg, 521 U.S., at 710-711, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*, and n. 8.

The Court errs both in its interpretation of *Palko* and in its suggestion that later cases rendered *Palko*'s methodology defunct. Echoing *Duncan*, the Court advises that Justice Cardozo's test will not be satisfied "'if a civilized system could be imagined that would not accord the particular [*3097] protection.'" *Ante*, at 12 (quoting *391 U.S., at 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*). *Palko* does contain some language that could be read to set an inordinate bar to substantive due process recognition, reserving it for practices without which "neither liberty nor justice would exist." *302 U.S., at 326, 58 S. Ct. 149, 82 L. Ed. 288*. But in view of Justice Cardozo's broader analysis, as well as the numerous cases that have upheld liberty claims [***229] under the *Palko* standard, such readings are plainly overreadings. We have never applied *Palko* in such a draconian manner.

Nor, as the Court intimates, see *ante*, at 16, did *Duncan* mark an irreparable break from *Palko*, swapping out liberty for history. *Duncan* limited its discussion to "particular procedural safeguard[s]" in the *Bill of Rights* relating to "criminal processes," *391 U.S., at 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*; it did not purport to set a standard for other types of liberty interests. Even with regard to procedural safeguards, *Duncan* did not jettison the *Palko* test so much as refine it: The judge is still tasked with evaluating whether a practice "is fundamental . . . to ordered liberty," within the context of the "Anglo-American" system. *Duncan, 391 U.S., at 149-150, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*. Several of our most important recent decisions confirm the proposition that substantive due process analysis -- from which, once again, "incorporation" analysis derives -- must not be wholly backward looking. See, *e.g., Lawrence v. Texas, 539 U.S. 558, 572, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)* ("[H]istory and tradition are the starting point but

not in all cases the ending point of the substantive due process inquiry" (internal quotation marks omitted)); *Michael H. v. Gerald D., 491 U.S. 110, 127-128, n. 6, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989)* [***230] (garnering only two votes for history-driven methodology that "consult[s] the most specific tradition available"); see also *post*, at 6-7 (BREYER, J., dissenting) (explaining that post-*Duncan* "incorporation" cases continued to rely on more than history). [16]

> 16 I acknowledge that some have read the Court's opinion in *Glucksberg* as an attempt to move substantive due process analysis, for all purposes, toward an exclusively historical methodology -- and thereby to debilitate the doctrine. If that were ever *Glucksberg*'s aspiration, *Lawrence* plainly renounced it. As between *Glucksberg* and *Lawrence*, I have little doubt which will prove the more enduring precedent.

[**980] The Court's flight from *Palko* leaves its analysis, careful and scholarly though it is, much too narrow to provide a satisfying answer to this case. The Court hinges its entire decision on one mode of intellectual history, culling selected pronouncements and enactments from the 18th and 19th centuries to ascertain what Americans thought about firearms. Relying on *Duncan* and *Glucksberg*, the plurality suggests that only interests that have proved "fundamental from an American perspective," *ante*, at 37, 44, or "'deeply rooted in this [***231] Nation's history and tradition,'" *ante*, at 19 (quoting *Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*), to the Court's satisfaction, may qualify for incorporation into the *Fourteenth Amendment*. To the extent the Court's opinion could be read to imply that the historical pedigree of a right is the exclusive or dispositive determinant of its status under the *Due Process Clause*, the opinion is seriously mistaken.

A rigid historical test is inappropriate in this case, most basically, because our substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms. When the Court applied many of the *procedural* guarantees in the *Bill of Rights* to the States in the 1960's, it often asked whether the guarantee in question was "fundamental in the context of the criminal [*3098] processes maintained by the American States." [17] *Duncan, 391 U.S., at 150, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*. That inquiry could extend back through time, but it was focused not so much on historical conceptions of the guarantee as on its functional significance within the States' regimes. This contextualized approach made sense, as the choice to employ any given trial-type procedure means little in the abstract. It is [***232] only by inquiring into how that procedure intermeshes with other procedures and practices in a criminal justice system that its relationship to "liberty" and "due process" can be determined.

> 17 The Court almost never asked whether the guarantee in question was deeply rooted in founding-era practice. See Brief for Respondent City of Chicago et al. 31, n. 17 (hereinafter Municipal Respondents' Brief) (noting that only two opinions extensively discussed such history).

Yet when the Court has used the *Due Process Clause* to recognize rights distinct from the trial context -- rights relating to the primary conduct of free individuals -- Justice Cardozo's test has been our guide. The right to free speech, for instance, has been safeguarded from state infringement not because the States have always honored it, but because it is "essential to free government" and "to the maintenance of democratic institutions" -- that is, because the right to free speech is implicit in the concept of ordered liberty. *Thornhill v. Alabama, 310 U.S. 88, 95, 96, 60 S. Ct. 736, 84 L. Ed. 1093 (1940)*; see also, *e.g., Loving, 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010* (discussing right to marry person of another race); *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)* (discussing [***233] right to be free from arbitrary intrusion by police); *Schneider v. State (Town of Irvington), 308 U.S. 147, 161, 60 S. Ct. 146, 84 L. Ed. 155 (1939)* (discussing right to distribute printed matter). [18] [**981] While the verbal formula has varied, the Court has largely been consistent in its liberty-based approach to substantive interests outside of the adjudicatory system. As the question before us indisputably concerns such an interest, the answer cannot be found in a granular inspection of state constitutions or congressional debates.

> 18 Cf. *Robinson v. California, 370 U.S. 660, 666-668, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962)* (invalidating state statute criminalizing narcotics addiction as "cruel and unusual punishment in violation of the *Fourteenth Amendment*" based on nature of the alleged "'crime,'" without historical analysis); Brief for Respondent National Rifle Association of America, Inc., et al. 29 (noting that "lynchpin" of incorporation test has always been "the importance of the right in question to . . . 'liberty'" and to our "system of government").

More fundamentally, a rigid historical methodology is unfaithful to the Constitution's command. For if it were really the case that the *Fourteenth Amendment's* guarantee of liberty embraces only those [***234] rights "so rooted in our history, tradition, and practice as to require special protection," *Glucksberg, 521 U.S., at*

721, n. 17, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772, then the guarantee would serve little function, save to ratify those rights that state actors have *already* been according the most extensive protection. [19] Cf. *Duncan, 391 U.S., at 183, 88 S. Ct. 1444, 20 L. Ed. 2d 491* (Harlan, J., dissenting) (critiquing "circular[ity]" of historicized test for incorporation). That approach is unfaithful to the expansive principle Americans laid down when they ratified the *Fourteenth Amendment* and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade [*3099] any analysis of what customs, defined in what manner, are sufficiently "'rooted'"; it countenances the most revolting injustices in the name of continuity, [20] for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial [***235] modesty.

19 I do not mean to denigrate this function, or to imply that only "*new* rights" -- whatever one takes that term to mean -- ought to "get in" the substantive due process door. *Ante*, at 5 (SCALIA, J., concurring).

20 See *Bowers v. Hardwick, 478 U.S. 186, 199, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986)* (Blackmun, J., dissenting) ("Like Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past'" (quoting Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897))).

No, the liberty safeguarded by the *Fourteenth Amendment* is not merely preservative in nature but rather is a "dynamic concept." Stevens, The *Bill of Rights*: A Century of Progress, *59 U. Chi. L. Rev. 13, 38 (1972)*. Its dynamism provides a central means through which the Framers enabled the Constitution to "endure for ages to come," *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 415, 4 L. Ed. 579 (1819)*, a central example of how they "wisely spoke in general language and left to succeeding generations the task of applying that language [***236] to the unceasingly changing environment in which they would live," Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 694 (1976). "The task of [**982] giving concrete meaning to the term 'liberty,'" I have elsewhere explained at some length, "was a part of the work assigned to future generations." Stevens, The Third Branch of Liberty, *41 U. Miami L. Rev. 277, 291 (1986)*. [21] The judge who would outsource the interpretation of "liberty" to historical sentiment has turned his back on a task the Constitution assigned to him and drained the document of its intended vitality. [22]

21 JUSTICE KENNEDY has made the point movingly:

"Had those who drew and ratified the *Due Process Clauses of the Fifth Amendment* or the *Fourteenth Amendment* known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence, 539 U.S., at 578-579, 123 S. Ct. 2472, 156 L. Ed. 2d 508.*

22 Contrary [***237] to JUSTICE SCALIA's suggestion, I emphatically do not believe that "only we judges" can interpret the *Fourteenth Amendment*, *ante*, at 4, or any other constitutional provision. All Americans can; all Americans should. I emphatically do believe that we judges must exercise -- indeed, cannot help but exercise -- our own reasoned judgment in so doing. JUSTICE SCALIA and I are on common ground in maintaining that courts should be "guided by what the American people throughout our history have thought." *Ibid.* Where we part ways is in his view that courts should be guided *only* by historical considerations.

There is, moreover, a tension between JUSTICE SCALIA's concern that "courts have the last word" on constitutional questions, *ante*, at 3, n. 2, on the one hand, and his touting of the *Constitution's Article V* amendment process, *ante*, at 3, on the other. The American people can of course reverse this Court's rulings through that same process.

III

At this point a difficult question arises. In considering such a majestic term as "liberty" and applying it to present circumstances, how are we to do justice to its urgent call and its open texture -- and to the grant of interpretive discretion the [***238] [*3100] latter embodies -- without injecting excessive subjectivity or unduly restricting the States'"broad latitude in experimenting with possible solutions to problems of vital local concern," *Whalen v. Roe, 429 U.S. 589, 597, 97 S. Ct.*

869, 51 L. Ed. 2d 64 (1977)? One part of the answer, already discussed, is that we must ground the analysis in historical experience and reasoned judgment, and never on "merely personal and private notions." *Rochin v. California, 342 U.S. 165, 170, 72 S. Ct. 205, 96 L. Ed. 183 (1952)*. Our precedents place a number of additional constraints on the decisional process. Although "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins v. Harker Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)*, significant guideposts do exist. [23]

> 23 In assessing concerns about the "open-ended[ness]" of this area of law, *Collins, 503 U.S., at 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261*, one does well to keep in view the malleability not only of the Court's "deeply rooted"/fundamentality standard but also of substantive due process' constitutional cousin, "equal protection" analysis. Substantive due process is sometimes accused of entailing an insufficiently "restrained methodology." *Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*. Yet "the word 'liberty' in the *Due Process Clause* [***239] seems to provide at least as much meaningful guidance as does the word 'equal' in the *Equal Protection Clause*." Post, The Supreme Court 2002 Term -- Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, *117 Harv. L. Rev. 4, 94, n. 440 (2003)*. And "[i]f the objection is that the text of the *[Due Process] Clause* warrants providing only protections of process rather than protections of substance," "it is striking that even those Justices who are most theoretically opposed to substantive due process, like Scalia and Rehnquist, are also nonetheless enthusiastic about applying the equal protection component of the *Due Process Clause of the Fifth Amendment* to the federal government." *Ibid.* (citing *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213-231, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995))*.

The most basic is that we have eschewed attempts to provide any all-purpose, [**983] top-down, totalizing theory of "liberty." [24] That project is bound to end in failure or worse. The Framers did not express a clear understanding of the term to guide us, and the now-repudiated *Lochner* line of cases attests to the dangers of judicial overconfidence in using substantive due process to advance a broad theory of the right or [***240] the good. See, *e.g., Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905)*. In its most durable precedents, the Court "has not attempted to define with exactness the liberty . . . guaranteed" by the *Fourteenth Amendment. Meyer, 262 U.S., at 399, 43 S. Ct. 625, 67 L. Ed. 1042*; see also, *e.g., Bolling, 347 U. S, at 499, 74 S. Ct. 693, 98 L. Ed. 884*. By its very nature, the meaning of liberty cannot be "reduced to any formula; its content cannot be determined by reference to any code." *Poe, 367 U.S., at 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989* (Harlan, J., dissenting).

> 24 That one eschews a comprehensive theory of liberty does not, *pace* JUSTICE SCALIA, mean that one lacks "a coherent theory of the *Due Process Clause*," *ante*, at 5. It means that one lacks the hubris to adopt a rigid, context-independent definition of a constitutional guarantee that was deliberately framed in open-ended terms.

Yet while "the 'liberty' specially protected by the *Fourteenth Amendment*" is "perhaps not capable of being fully clarified," *Glucksberg, 521 U.S., at 722, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*, it is capable of being refined and delimited. We have insisted that only certain types of especially significant personal interests may qualify for especially heightened protection. Ever since "the deviant economic due process cases [were] repudiated," *id., at 761, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* [***241] (Souter, J., concurring in judgment), our doctrine has steered away from "laws that touch economic problems, business affairs, [*3101] or social conditions," *Griswold, 381 U.S., at 482, 85 S. Ct. 1678, 14 L. Ed. 2d 510*, and has instead centered on "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education," *Paul v. Davis, 424 U.S. 693, 713, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)*. These categories are not exclusive. Government action that shocks the conscience, pointlessly infringes settled expectations, trespasses into sensitive private realms or life choices without adequate justification, perpetrates gross injustice, or simply lacks a rational basis will always be vulnerable to judicial invalidation. Nor does the fact that an asserted right falls within one of these categories end the inquiry. More fundamental rights may receive more robust judicial protection, but the strength of the individual's liberty interests and the State's regulatory interests must always be assessed and compared. No right is absolute.

Rather than seek a categorical understanding of the liberty clause, our precedents have thus elucidated a conceptual core. The clause safeguards, most basically, "the ability independently to define [***242] one's identity," *Roberts v. United States Jaycees, 468 U.S. 609, 619, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)*, "the individual's right to make certain unusually important decisions that will affect his [**984] own, or his family's, destiny," *Fitzgerald, 523 F.2d at 719*, and the right to be respected as a human being. Self-determination, bodily

integrity, freedom of conscience, intimate relationships, political equality, dignity and respect -- these are the central values we have found implicit in the concept of ordered liberty.

Another key constraint on substantive due process analysis is respect for the democratic process. If a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate. When the Court declined to establish a general right to physician-assisted suicide, for example, it did so in part because "the States [were] currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," rendering judicial intervention both less necessary and potentially more disruptive. *Glucksberg, 521 U.S., at 719, 735, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.* Conversely, we have long appreciated that more "searching" [***243] judicial review may be justified when the rights of "discrete and insular minorities" -- groups that may face systematic barriers in the political system -- are at stake. *United States v. Carolene Products Co., 304 U.S. 144, 153, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).* Courts have a "comparative . . . advantage" over the elected branches on a limited, but significant, range of legal matters. *Post,* at 8.

Recognizing a new liberty right is a momentous step. It takes that right, to a considerable extent, "outside the arena of public debate and legislative action." *Glucksberg, 521 U.S., at 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.* Sometimes that momentous step must be taken; some fundamental aspects of personhood, dignity, and the like do not vary from State to State, and demand a baseline level of protection. But sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society provides an important tool for guiding judicial discretion.

This sensitivity is an aspect of a deeper principle: the need to approach our work with humility and caution. Because the relevant constitutional language is so "spacious," *Duncan, 391 U.S., at 148, 88 S. Ct. 1444, 20 L. Ed. 2d 491,* I have emphasized that "[t]he doctrine of judicial self-restraint [***244] requires us to exercise the utmost care whenever we are [*3102] asked to break new ground in this field." *Collins, 503 U.S., at 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261.* Many of my colleagues and predecessors have stressed the same point, some with great eloquence. See, *e.g., Casey, 505 U.S., at 849, 112 S. Ct. 2791, 120 L. Ed. 2d 674*; *Moore v. East Cleveland, 431 U.S. 494, 502-503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)* (plurality opinion); *Poe, 367 U.S., at 542-545, 81 S. Ct. 1752, 6 L. Ed. 2d 989* (Harlan, J., dissenting); *Adamson v. California, 332 U.S. 46, 68, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947)* (Frankfurter, J., concurring). Historical study may discipline as well as enrich the analysis. But the inescapable reality is that no serious theory of *Section 1 of the Fourteenth Amendment* yields clear answers in every case, and "[n]o formula could serve as a substitute, in this area, for judgment and restraint." *Poe, 367 U.S., at 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989* (Harlan, J., dissenting).

[**985] Several rules of the judicial process help enforce such restraint. In the substantive due process field as in others, the Court has applied both the doctrine of *stare decisis* -- adhering to precedents, respecting reliance interests, prizing stability and order in the law -- and the common-law method -- taking cases and controversies as they present themselves, proceeding slowly and incrementally, building [***245] on what came before. This restrained methodology was evident even in the heyday of "incorporation" during the 1960's. Although it would have been much easier for the Court simply to declare certain Amendments in the *Bill of Rights* applicable to the States *in toto*, the Court took care to parse each Amendment into its component guarantees, evaluating them one by one. This piecemeal approach allowed the Court to scrutinize more closely the right at issue in any given dispute, reducing both the risk and the cost of error.

Relatedly, rather than evaluate liberty claims on an abstract plane, the Court has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* (quoting *Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)*; *Collins, 503 U.S., at 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261*; *Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 277-278, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990)).* And just as we have required such careful description from the litigants, we have required of ourselves that we "focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake." *Collins, 503 U.S., at 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261*; see also Stevens, Judicial Restraint, 22 San Diego L. Rev. 437, 446-448 (1985). [***246] This does not mean that we must define the asserted right at the most specific level, thereby sapping it of a universal valence and a moral force it might otherwise have. [25] It means, simply, that we must pay close attention to the precise liberty interest the litigants have asked us to vindicate.

> 25 The notion that we should define liberty claims at the most specific level available is one of JUSTICE SCALIA's signal contributions to the theory of substantive due process. See, *e.g., Michael H. v. Gerald D., 491 U.S. 110, 127-128,*

n. 6, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989) (opinion of SCALIA, J.); *ante*, at 7 (opinion of SCALIA, J.). By so narrowing the asserted right, this approach "loads the dice" against its recognition, Roosevelt, Forget the Fundamentals: Fixing Substantive Due Process, *8 U. Pa. J. Const. L. 983, 1002, n. 73 (2006)*: When one defines the liberty interest at issue in *Lawrence* as the freedom to perform specific sex acts, *ante*, at 2, the interest starts to look less compelling. The Court today does not follow JUSTICE SCALIA's "particularizing" method, *Katzenbach v. Morgan, 384 U.S. 641, 649, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966)*, as it relies on general historical references to keeping and bearing arms, without any close study of [***247] the States' practice of regulating especially dangerous weapons.

[*3103] Our holdings should be similarly tailored. Even if the most expansive formulation of a claim does not qualify for substantive due process recognition, particular components of the claim might. Just because there may not be a categorical right to physician-assisted suicide, for example, does not "'foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge.'" *Glucksberg, 521 U.S., at 735, n. 24, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* (quoting *id., at 750, 117 S. Ct. 2258, 117 S. Ct.* [**986] *2302, 138 L. Ed. 2d 772* (STEVENS, J., concurring in judgments)); see also *Vacco v. Quill, 521 U.S. 793, 809, n. 13, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997)* (leaving open "'the possibility that some applications of the [New York prohibition on assisted suicide] may impose an intolerable intrusion on the patient's freedom'"). Even if a State's interest in regulating a certain matter must be permitted, in the general course, to trump the individual's countervailing liberty interest, there may still be situations in which the latter "is entitled to constitutional protection." *Glucksberg, 521 U.S., at 742, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* (STEVENS, J., concurring in judgments).

As this discussion [***248] reflects, to acknowledge that the task of construing the liberty clause requires judgment is not to say that it is a license for unbridled judicial lawmaking. To the contrary, only an honest reckoning with our discretion allows for honest argumentation and meaningful accountability.

IV

The question in this case, then, is not whether the *Second Amendment* right to keep and bear arms (whatever that right's precise contours) applies to the States because the Amendment has been incorporated into the *Fourteenth Amendment*. It has not been. The question, rather, is whether the particular right asserted by petitioners applies to the States because of the *Fourteenth Amendment* itself, standing on its own bottom. And to answer that question, we need to determine, first, the nature of the right that has been asserted and, second, whether that right is an aspect of *Fourteenth Amendment* "liberty." Even accepting the Court's holding in *Heller*, it remains entirely possible that the right to keep and bear arms identified in that opinion is not judicially enforceable against the States, or that only part of the right is so enforceable. [26] It is likewise possible for the Court to find in this case that [***249] some part of the *Heller* right applies to the States, and then to find in later cases that other parts of the right also apply, or apply on different terms.

26 In *District of Columbia v. Heller, 554 U.S. ___, ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 675*, the Court concluded, over my dissent, that the *Second Amendment* confers "an individual right to keep and bear arms" disconnected from militia service. If that conclusion were wrong, then petitioners'"incorporation" claim clearly would fail, as they would hold no right against the Federal Government to be free from regulations such as the ones they challenge. Cf. *post*, at 8. I do not understand petitioners or any of their *amici* to dispute this point. Yet even if *Heller* had never been decided -- indeed, even if the *Second Amendment* did not exist -- we would still have an obligation to address petitioners' *Fourteenth Amendment* claim.

As noted at the outset, the liberty interest petitioners have asserted is the "right to possess a functional, personal firearm, including a handgun, within the home." Complaint P34, App. 23. The city of Chicago allows residents to keep functional firearms, so long as they are registered, but it generally prohibits the possession of [***250] handguns, sawed-off shotguns, machine guns, and short-barreled rifles. See Chicago, Ill., Municipal Code § 8-20-050 [*3104] (2009). [27] Petitioners' complaint centered on their desire to keep [**987] a handgun at their domicile -- it references the "home" in nearly every paragraph, see Complaint PP3-4, 11-30, 32, 34, 37, 42, 44, 46, App. 17, 19-26 -- as did their supporting declarations, see, *e.g.*, App. 34, 36, 40, 43, 49-52, 54-56. Petitioners now frame the question that confronts us as "[w]hether the *Second Amendment* right to keep and bear arms is incorporated as against the States by the *Fourteenth Amendment's Privileges or Immunities* or *Due Process Clauses*." Brief for Petitioners, p. i. But it is our duty "to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake," *Collins, 503 U.S., at 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261*, and the gravamen of this complaint is

plainly an appeal to keep a handgun or other firearm of one's choosing in the home.

> 27 The village of Oak Park imposes more stringent restrictions that may raise additional complications. See *ante*, at 2 (majority opinion) (quoting Oak Park, Ill., Municipal Code §§ 27-2-1 (2007), 27-1-1 (2009)). The Court, however, [***251] declined to grant certiorari on the National Rifle Association's challenge to the Oak Park restrictions. Chicago is the only defendant in this case.

Petitioners' framing of their complaint tracks the Court's ruling in *Heller*. The majority opinion contained some dicta suggesting the possibility of a more expansive arms-bearing right, one that would travel with the individual to an extent into public places, as "in case of confrontation." *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 19)*. But the *Heller* plaintiff sought only dispensation to keep an operable firearm in his home for lawful self-defense, see *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 2*, and n. 2), and the Court's opinion was bookended by reminders that its holding was limited to that one issue, *id., at ___, ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 1, 64)*; accord, *ante*, at 44 (plurality opinion). The distinction between the liberty right these petitioners have asserted and the *Second Amendment* right identified in *Heller* is therefore evanescent. Both are rooted to the home. Moreover, even if both rights have the logical potential to extend further, upon "future evaluation," *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 63)*, it is incumbent upon us, as federal judges contemplating a novel [***252] rule that would bind all 50 States, to proceed cautiously and to decide only what must be decided.

Understood as a plea to keep their preferred type of firearm in the home, petitioners' argument has real force. [28] The decision to keep a loaded handgun in the house is often motivated by the desire to protect life, liberty, and property. It is comparable, in some ways, to decisions about the education and upbringing of one's children. For it is the kind of decision that may have profound consequences for every member of the family, and for the world beyond. In considering whether to keep a handgun, heads of households must ask themselves whether the desired safety benefits outweigh the risks of deliberate or accidental misuse that may result in death or serious injury, not only to residents of the home but to others as well. Millions of Americans have answered this question in the affirmative, not infrequently because they believe they have an inalienable right to do so -- because they consider it an aspect of "the supreme human dignity of being master of one's fate rather than a ward of the State," [*3105] *Indiana v. Edwards, 554 U.S. 164, 186, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008)* [**988] (SCALIA, J., dissenting). Many such decisions [***253] have been based, in part, on family traditions and deeply held beliefs that are an aspect of individual autonomy the government may not control. [29]

> 28 To the extent that petitioners contend the city of Chicago's registration requirements for firearm possessors also, and separately, violate the Constitution, that claim borders on the frivolous. Petitioners make no effort to demonstrate that the requirements are unreasonable or that they impose a severe burden on the underlying right they have asserted.
>
> 29 Members of my generation, at least, will recall the many passionate statements of this view made by the distinguished actor, Charlton Heston.

Bolstering petitioners' claim, our law has long recognized that the home provides a kind of special sanctuary in modern life. See, *e.g., U.S. Const., Amdts. 3, 4*; *Lawrence, 539 U.S., at 562, 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508*; *Payton v. New York, 445 U.S. 573, 585-590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)*; *Stanley v. Georgia, 394 U.S. 557, 565-568, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969)*; *Griswold, 381 U.S., at 484-485, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. Consequently, we have long accorded special deference to the privacy of the home, whether a humble cottage or a magnificent manse. This veneration of the domestic harkens back to the common law. William Blackstone recognized [***254] a "right of habitation," 4 Commentaries *223, and opined that "every man's house is looked upon by the law to be his castle of defence and asylum," 3 *id.*, at *288. *Heller* carried forward this legacy, observing that "the need for defense of self, family, and property is most acute" in one's abode, and celebrating "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *554 U.S., at ___, ___, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637*.

While the individual's interest in firearm possession is thus heightened in the home, the State's corresponding interest in regulation is somewhat weaker. The State generally has a lesser basis for regulating private as compared to public acts, and firearms kept inside the home generally pose a lesser threat to public welfare as compared to firearms taken outside. The historical case for regulation is likewise stronger outside the home, as many States have for many years imposed stricter, and less controversial, restrictions on the carriage of arms than on their domestic possession. See, *e.g., id., at ___, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637, 678* (noting that "the majority of the 19th-century courts to consider

the question held that prohibitions on carrying concealed [***255] weapons were lawful under the *Second Amendment* or state analogues"); *English v. State, 35 Tex. 473, 478-479 (1871)* (observing that "almost, if not every one of the States of this Union have [a prohibition on the carrying of deadly weapons] upon their statute books," and lambasting claims of a right to carry such weapons as "little short of ridiculous"); Miller, Guns as Smut: Defending the Home-Bound *Second Amendment*, *109 Colum. L. Rev. 1278, 1321-1336 (2009)*.

It is significant, as well, that a rule limiting the federal constitutional right to keep and bear arms to the home would be less intrusive on state prerogatives and easier to administer. Having unleashed in *Heller* a tsunami of legal uncertainty, and thus litigation, [30] and now on the cusp of imposing a national rule on the States in this area for the first time in United States history, the Court could at least moderate the confusion, upheaval, and burden on the States by [**989] adopting a rule that is clearly and tightly bounded in scope.

30 See Municipal Respondents' Brief 20, n. 11 (stating that at least 156 *Second Amendment* challenges were brought in time between *Heller*'s issuance and brief's filing); Brady Center Brief 3 (stating [***256] that over 190 *Second Amendment* challenges were brought in first 18 months since *Heller*); Brief for Villages of Winnetka and Skokie, Illinois, et al. as *Amici Curiae* 15 (stating that, in wake of *Heller*, municipalities have "repealed longstanding handgun laws to avoid costly litigation").

[*3106] In their briefs to this Court, several *amici* have sought to bolster petitioners' claim still further by invoking a right to individual self-defense. [31] As petitioners note, the *Heller* majority discussed this subject extensively and remarked that "[t]he inherent right of self-defense has been central to the *Second Amendment* right." *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 679*. And it is true that if a State were to try to deprive its residents of any reasonable means of defending themselves from imminent physical threats, or to deny persons any ability to assert self-defense in response to criminal prosecution, that might pose a significant constitutional problem. The argument that there is a substantive due process right to be spared such untenable dilemmas is a serious one. [32]

31 See, *e.g.*, Brief for Professors of Philosophy, Criminology, Law, and Other Fields as *Amici Curiae;* Brief for International Law Enforcement [***257] Educators and Trainers Association et al. as *Amici Curiae* 29-45; Brief for 34 California District Attorneys et al. as *Amici Curiae* 12-31.

32 The argument that this Court should establish any such right, however, faces steep hurdles. All 50 States already recognize self-defense as a defense to criminal prosecution, see 2 P. Robinson, Criminal Law Defenses § 132, p. 96 (1984 and Supp. 2009), so this is hardly an interest to which the democratic process has been insensitive. And the States have always diverged on how exactly to implement this interest, so there is wide variety across the Nation in the types and amounts of force that may be used, the necessity of retreat, the rights of aggressors, the availability of the "castle doctrine," and so forth. See Brief for Oak Park Citizens Committee for Handgun Control as *Amicus Curiae* 9-21; Brief for American Cities et al. as *Amici Curiae* 17-19; 2 W. LaFave, Substantive Criminal Law § 10.4, pp. 142-160 (2d ed. 2003). Such variation is presumed to be a healthy part of our federalist system, as the States and localities select different rules in light of different priorities, customs, and conditions.

As a historical and theoretical matter, moreover, [***258] the legal status of self-defense is far more complicated than it might first appear. We have generally understood *Fourteenth Amendment* "liberty" as something one holds against direct state interference, whereas a personal right of self-defense runs primarily against other individuals; absent government tyranny, it is only when the state has *failed* to interfere with (violent) private conduct that self-help becomes potentially necessary. Moreover, it was a basic tenet of founding-era political philosophy that, in entering civil society and gaining "the advantages of mutual commerce" and the protections of the rule of law, one had to relinquish, to a significant degree, "that wild and savage liberty" one possessed in the state of nature. 1 W. Blackstone, Commentaries *125; see also, *e.g.*, J. Locke, Second Treatise of Civil Government § 128, pp. 63-64 (J. Gough ed. 1947) (in state of nature man has power "to do whatever he thinks fit for the preservation of himself and others," but this "he gives up when he joins in a . . . particular political society"); *Green v. Biddle, 21 U.S. 1, 8 Wheat. 1, 63, 5 L. Ed. 547 (1823)* ("It is a trite maxim, that man gives up a part of his natural liberty when he enters into civil [***259] society, as the price of the blessings of that state: and it may be said, with truth, that this liberty is well exchanged for the advantages which flow from law and justice"). Some strains of founding-era thought took

a very narrow view of the right to armed self-defense. See, *e.g.*, Brief of Historians on Early American Legal, Constitutional, and Pennsylvania History as *Amici Curiae* 6-13 (discussing Whig and Quaker theories). Just because there may be a natural or common-law right to some measure of self-defense, it hardly follows that States may not place substantial restrictions on its exercise or that this Court should recognize a constitutional right to the same.

But that is not the case before us. Petitioners have not asked that we establish a constitutional right to individual self-defense; neither their pleadings in the District Court nor their filings in this Court make any such request. Nor do petitioners contend that the city of Chicago -- which, recall, allows its residents to keep most rifles and shotguns, and to keep [**990] them loaded -- has unduly burdened any such right. What petitioners have asked is that [*3107] we "incorporate" the *Second Amendment* and thereby establish a constitutional [***260] entitlement, enforceable against the States, to keep a handgun in the home.

Of course, owning a handgun may be useful for practicing self-defense. But the right to take a certain type of action is analytically distinct from the right to acquire and utilize specific instrumentalities in furtherance of that action. And while some might favor handguns, it is not clear that they are a superior weapon for lawful self-defense, and nothing in petitioners' argument turns on that being the case. The notion that a right of self-defense *implies* an auxiliary right to own a certain type of firearm presupposes not only controversial judgments about the strength and scope of the (posited) self-defense right, but also controversial assumptions about the likely effects of making that type of firearm more broadly available. It is a very long way from the proposition that the *Fourteenth Amendment* protects a basic individual right of self-defense to the conclusion that a city may not ban handguns. [33]

33 The *Second Amendment* right identified in *Heller* is likewise clearly distinct from a right to protect oneself. In my view, the Court badly misconstrued the *Second Amendment* in linking it to the value of personal [***261] self-defense above and beyond the functioning of the state militias; as enacted, the *Second Amendment* was concerned with tyrants and invaders, and paradigmatically with the federal military, not with criminals and intruders. But even still, the Court made clear that self-defense plays a limited role in determining the scope and substance of the Amendment's guarantee. The Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose. See *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 57-58)*. And the Court's common-use gloss on the *Second Amendment* right, see *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637(slip op., at 55)*, as well as its discussion of permissible limitations on the right, *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 54-55)*, had little to do with self-defense.

In short, while the utility of firearms, and handguns in particular, to the defense of hearth and home is certainly relevant to an assessment of petitioners' asserted right, there is no freestanding self-defense claim in this case. The question we must decide is whether the interest in keeping in the home a firearm of one's choosing -- a handgun, for petitioners -- is [***262] one that is "comprised within the term liberty" in the *Fourteenth Amendment*. *Whitney, 274 U.S., at 373, 47 S. Ct. 641, 71 L. Ed. 1095* (Brandeis, J., concurring).

V

While I agree with the Court that our substantive due process cases offer a principled basis for holding that petitioners have a constitutional right to possess a usable fiream in the home, I am ultimately persuaded that a better reading of our case law supports the city of Chicago. I would not foreclose the possibility that a particular plaintiff -- say, an elderly widow who lives in a dangerous neighborhood and does not have the strength to operate a long gun -- may have a cognizable liberty interest in possessing a handgun. But I cannot accept petitioners' broader submission. A number of factors, taken together, lead me to this conclusion.

First, firearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs and insurrectionists murder innocent victims. The threat that firearms will be misused is far from hypothetical, [**991] for gun crime has devastated many of our communities. *Amici* calculate that approximately one million Americans have been wounded [***263] or killed by gunfire in the last decade. [34] Urban areas such as Chicago [*3108] suffer disproportionately from this epidemic of violence. Handguns contribute disproportionately to it. Just as some homeowners may prefer handguns because of their small size, light weight, and ease of operation, some criminals will value them for the same reasons. See *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637* (BREYER, J., dissenting) (slip op., at 32-33). In recent years, handguns were reportedly used in more than four-fifths of firearm murders and more than half of all murders nationwide. [35]

34 Brady Center Brief 11 (extrapolating from Government statistics); see also Brief for American Public Health Association et al. as *Amici Curiae* 6-7 (reporting estimated social cost of firearm-related violence of $ 100 billion per year).

35 Bogus, Gun Control and America's Cities: Public Policy and Politics, 1 Albany Govt. L. Rev. 440, 447 (2008) (drawing on FBI data); see also *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 18-19)* (BREYER, J., dissenting) (providing additional statistics on handgun violence); Municipal Respondents' Brief 13-14 (same).

Hence, in evaluating an asserted right to be free from particular gun-control regulations, liberty [***264] is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence. And while granting you the right to own a handgun might make you safer on any given day -- assuming the handgun's marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief -- it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation. It is at least reasonable for a democratically elected legislature to take such concerns into account in considering what sorts of regulations would best serve the public welfare.

The practical impact of various gun-control measures may be highly controversial, but this basic insight should not be. The idea that deadly weapons pose a distinctive threat to the social order -- and that reasonable restrictions on their usage therefore impose an acceptable burden on one's personal [***265] liberty -- is as old as the Republic. As THE CHIEF JUSTICE observed just the other day, it is a foundational premise of modern government that the State holds a monopoly on legitimate violence: "A basic step in organizing a civilized society is to take [the] sword out of private hands and turn it over to an organized government, acting on behalf of all the people." *Robertson v. United States ex rel. Watson, ante, at ___, 130 S. Ct. 2184, 176 L. Ed. 2d 1024, 2010 U.S. LEXIS 4169 at *17* (dissenting opinion). The same holds true for the handgun. The power a man has in the state of nature "of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up," to a significant extent, "to be regulated by laws made by the society." J. Locke, Second Treatise of Civil Government § 129, p. 64 (J. Gough ed. 1947).

Limiting the federal constitutional right to keep and bear arms to the home complicates the analysis but does not dislodge this conclusion. [**992] Even though the Court has long afforded special solicitude for the privacy of the home, we have never understood that principle to "infring[e] upon" the authority of the States to proscribe certain inherently dangerous items, for "[i]n such cases, compelling [***266] reasons may exist for overriding the right of the individual to possess those materials." *Stanley, 394 U.S., at 568, n. 11, 89 S. Ct. 1243, 22 L. Ed. 2d 542.* [*3109] And, of course, guns that start out in the home may not stay in the home. Even if the government has a weaker basis for restricting domestic possession of firearms as compared to public carriage -- and even if a blanket, statewide prohibition on domestic possession might therefore be unconstitutional -- the line between the two is a porous one. A state or local legislature may determine that a prophylactic ban on an especially portable weapon is necessary to police that line.

Second, the right to possess a firearm of one's choosing is different in kind from the liberty interests we have recognized under the *Due Process Clause*. Despite the plethora of substantive due process cases that have been decided in the post-*Lochner* century, I have found none that holds, states, or even suggests that the term "liberty" encompasses either the common-law right of self-defense or a right to keep and bear arms. I do not doubt for a moment that many Americans feel deeply passionate about firearms, and see them as critical to their way of life as well as to their security. Nevertheless, [***267] it does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality: The marketplace offers many tools for self-defense, even if they are imperfect substitutes, and neither petitioners nor their *amici* make such a contention. Petitioners' claim is not the kind of substantive interest, accordingly, on which a uniform, judicially enforced national standard is presumptively appropriate. [36]

36 JUSTICE SCALIA worries that there is no "objective" way to decide what is essential to a "liberty-filled" existence: Better, then, to ignore such messy considerations as how an interest actually affects people's lives. *Ante*, at 10. Both the constitutional text and our cases use the term "liberty," however, and liberty is not a purely objective concept. Substantive due process analysis does not require any "political" judgment, *ibid.* It does require some amount of practical and normative judgment. The only way to assess what is essential to fulfilling the Constitution's guarantee

of "liberty," in the present day, is to provide reasons that apply to the present day. I have provided many; JUSTICE [***268] SCALIA and the Court have provided virtually none.

JUSTICE SCALIA also misstates my argument when he refers to "the right to keep and bear arms," without qualification. *Ante*, at 9. That is what the *Second Amendment* protects against Federal Government infringement. I have taken pains to show why the *Fourteenth Amendment* liberty interest asserted by petitioners -- the interest in keeping a firearm of one's choosing in the home -- is not necessarily coextensive with the *Second Amendment* right.

Indeed, in some respects the substantive right at issue may be better viewed as a property right. Petitioners wish to *acquire* certain types of firearms, or to *keep* certain firearms they have previously acquired. Interests in the possession of chattels have traditionally been viewed as property interests subject to definition and regulation by the States. Cf. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. ___, ___, 130 S. Ct. 2592, 177 L. Ed. 2d 184, 2010 U.S. LEXIS 4971 (2010) (slip op., at 1)* (opinion of SCALIA, J.) ("Generally speaking, state [**993] law defines property interests"). Under that tradition, Chicago's ordinance is unexceptional. [37]

37 It has not escaped my attention that the *Due Process Clause* refers to "property" [***269] as well as "liberty." Cf. *ante*, at 2, n. 1, 9-10, n. 6 (opinion of SCALIA, J.). Indeed, in *Moore v. East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)* (plurality opinion), I alone viewed "the critical question" as "whether East Cleveland's housing ordinance [was] a permissible restriction on appellant's right to use her own property as she sees fit," *id., at 513, 97 S. Ct. 1932, 52 L. Ed. 2d 531* (opinion concurring in judgment). In that case, unlike in this case, the asserted property right was coextensive with a right to organize one's family life, and I could find "no precedent" for the ordinance at issue, which "exclude[d] any of an owner's relatives from the group of persons who may occupy his residence on a permanent basis." *Id., at 520, 97 S. Ct. 1932, 52 L. Ed. 2d 531*. I am open to property claims under the *Fourteenth Amendment*. This case just involves a weak one. And ever since the Court "incorporated" the more specific property protections of the *Takings Clause* in 1897, see *Chicago, B. & Q. R. Co., 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979*, substantive due process doctrine has focused on liberty.

[*3110] The liberty interest asserted by petitioners is also dissimilar from those we have recognized in its capacity to undermine the security of others. To be sure, some of the *Bill of Rights*' procedural [***270] guarantees may place "restrictions on law enforcement" that have "controversial public safety implications." *Ante*, at 36 (plurality opinion); see also *ante*, at 9 (opinion of SCALIA, J.). But those implications are generally quite attenuated. A defendant's invocation of his right to remain silent, to confront a witness, or to exclude certain evidence cannot directly cause any threat. The defendant's liberty interest is constrained by (and is itself a constraint on) the adjudicatory process. The link between handgun ownership and public safety is much tighter. The handgun is itself a tool for crime; the handgun's bullets *are* the violence.

Similarly, it is undeniable that some may take profound offense at a remark made by the soapbox speaker, the practices of another religion, or a gay couple's choice to have intimate relations. But that offense is moral, psychological, or theological in nature; the actions taken by the rights-bearers do not actually threaten the physical safety of any other person. [38] Firearms may be used to kill another person. If a legislature's response to dangerous weapons ends up impinging upon the liberty of any individuals in pursuit of the greater good, it invariably [***271] does so on the basis of more than the majority's "'own moral code,'" *Lawrence, 539 U.S., at 571, 123 S. Ct. 2472, 156 L. Ed. 2d 508* (quoting *Casey, 505 U.S., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674*). While specific policies may of course be misguided, gun control is an area in which it "is quite wrong . . . to assume that regulation and liberty occupy mutually exclusive zones -- that as one expands, the other must contract." Stevens, *41 U. Miami L. Rev., at 280.*

38 Cf. *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 913-914, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)* (STEVENS, J., concurring in part and dissenting in part).

Third, the experience of other advanced democracies, including those that share our British heritage, undercuts the notion that an expansive right to keep and bear arms is intrinsic to ordered liberty. Many of these countries place restrictions on the possession, use, and carriage of firearms far more onerous than the restrictions found in this Nation. See Municipal Respondents' Brief 21-23 (discussing laws of England, Canada, Australia, Japan, Denmark, Finland, [**994] Luxembourg, and New Zealand). That the United States is an international outlier in the permissiveness of its approach to guns does not suggest that our laws are bad laws. It does suggest that this [***272] Court may not need to

assume responsibility for making our laws still more permissive.

Admittedly, these other countries differ from ours in many relevant respects, including their problems with violent crime and the traditional role that firearms have played in their societies. But they are not so different from the United States that we ought to dismiss their experience entirely. Cf. *ante*, at 34-35 (plurality opinion); *ante*, at 10-11 (opinion of SCALIA, J.). The fact that our oldest allies have almost uniformly found it appropriate to regulate firearms extensively [*3111] tends to weaken petitioners' submission that the right to possess a gun of one's choosing is fundamental to a life of liberty. While the "American perspective" must always be our focus, *ante*, at 37, 44 (plurality opinion), it is silly -- indeed, arrogant -- to think we have nothing to learn about liberty from the billions of people beyond our borders.

Fourth, the *Second Amendment* differs in kind from the Amendments that surround it, with the consequence that its inclusion in the *Bill of Rights* is not merely unhelpful but positively harmful to petitioners' claim. Generally, the inclusion of a liberty interest in the *Bill of Rights* [***273] points toward the conclusion that it is of fundamental significance and ought to be enforceable against the States. But the *Second Amendment* plays a peculiar role within the Bill, as announced by its peculiar opening clause. [39] Even accepting the *Heller* Court's view that the Amendment protects an individual right to keep and bear arms disconnected from militia service, it remains undeniable that "the purpose for which the right was codified" was "to prevent elimination of the militia." *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 662*; see also *United States v. Miller, 307 U.S. 174, 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)* (*Second Amendment* was enacted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces"). It was the States, not private persons, on whose immediate behalf the *Second Amendment* was adopted. Notwithstanding the *Heller* Court's efforts to write the *Second Amendment's* preamble out of the Constitution, the Amendment still serves the structural function of protecting the States from encroachment by an overreaching Federal Government.

> 39 The *Second Amendment* provides: "A well regulated Militia, being necessary to the security of a free State, the right of the [***274] people to keep and bear Arms, shall not be infringed."

The *Second Amendment*, in other words, "is a federalism provision," *Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 45, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)* (THOMAS, J., concurring in judgment). It is directed at preserving the autonomy of the sovereign States, and its logic therefore "resists" incorporation by a federal court *against* the States. *Ibid.* No one suggests that the *Tenth Amendment*, which provides that powers not given to the Federal Government remain with "the States," applies to the States; such a reading would border on incoherent, given that the *Tenth Amendment* exists (in significant [**995] part) to safeguard the vitality of state governance. The *Second Amendment* is no different. [40]

> 40 Contrary to JUSTICE SCALIA's suggestion, this point is perfectly compatible with my opinion for the Court in *Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)*. Cf. *ante*, at 11. Like the Court itself, I have never agreed with JUSTICE THOMAS' view that the *Establishment Clause* is a federalism provision. But I agree with his underlying logic: If a clause in the *Bill of Rights* exists to safeguard federalism interests, then it makes little sense to "incorporate" [***275] it. JUSTICE SCALIA's further suggestion that I ought to have revisited the *Establishment Clause* debate in this opinion, *ibid.*, is simply bizarre.

The Court is surely correct that Americans' conceptions of the *Second Amendment* right evolved over time in a more individualistic direction; that Members of the Reconstruction Congress were urgently concerned about the safety of the newly freed slaves; and that some Members believed that, following ratification of the *Fourteenth Amendment*, the *Second Amendment* would apply to the States. But it is a giant leap from these data points to the conclusion that the *Fourteenth Amendment* [*3112] "incorporated" the *Second Amendment* as a matter of original meaning or postenactment interpretation. Consider, for example, that the text of the *Fourteenth Amendment* says nothing about the *Second Amendment* or firearms; that there is substantial evidence to suggest that, when the Reconstruction Congress enacted measures to ensure newly freed slaves and Union sympathizers in the South enjoyed the right to possess firearms, it was motivated by antidiscrimination and equality concerns rather than arms-bearing concerns *per se;* [41] that many contemporaneous courts and commentators [***276] did not understand the *Fourteenth Amendment* to have had an "incorporating" effect; and that the States heavily regulated the right to keep and bear arms both before and after the Amendment's passage. The Court's narrative largely elides these facts. The complications they raise show why even the most dogged historical inquiry into the "fundamentality" of the *Second Amendment* right (or any other) necessarily en-

tails judicial judgment -- and therefore judicial discretion -- every step of the way.

> 41 See *post*, at 24-25; Municipal Respondents' Brief 62-69; Brief for 34 Professional Historians and Legal Historians as *Amici Curiae* 22-26; Rosenthal, *Second Amendment* Plumbing After *Heller:* Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs, *41 Urb. Law. 1, 73-75 (2009)*. The plurality insists that the Reconstruction-era evidence shows the right to bear arms was regarded as "a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner." *Ante*, at 33. That may be so, but it does not resolve the question whether the *Fourteenth Amendment's Due Process Clause* was originally understood to encompass [***277] a right to keep and bear arms, or whether it ought to be so construed now.

I accept that the evolution in Americans' understanding of the *Second Amendment* may help shed light on the question whether a right to keep and bear arms is comprised within *Fourteenth Amendment* "liberty." But the reasons that motivated the Framers to protect the ability of militiamen to keep muskets available for military use when our Nation was in its infancy, or that motivated the Reconstruction Congress to extend full citizenship to the freedmen in the wake of the Civil War, have only a limited bearing on the question that confronts the homeowner in a crime-infested metropolis today. The many episodes of brutal violence against African-Americans that blight our Nation's history, see *ante*, at [**996] 23-29 (majority opinion); *ante*, at 41-44, 53-55 (THOMAS, J., concurring in part and concurring in judgment), do not suggest that every American must be allowed to own whatever type of firearm he or she desires -- just that no group of Americans should be systematically and discriminatorily disarmed and left to the mercy of racial terrorists. And the fact that some Americans may have thought or hoped that the *Fourteenth Amendment* [***278] would nationalize the *Second Amendment* hardly suffices to justify the conclusion that it did.

Fifth, although it may be true that Americans' interest in firearm possession and state-law recognition of that interest are "deeply rooted" in some important senses, *ante*, at 19 (internal quotation marks omitted), it is equally true that the States have a long and unbroken history of regulating firearms. The idea that States may place substantial restrictions on the right to keep and bear arms short of complete disarmament is, in fact, far more entrenched than the notion that the Federal Constitution protects any such right. Federalism is a far "older and more deeply rooted tradition than is a right to carry," or to own, "any particular kind of weapon." [*3113] *567 F.3d 856, 860 (CA7 2009)* (Easterbrook, C. J.).

From the early days of the Republic, through the Reconstruction era, to the present day, States and municipalities have placed extensive licensing requirements on firearm acquisition, restricted the public carriage of weapons, and banned altogether the possession of especially dangerous weapons, including handguns. See *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637* (BREYER, J., dissenting) (slip op., at 4-7) (reviewing [***279] colonial laws); Cornell & DeDino, A Well Regulated Right: The Early American Origins of Gun Control, *73 Fordham L. Rev. 487, 502-516 (2004)* (reviewing pre-Civil War laws); Brief for 34 Professional Historians and Legal Historians as *Amici Curiae* 4-22 (reviewing Reconstruction-era laws); Winkler, Scrutinizing the *Second Amendment*, *105 Mich. L. Rev. 683, 711-712, 716-726 (2007)* (reviewing 20th-century laws); see generally *post*, at 21-31. [42] After the 1860's just as before, the state courts almost uniformly upheld these measures: Apart from making clear that all regulations had to be constructed and applied in a nondiscriminatory manner, the *Fourteenth Amendment* hardly made a dent. And let us not forget that this Court did not recognize *any* non-militia-related interests under the *Second Amendment* until two Terms ago, in *Heller*. Petitioners do not dispute the city of Chicago's observation that "[n]o other substantive *Bill of Rights* protection has been regulated nearly as intrusively" as the right to [**997] keep and bear arms. Municipal Respondents' Brief 25. [43]

> 42 I am unclear what the plurality means when it refers to "the paucity of precedent sustaining bans comparable to those at issue here." [***280] *Ante*, at 39. There is only one ban at issue here -- the city of Chicago's handgun prohibition -- and the municipal respondents cite far more than "one case," *ibid.*, from the post-Reconstruction period. See Municipal Respondents' Brief 24-30. The evidence adduced by respondents and their *amici* easily establishes their contentions that the "consensus in States that recognize a firearms right is that arms possession, even in the home, is . . . subject to interest-balancing," *id., at 24*; and that the practice of "[b]anning weapons routinely used for self-defense," when deemed "necessary for the public welfare," "has ample historical pedigree," *id., at 28*. Petitioners do not even try to challenge these contentions.
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> 43 I agree with JUSTICE SCALIA that a history of regulation hardly proves a right is not "of fundamental character." *Ante*, at 12. An unbroken history of extremely intensive, carefully consi-

dered regulation does, however, tend to suggest that it is not.

This history of intrusive regulation is not surprising given that the very text of the *Second Amendment* calls out for regulation, [44] and the ability to respond to the social ills associated with dangerous weapons [*3114] goes to the very [***281] core of the States' police powers. Our precedent is crystal-clear on this latter point. See, *e.g., Gonzales v. Oregon, 546 U.S. 243, 270, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006)* ("[T]he structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (internal quotation marks omitted)); *United States v. Morrison, 529 U.S. 598, 618, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000)* ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims"); *Kelley v. Johnson, 425 U.S. 238, 247, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976)* ("The promotion of safety of persons and property is unquestionably at the core of the State's police power"); *Automobile Workers v. Wisconsin Employment Relations Bd., 351 U.S. 266, 274, 76 S. Ct. 794, 100 L. Ed. 1162 (1956)* ("The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern"). Compared with today's ruling, most if not all of this Court's decisions requiring the States to comply with other provisions in the *Bill of Rights* did not exact nearly [***282] so heavy a toll in terms of state sovereignty.

44 The *Heller* majority asserted that "the adjective 'well-regulated'" in the *Second Amendment's* preamble "implies nothing more than the imposition of proper discipline and training." *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 660.* It is far from clear that this assertion is correct. See, *e.g., U.S. Const., Art. 1, § 4, cl. 1*; § 8, cls. 3, 5, 14; § 9, cl. 6; Art. 3, § 2, cl. 2; Art. 4, § 2, cl. 3; § 3, cl. 2 (using "regulate" or "Regulation" in manner suggestive of broad, discretionary governmental authority); Art. 1, § 8, cl. 16 (invoking powers of "disciplining" and "training" Militia in manner suggestive of narrower authority); *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 6-7)* (investigating Constitution's separate references to "people" as clue to term's meaning in *Second Amendment*); cf. Cornell & DeDino, A Well Regulated Right: The Early American Origins of Gun Control, *73 Fordham L. Rev. 487, 504 (2004)* ("The authors of this curious interpretation of the *Second Amendment* have constructed a fantasy world where words mean their opposite, and regulation is really anti-regulation"). But even if the assertion were correct, the point would remain that the [***283] preamble envisions an active state role in overseeing how the right to keep and bear arms is utilized, and in ensuring that it is channeled toward productive ends.

Finally, even apart from the States' long history of firearms regulation and its location at the core of their police powers, this is a quintessential area in which federalism ought to be allowed to flourish without this Court's meddling. Whether or not we *can* assert a plausible constitutional basis for intervening, there are powerful reasons why we *should not* do so.

Across the Nation, States and localities vary significantly in the patterns and problems of gun violence they face, as well as in the traditions and cultures of lawful gun use they claim. Cf. *post*, at 16-17. The city of Chicago, for example, faces a pressing challenge in combating criminal street gangs. Most rural areas do not. [**998] The city of Chicago has a high population density, which increases the potential for a gunman to inflict mass terror and casualties. Most rural areas do not. [45] The city of Chicago offers little in the way of hunting opportunities. Residents of rural communities are, one presumes, much more likely to stock the dinner table with game they [***284] have personally felled.

45 Cf. *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 721* (BREYER, J., dissenting) (detailing evidence showing that 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").

Given that relevant background conditions diverge so much across jurisdictions, the Court ought to pay particular heed to state and local legislatures'"right to experiment." *New State Ice, 285 U.S., at 311, 52 S. Ct. 371, 76 L. Ed. 747* (Brandeis, J., dissenting). So long as the regulatory measures they have chosen are not "arbitrary, capricious, or unreasonable," we should be allowing them to "try novel social and economic" policies. *Ibid.* It "is more in keeping . . . with our status as a court in a federal system," under these circumstances, "to avoid imposing a single solution . . . from the top down." *Smith v. Robbins, 528 U.S. 259, 275, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).*

It is all the more unwise for this Court to limit experimentation in an area "where the best solution is far from clear." *United States v. Lopez, 514 U.S. 549, 581, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)* (KENNEDY, J., concurring). Few issues of public policy are subject to

such intensive [***285] [*3115] and rapidly developing empirical controversy as gun control. See *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 20-25)* (BREYER, J., dissenting). Chicago's handgun ban, in itself, has divided researchers. Compare Brief for Professors of Criminal Justice as *Amici Curiae* (arguing that ordinance has been effective at reducing gun violence), with Brief for International Law Enforcement Educators and Trainers Association et al. as *Amici Curiae* 17-26 (arguing that ordinance has been a failure). [46] Of course, on some matters the Constitution requires that we ignore such pragmatic considerations. But the Constitution's text, history, and structure are not so clear on the matter before us -- as evidenced by the groundbreaking nature of today's fractured decision -- and this Court lacks both the technical capacity and the localized expertise to assess "the wisdom, need, and propriety" of most gun-control measures. *Griswold, 381 U.S., at 482, 85 S. Ct. 1678, 14 L. Ed. 2d 510.* [47]

46 The fact that Chicago's handgun murder rate may have "actually increased since the ban was enacted," *ante*, at 2 (majority opinion), means virtually nothing in itself. Countless factors unrelated to the policy may have contributed to that trend. Without a sophisticated [***286] regression analysis, we cannot even begin to speculate as to the efficacy or effects of the handgun ban. Even with such an analysis, we could never be certain as to the determinants of the city's murder rate.

47 In some sense, it is no doubt true that the "best" solution is elusive for many "serious social problems." *Ante*, at 12 (opinion of SCALIA, J.). Yet few social problems have raised such heated empirical controversy as the problem of gun violence. And few, if any, of the liberty interests we have recognized under the *Due Process Clause* have raised as many complications for judicial oversight as the interest that is recognized today. See *post*, at 11-16.

I agree with the plurality that for a right to be eligible for substantive due process recognition, there need not be "a 'popular consensus' that the right is fundamental." *Ante*, at 42. In our remarkably diverse, pluralistic society, there will almost never be such uniformity of opinion. But to the extent that popular consensus is relevant, I do not agree with the Court that the *amicus* brief filed in this case by numerous state attorneys general constitutes evidence thereof. *Ante*, at 42-43. It is puzzling that so many state lawmakers [***287] have asked us to limit their *option* to regulate a dangerous item. Cf. *post*, at 9-10.

Nor will the Court's intervention bring any clarity to this enormously [**999] complex area of law. Quite to the contrary, today's decision invites an avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right -- the precise contours of which are far from pellucid -- under a standard of review we have not even established. See *post*, at 12-15. The plurality's "assuranc[e]" that "incorporation does not imperil every law regulating firearms," *ante*, at 40, provides only modest comfort. For it is also an admission of just how many different types of regulations are potentially implicated by today's ruling, and of just how ad hoc the Court's initial attempt to draw distinctions among them was in *Heller*. The practical significance of the proposition that "the *Second Amendment* right is fully applicable to the States," *ante*, at 1 (majority opinion), remains to be worked out by this Court over many, many years.

Furthermore, and critically, the Court's imposition of a national standard is still more unwise because the elected [***288] branches have shown themselves to be perfectly capable of safeguarding the interest in keeping and bearing arms. The strength of a liberty claim must be assessed in connection with its status in the democratic process. And in this case, no one disputes "that opponents of [gun] control have considerable political power and do not seem [*3116] to be at a systematic disadvantage in the democratic process," or that "the widespread commitment to an individual right to own guns . . . operates as a safeguard against excessive or unjustified gun control laws." [48] Sunstein, *Second Amendment* Minimalism: *Heller* as *Griswold*, *122 Harv. L. Rev. 246, 260 (2008)*. Indeed, there is a good deal of evidence to suggest that, if anything, American lawmakers tend to *under*regulate guns, relative to the policy views expressed by majorities in opinion polls. See K. Goss, Disarmed: The Missing Movement for Gun Control in America 6 (2006). If a particular State or locality has enacted some "improvident" gun-control measures, as petitioners believe Chicago has done, there is no apparent reason to infer that the mistake will not "eventually be rectified by the democratic process." *Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979).*

48 Likewise, [***289] no one contends that those interested in personal self-defense -- every American, presumably -- face any particular disadvantage in the political process. All 50 States recognize self-defense as a defense to criminal prosecution. See n. 32, *supra*.

This is not a case, then, that involves a "special condition" that "may call for a correspondingly more

searching judicial inquiry." *Carolene Products, 304 U.S., at 153, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234.* Neither petitioners nor those most zealously committed to their views represent a group or a claim that is liable to receive unfair treatment at the hands [**1000] of the majority. On the contrary, petitioners' views are supported by powerful participants in the legislative process. Petitioners have given us no reason to believe that the interest in keeping and bearing arms entails any special need for judicial lawmaking, or that federal judges are more qualified to craft appropriate rules than the people's elected representatives. Having failed to show why their asserted interest is intrinsic to the concept of ordered liberty or vulnerable to maltreatment in the political arena, they have failed to show why "the word liberty in the *Fourteenth Amendment*" should be "held to prevent [***290] the natural outcome of a dominant opinion" about how to deal with the problem of handgun violence in the city of Chicago. *Lochner, 198 U.S., at 76, 25 S. Ct. 539, 49 L. Ed. 937* (Holmes, J., dissenting).

VI

The preceding sections have already addressed many of the points made by JUSTICE SCALIA in his concurrence. But in light of that opinion's fixation on this one, it is appropriate to say a few words about JUSTICE SCALIA's broader claim: that his preferred method of substantive due process analysis, a method "that makes the traditions of our people paramount," *ante*, at 1, is both more restrained and more facilitative of democracy than the method I have outlined. Colorful as it is, JUSTICE SCALIA's critique does not have nearly as much force as does his rhetoric. His theory of substantive due process, moreover, comes with its own profound difficulties.

Although JUSTICE SCALIA aspires to an "objective," "neutral" method of substantive due process analysis, *ante*, at 10, his actual method is nothing of the sort. Under the "historically focused" approach he advocates, *ante*, at 13, numerous threshold questions arise before one ever gets to the history. At what level of generality should one frame the liberty interest in [***291] question? See n. 25, *supra.* What does it mean for a right to be "'deeply rooted in this Nation's history and tradition,'" *ante*, at 3 (quoting *Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302*)? By what standard will that proposition be tested? Which types of sources will count, and how will those sources be [*3117] weighed and aggregated? There is no objective, neutral answer to these questions. There is not even a theory -- at least, JUSTICE SCALIA provides none -- of how to go about answering them.

Nor is there any escaping *Palko*, it seems. To qualify for substantive due process protection, JUSTICE SCALIA has stated, an asserted liberty right must be not only deeply rooted in American tradition, "but it must *also* be implicit in the concept of ordered liberty." *Lawrence, 539 U.S., at 593, n. 3, 123 S. Ct. 2472, 156 L. Ed. 2d 508* (dissenting opinion) (internal quotation marks omitted). Applying the latter, *Palko*-derived half of that test requires precisely the sort of reasoned judgment -- the same multifaceted evaluation of the right's contours and consequences -- that JUSTICE SCALIA mocks in his concurrence today.

So does applying the first half. It is hardly a novel insight that history is not an objective science, and that its use can therefore [***292] "point in any direction the judges favor," *ante*, at 14 (opinion of SCALIA, J.). Yet 21 years after the point was brought to his attention by Justice [**1001] Brennan, JUSTICE SCALIA remains "oblivious to the fact that [the concept of 'tradition'] can be as malleable and elusive as 'liberty' itself." *Michael H., 491 U.S., at 137, 109 S. Ct. 2333, 105 L. Ed. 2d 91* (dissenting opinion). Even when historical analysis is focused on a discrete proposition, such as the original public meaning of the *Second Amendment*, the evidence often points in different directions. The historian must choose which pieces to credit and which to discount, and then must try to assemble them into a coherent whole. In *Heller*, JUSTICE SCALIA preferred to rely on sources created much earlier and later in time than the *Second Amendment* itself, see, *e.g., 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 4-5)* (consulting late 19th-century treatises to ascertain how Americans would have read the Amendment's preamble in 1791); I focused more closely on sources contemporaneous with the Amendment's drafting and ratification. [49] No [***293] mechanical yardstick can measure which of us was correct, either with respect to the materials we chose to privilege or the insights we gleaned from them.

> 49 See *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 699*) (STEVENS, J., dissenting) ("Although it gives short shrift to the drafting history of the *Second Amendment*, the Court dwells at length on four other sources: the 17th-century English *Bill of Rights*; Blackstone's Commentaries on the Laws of England; post-enactment commentary on the *Second Amendment*; and post-Civil War legislative history"); see also *post*, at 2-5 (discussing professional historians' criticisms of *Heller*).

The malleability and elusiveness of history increase exponentially when we move from a pure question of original meaning, as in *Heller*, to JUSTICE SCALIA's theory of substantive due process. At least with the former sort of question, the judge can focus on a single legal provision; the temporal scope of the inquiry is (or

should be) relatively bounded; and there is substantial agreement on what sorts of authorities merit consideration. With JUSTICE SCALIA's approach to substantive due process, these guideposts all fall away. The judge must canvas the entire landscape of [***294] American law as it has evolved through time, and perhaps older laws as well, see, *e.g., Lawrence, 539 U.S., at 596, 123 S. Ct. 2472, 156 L. Ed. 2d 508* (SCALIA, J., dissenting) (discussing "'ancient roots'" of proscriptions against sodomy (quoting *Bowers v. Hardwick, 478 U.S. 186, 192, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986))*, pursuant to a standard (deeply rootedness) that has never been defined. In conducting this rudderless, panoramic tour of American legal history, the judge has more than ample opportunity to "look over the heads of the crowd and pick out [his] friends," *Roper v. Simmons, 543 U.S. 551, 617,* [*3118] *125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)* (SCALIA, J., dissenting).

My point is not to criticize judges' use of history in general or to suggest that it always generates indeterminate answers; I have already emphasized that historical study can discipline as well as enrich substantive due process analysis. My point is simply that JUSTICE SCALIA's defense of his method, which holds out objectivity and restraint as its cardinal -- and, it seems, only -- virtues, is unsatisfying on its own terms. For a limitless number of subjective judgments may be smuggled into his historical analysis. Worse, they may be *buried* in the analysis. At least with my approach, the judge's cards are laid [***295] on the table for all to see, and to critique. The judge must exercise judgment, to be [**1002] sure. When answering a constitutional question to which the text provides no clear answer, there is always some amount of discretion; our constitutional system has always depended on judges' filling in the document's vast open spaces. [50] But there is also transparency.

50 Indeed, this is truly one of our most deeply rooted legal traditions.

JUSTICE SCALIA's approach is even less restrained in another sense: It would effect a major break from our case law outside of the "incorporation" area. JUSTICE SCALIA does not seem troubled by the fact that his method is largely inconsistent with the Court's canonical substantive due process decisions, ranging from *Meyer, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042*, and *Pierce, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070*, in the 1920's, to *Griswold, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510*, in the 1960's, to *Lawrence, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508*, in the 2000's. To the contrary, he seems to embrace this dissonance. My method seeks to synthesize dozens of cases on which the American people have relied for decades. JUSTICE SCALIA's method seeks to vaporize them. So I am left to wonder, which of us is more faithful to this Nation's constitutional history? And which of us [***296] is more faithful to the values and commitments of the American people, as they stand today? In 1967, when the Court held in *Loving, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*, that adults have a liberty-based as well as equality-based right to wed persons of another race, interracial marriage was hardly "deeply rooted" in American tradition. Racial segregation and subordination were deeply rooted. The Court's substantive due process holding was nonetheless correct -- and we should be wary of any interpretive theory that implies, emphatically, that it was not.

Which leads me to the final set of points I wish to make: JUSTICE SCALIA's method invites not only bad history, but also bad constitutional law. As I have already explained, in evaluating a claimed liberty interest (or any constitutional claim for that matter), it makes perfect sense to give history significant weight: JUSTICE SCALIA's position is closer to my own than he apparently feels comfortable acknowledging. But it makes little sense to give history dispositive weight in every case. And it makes *especially* little sense to answer questions like whether the right to bear arms is "fundamental" by focusing only on the past, given that both the practical significance [***297] and the public understandings of such a right often change as society changes. What if the evidence had shown that, whereas at one time firearm possession contributed substantially to personal liberty and safety, nowadays it contributes nothing, or even tends to undermine them? Would it still have been reasonable to constitutionalize the right?

[*3119] The concern runs still deeper. Not only can historical views be less than completely clear or informative, but they can also be wrong. Some notions that many Americans deeply believed to be true, at one time, turned out not to be true. Some practices that many Americans believed to be consistent with the Constitution's guarantees of liberty and equality, at one time, turned out to be inconsistent with them. The fact that we have a written Constitution does not consign this Nation to a static legal existence. Although we should always "pa[y] a [**1003] decent regard to the opinions of former times," it "is not the glory of the people of America" to have "suffered a blind veneration for antiquity." The Federalist No. 14, p. 99, 104 (C. Rossiter ed. 1961) (J. Madison). It is not the role of federal judges to be amateur historians. And it is not fidelity [***298] to the Constitution to ignore its use of deliberately capacious language, in an effort to transform foundational legal commitments into narrow rules of decision.

As for "the democratic process," *ante*, at 14, 15, a method that looks exclusively to history can easily do more harm than good. Just consider this case. The net

result of JUSTICE SCALIA's supposedly objective analysis is to vest federal judges -- ultimately a majority of the judges on this Court -- with unprecedented law-making powers in an area in which they have no special qualifications, and in which the give-and-take of the political process has functioned effectively for decades. Why this "intrudes much less upon the democratic process," *ante*, at 14, than an approach that would defer to the democratic process on the regulation of firearms is, to say the least, not self-evident. I cannot even tell what, under JUSTICE SCALIA's view, constitutes an "intrusion."

It is worth pondering, furthermore, the vision of democracy that underlies JUSTICE SCALIA's critique. Because very few of us would welcome a system in which majorities or powerful interest groups always get their way. Under our constitutional scheme, I would have thought [***299] that a judicial approach to liberty claims such as the one I have outlined -- an approach that investigates both the intrinsic nature of the claimed interest and the practical significance of its judicial enforcement, that is transparent in its reasoning and sincere in its effort to incorporate constraints, that is guided by history but not beholden to it, and that is willing to protect some rights even if they have not already received uniform protection from the elected branches -- has the capacity to improve, rather than "[im]peril," *ante*, at 15, our democracy. It all depends on judges' exercising careful, reasoned judgment. As it always has, and as it always will.

VII

The fact that the right to keep and bear arms appears in the Constitution should not obscure the novelty of the Court's decision to enforce that right against the States. By its terms, the *Second Amendment* does not apply to the States; read properly, it does not even apply to individuals outside of the militia context. The *Second Amendment* was adopted to protect the *States* from federal encroachment. And the *Fourteenth Amendment* has never been understood by the Court to have "incorporated" the entire *Bill of Rights*. [***300] There was nothing foreordained about today's outcome.

Although the Court's decision in this case might be seen as a mere adjunct to its decision in *Heller*, the consequences could prove far more destructive -- quite literally -- to our Nation's communities and to our constitutional structure. Thankfully, the *Second Amendment* right identified in *Heller* and its newly minted *Fourteenth Amendment* [*3120] analogue are limited, at least for now, to the home. But neither the "assurances" provided by the plurality, *ante*, at 40, nor the many historical [**1004] sources cited in its opinion should obscure the reality that today's ruling marks a dramatic change in our law -- or that the Justices who have joined it have brought to bear an awesome amount of discretion in resolving the legal question presented by this case.

I would proceed more cautiously. For the reasons set out at length above, I cannot accept either the methodology the Court employs or the conclusions it draws. Although impressively argued, the majority's decision to overturn more than a century of Supreme Court precedent and to unsettle a much longer tradition of state practice is not, in my judgment, built "upon respect for the teachings of history, [***301] solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." *Griswold, 381 U.S., at 501, 85 S. Ct. 1678, 14 L. Ed. 2d 510* (Harlan, J., concurring in judgment).

Accordingly, I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, dissenting.

In my view, JUSTICE STEVENS has demonstrated that the *Fourteenth Amendment's* guarantee of "substantive due process" does not include a general right to keep and bear firearms for purposes of private self-defense. As he argues, the Framers did not write the *Second Amendment* with this objective in view. See *ante,* at 41-44 (dissenting opinion). Unlike other forms of substantive liberty, the carrying of arms for that purpose often puts others' lives at risk. See *ante,* at 35-37. And the use of arms for private self-defense does not warrant federal constitutional protection from state regulation. See *ante,* at 44-51.

The Court, however, does not expressly rest its opinion upon "substantive due process" concerns. Rather, it directs its attention to this Court's "incorporation" precedents and [***302] asks whether the *Second Amendment* right to private self-defense is "fundamental" so that it applies to the States through the *Fourteenth Amendment*. See *ante,* at 11-19.

I shall therefore separately consider the question of "incorporation." I can find nothing in the *Second Amendment's* text, history, or underlying rationale that could warrant characterizing it as "fundamental" insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes. Nor can I find any justification for interpreting the Constitution as transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts or from the States to the Federal Government. I therefore conclude that the *Fourteenth Amendment* does not "incorporate" the *Second Amendment's* right "to keep and bear Arms." And I consequently dissent.

I

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." Two years ago, in *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783,* [**1005] *171 L. Ed. 2d 637 (2008)*, the Court rejected the pre-existing judicial consensus that the *Second Amendment* [***303] was primarily concerned with the need to maintain a "well regulated Militia." See *id., at ___ , 128 S. Ct. 2783, 171 L. Ed. 2d 637*(STEVENS, J., dissenting) (slip op., at 2-3, and n. 2, 38-45,); [*3121] *United States v. Miller, 307 U.S. 174, 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)*. Although the Court acknowledged 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," the Court asserted that "individual self defense . . . was the *central component* of the right itself." *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 662* (first emphasis added). The Court went on to hold that the *Second Amendment* restricted Congress' power to regulate handguns used for self-defense, and the Court found unconstitutional the District of Columbia's ban on the possession of handguns in the home. *Id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 64)*.

The Court based its conclusions almost exclusively upon its reading of history. But the relevant history in *Heller* was far from clear: Four dissenting Justices disagreed with the majority's historical analysis. And subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges [***304] who are not expert at history.

Since *Heller,* historians, scholars, and judges have continued to express the view that the Court's historical account was flawed. See, *e.g.,* Konig, Why the *Second Amendment* Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America, *56 UCLA L. Rev. 1295 (2009)*; Finkelman, It Really Was About a Well Regulated Militia, *59 Syracuse L. Rev. 267 (2008)*; P. Charles, The *Second Amendment*: The Intent and Its Interpretation by the States and the Supreme Court (2009); Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism, 13 Lewis & Clark L. Rev. 349 (2009)*; Kozuskanich, Originalism in a Digital Age: An Inquiry into the Right to Bear Arms, 29 J. Early Republic 585 (2009); Cornell, St. George Tucker's Lecture Notes, the *Second Amendment*, and Originalist Methodology, *103 Nw. U. L. Rev. 1541 (2009)*; Posner, In Defense of Looseness: The Supreme Court and Gun Control, New Republic, Aug. 27, 2008, pp. 32-35; see also Epstein, A Structural Interpretation of the *Second Amendment*: Why *Heller* is (Probably) Wrong on Originalist Grounds, *59 Syracuse L. Rev. 171 (2008)*.

Consider as [***305] an example of these critiques an *amici* brief filed in this case by historians who specialize in the study of the English Civil Wars. They tell us that *Heller* misunderstood a key historical point. See Brief for English/Early American Historians as *Amici Curiae* (hereinafter English Historians' Brief) (filed by 21 professors at leading universities in the United States, United Kingdom, and Australia). *Heller*'s conclusion that "individual self-defense" was "the *central component*" of the *Second Amendment's* right "to keep and bear Arms" rested upon its view that the Amendment "codified a *pre-existing* right" that had "nothing whatever to do with service in a militia." *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 658*. That view in turn rested in significant part upon Blackstone [**1006] having described the right as "'the right of having and using arms for self-preservation and defence,'" which reflected the provision in the English Declaration of Right of 1689 that gave the King's Protestant "'subjects'" the right to "'have Arms for their defence suitable to their Conditions, and as allowed by law.'" *Id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 658, 667* (quoting 1 W. Blackstone, Commentaries on the Laws of England 140 (1765) [***306] (hereinafter Blackstone) and 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689)). The Framers, said the majority, understood that right "as permitting a citizen to [*3122] 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 659* (quoting St. George Tucker, 1 Blackstone's Commentaries 145-146, n. 42 (1803)).

The historians now tell us, however, that the right to which Blackstone referred had, not *nothing*, but *everything*, to do with the militia. As properly understood at the time of the English Civil Wars, the historians claim, the right to bear arms "ensured that *Parliament* had the power" to arm the citizenry: "to defend the realm" in the case of a foreign enemy, and to "secure the right of 'self-preservation,'" or "self-defense," should "*the sovereign* usurp the English Constitution." English Historians' Brief 3, 8-13, 23-24 (emphasis added). Thus, the Declaration of Right says that private persons can possess guns only "as allowed by law." See *id.,* at 20-24. Moreover, when Blackstone referred to "'the right of having and using arms for self-preservation and defence,'" he was referring to the right [***307] of the people "*to take part in the militia* to defend their political liberties," and *to the right of Parliament* (which represented the people) to *raise a militia* even when the King sought to deny it that power. *Id.,* at 4, 24-27 (emphasis added) (quoting 1 Blackstone 140). Nor can the

historians find any convincing reason to believe that the Framers had something different in mind than what Blackstone himself meant. Compare *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 21-22)* with English Historians' Brief 28-40. The historians concede that at least one historian takes a different position, see *id.*, at 7, but the Court, they imply, would lose a poll taken among professional historians of this period, say, by a vote of 8 to 1.

If history, and history alone, is what matters, why would the Court not now reconsider *Heller* in light of these more recently published historical views? See *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 923-924, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (BREYER, J., dissenting) (noting that *stare decisis* interests are at their lowest with respect to recent and erroneous constitutional decisions that create unworkable legal regimes); *Citizens United v. FEC, 558 U.S. ___, ___, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (slip op., at 47)* [***308] (listing similar factors); see also *Wallace v. Jaffree, 472 U.S. 38, 99, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)* (Rehnquist, J., dissenting) ("*[S]tare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history"). At the least, where *Heller*'s historical foundations are so uncertain, why extend its applicability?

My aim in referring to this history is to illustrate the reefs and shoals that lie in wait for those nonexpert judges who place virtually determinative [**1007] weight upon historical considerations. In my own view, the Court should not look to history alone but to other factors as well -- above all, in cases where the history is so unclear that the experts themselves strongly disagree. It should, for example, consider the basic values that underlie a constitutional provision and their contemporary significance. And it should examine as well the relevant consequences and practical justifications that might, or might not, warrant removing an important question from the democratic decisionmaking process. See *ante*, at 16-20 (STEVENS, J., dissenting) (discussing shortcomings of an exclusively historical approach).

II

A

In my view, taking *Heller* as a given, the *Fourteenth Amendment* does not [***309] incorporate the *Second Amendment* right to keep and [*3123] bear arms for purposes of private self-defense. Under this Court's precedents, to incorporate the private self-defense right the majority must show that the right is, *e.g.*, "fundamental to the American scheme of justice," *Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)*; see *ibid.*, n. 14; see also *ante,* at 44 (plurality opinion) (finding that the right is "fundamental" and therefore incorporated). And this it fails to do.

The majority here, like that in *Heller,* relies almost exclusively upon history to make the necessary showing. *Ante,* at 20-33. But to do so for incorporation purposes is both wrong and dangerous. As JUSTICE STEVENS points out, our society has historically made mistakes -- for example, when considering certain 18th- and 19th-century property rights to be fundamental. *Ante,* at 19 (dissenting opinion). And in the incorporation context, as elsewhere, history often is unclear about the answers. See Part I, *supra;* Part III, *infra.*

Accordingly, this Court, in considering an incorporation question, has never stated that the historical status of a right is the only relevant consideration. Rather, the Court has either explicitly [***310] or implicitly made clear in its opinions that the right in question has remained fundamental over time. See, *e.g., Apodaca v. Oregon, 406 U.S. 404, 410, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972)* (plurality opinion) (stating that the incorporation "inquiry must focus upon the function served" by the right in question in "*contemporary society*" (emphasis added)); *Duncan v. Louisiana, 391 U.S. 145, 154, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)* (noting that the right in question "continues to receive strong support"); *Klopfer v. North Carolina, 386 U.S. 213, 226, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)* (same). And, indeed, neither of the parties before us in this case has asked us to employ the majority's history-constrained approach. See Brief for Petitioners 67-69 (arguing for incorporation based on trends in contemporary support for the right); Brief for Respondents City of Chicago et al. 23-31 (hereinafter Municipal Respondents) (looking to current state practices with respect to the right).

I thus think it proper, above all where history provides no clear answer, to look to other factors in considering whether a right is sufficiently "fundamental" to remove it from the political process in every State. I would include among those [**1008] factors the nature of the right; any contemporary disagreement [***311] about whether the right is fundamental; the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution's structural aims, including its division of powers among different governmental institutions (and the people as well). Is incorporation needed, for example, to further the Constitution's effort to ensure that the government treats each individual with equal respect? Will it help maintain the democratic form of government that the Constitution foresees? In a word, will incorporation prove consistent, or inconsistent, with the Constitution's efforts to create governmental institutions well suited to the carrying out of its constitutional promises?

Finally, I would take account of the Framers' basic reason for believing the Court ought to have the power of judicial review. Alexander Hamilton feared granting that power to Congress alone, for he feared that Congress, acting as judges, would not overturn as unconstitutional a popular statute that it had recently enacted, as legislators. The Federalist No. 78, p. 405 (G. Carey & J. McClellan eds. [*3124] 2001) (A. Hamilton) ("This independence [***312] of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours, which" can, at times, lead to "serious oppressions of the minor part in the community"). Judges, he thought, may find it easier to resist popular pressure to suppress the basic rights of an unpopular minority. See *United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938)*. That being so, it makes sense to ask whether that particular comparative judicial advantage is relevant to the case at hand. See, *e.g.*, J. Ely, Democracy and Distrust (1980).

B

How do these considerations apply here? For one thing, I would apply them only to the private self-defense right directly at issue. After all, the Amendment's militia-related purpose is primarily to protect *States* from *federal* regulation, not to protect individuals from militia-related regulation. *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 26)*; see also *Miller, 307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206*. Moreover, the Civil War Amendments, the electoral process, the courts, and numerous other institutions today help to safeguard the States and the people from any serious threat of federal tyranny. How are state militias additionally [***313] necessary? It is difficult to see how a right that, as the majority concedes, has "largely faded as a popular concern" could possibly be so fundamental that it would warrant incorporation through the *Fourteenth Amendment*. *Ante*, at 22. Hence, the incorporation of the *Second Amendment* cannot be based on the militia-related aspect of what *Heller* found to be more extensive *Second Amendment* rights.

For another thing, as *Heller* concedes, the private self-defense right that the Court would incorporate has nothing to do with "the *reason*" the Framers "codified" the right to keep and bear arms "in a written Constitution." *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 26)* (emphasis added). *Heller* immediately adds that the self-defense right was nonetheless "the *central component* of the right." *Ibid.* In my view, this is the historical [**1009] equivalent of a claim that water runs uphill. See Part I, *supra*. But, taking it as valid, the Framers' basic *reasons* for including language in the Constitution would nonetheless seem more pertinent (in deciding about the contemporary *importance* of a right) than the particular *scope* 17th- or 18th-century listeners would have then assigned to the words they used. And examination of [***314] the Framers' motivation tells us they did not think the private armed self-defense right was of paramount importance. See Amar, The *Bill of Rights* as a Constitution, *100 Yale L. J. 1131, 1164 (1991)* ("[T]o see the [Second] Amendment as primarily concerned with an individual right to hunt, or protect one's home," would be "like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge"); see also, *e.g.*, Rakove, The *Second Amendment*: The Highest Stage of Originalism, *76 Chi.-Kent L. Rev. 103, 127-128 (2000)*; Brief for Historians on Early American Legal, Constitutional, and Pennsylvania History as *Amici Curiae* 22-33.

Further, there is no popular consensus that the private self-defense right described in *Heller* is fundamental. The plurality suggests that two *amici* briefs filed in the case show such a consensus, see *ante*, at 42-43, but, of course, numerous *amici* briefs have been filed opposing incorporation as well. Moreover, every State regulates firearms extensively, and public opinion is sharply divided on the appropriate level of regulation. Much of [*3125] this disagreement rests upon empirical considerations. One side believes the right essential to [***315] protect the lives of those attacked in the home; the other side believes it essential to regulate the right in order to protect the lives of others attacked with guns. It seems unlikely that definitive evidence will develop one way or the other. And the appropriate level of firearm regulation has thus long been, and continues to be, a hotly contested matter of political debate. See, *e.g.*, Siegel, Dead or Alive: Originalism as Popular Constitutionalism in *Heller*, *122 Harv. L. Rev. 191, 201-246 (2008)*. (Numerous sources supporting arguments and data in Part II-B can be found in the Appendix, *infra.*)

Moreover, there is no reason here to believe that incorporation of the private self-defense right will further any other or broader constitutional objective. We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting "discrete and insular minorities." *Carolene Products Co., supra, at 153, n. 4*; see, *e.g., ante,* at 49-51 (STEVENS, J., dissenting). Nor will incorporation help to assure equal respect for individuals. Unlike the *First Amendment's* rights of free speech, free press, assembly, and petition, the private self-defense right does not comprise [***316] a necessary part of the democratic process that the Constitution seeks to establish. See, *e.g., Whitney v. California, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927)* (Brandeis, J., concurring). Unlike the *First Amendment's* religious protections, the *Fourth Amendment's* protection against unreasonable searches and seizures, the *Fifth* and *Sixth Amendments*' insistence upon

fair criminal procedure, and the *Eighth Amendment's* protection against cruel and unusual punishments, the private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair or inhumane [**1010] treatment at the hands of a majority. Unlike the protections offered by many of these same Amendments, it does not involve matters as to which judges possess a comparative expertise, by virtue of their close familiarity with the justice system and its operation. And, unlike the *Fifth Amendment's* insistence on just compensation, it does not involve a matter where a majority might unfairly seize for itself property belonging to a minority.

Finally, incorporation of the right *will* work a significant disruption in the constitutional allocation of decisionmaking authority, thereby interfering with the Constitution's ability [***317] to further its objectives.

First, on any reasonable accounting, the incorporation of the right recognized in *Heller* would amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government. Private gun regulation is the quintessential exercise of a State's "police power" -- *i.e.*, the power to "protec[t] . . . the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State," by enacting "all kinds of restraints and burdens" on both "persons and property." *Slaughter-House Cases, 83 U.S. 36, 16 Wall. 36, 62, 21 L. Ed. 394 (1873)* (internal quotation marks omitted). The Court has long recognized that the Constitution grants the States special authority to enact laws pursuant to this power. See, *e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 475, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)* (noting that States have "great latitude" to use their police powers (internal quotation marks omitted)); *Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985).* A decade ago, we wrote that there is "no better example of the police power" than "the [*3126] suppression of violent crime." *United States v. Morrison, 529 U.S. 598, 618, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).* [***318] And examples in which the Court has deferred to state legislative judgments in respect to the exercise of the police power are legion. See, *e.g., Gonzales v. Oregon, 546 U.S. 243, 270, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006)* (assisted suicide); *Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)* (same); *Berman v. Parker, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954)* ("We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless . . . ").

Second, determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make. See, *e.g., Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002)* (plurality opinion); *Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195-196, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997).* And it may require this kind of analysis in virtually every case.

Government regulation of the right to bear arms normally embodies a judgment that the regulation will help save lives. The determination whether a gun regulation is constitutional would thus almost always require the weighing of the constitutional right to bear arms against the "primary concern [***319] of every government -- a concern for the safety and indeed the lives of its citizens." *United* [**1011] *States v. Salerno, 481 U.S. 739, 755, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).* With respect to other incorporated rights, this sort of inquiry is *sometimes* present. See, *e.g., Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam)* (free speech); *Sherbert v. Verner, 374 U.S. 398, 403, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)* (religion); *Brigham City v. Stuart, 547 U.S. 398, 403-404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)* (*Fourth Amendment*); *New York v. Quarles, 467 U.S. 649, 655, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984)* (*Fifth Amendment*); *Salerno, supra, at 755* (bail). But here, this inquiry -- calling for the fine tuning of protective rules -- is likely to be part of a daily judicial diet.

Given the competing interests, courts will have to try to answer empirical questions of a particularly difficult kind. Suppose, for example, that after a gun regulation's adoption the murder rate went up. Without the gun regulation would the murder rate have risen even faster? How is this conclusion affected by the local recession which has left numerous people unemployed? What about budget cuts that led to a downsizing of the police force? How effective was that police force to begin with? And did the regulation simply take guns from [***320] those who use them for lawful purposes without affecting their possession by criminals?

Consider too that countless gun regulations of many shapes and sizes are in place in every State and in many local communities. Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic? Where are different kinds of weapons likely needed? Does time-of-day matter? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? Do police need special rules permitting patdowns designed to find guns? When do registration requirements become severe to the point that they amount to an unconstitutional ban?

Who can possess guns and of what kind? [*3127] Aliens? Prior drug offenders? Prior alcohol abusers? How would the right interact with a state or local government's ability to take special measures during, say, national security emergencies? As the questions suggest, state and local gun regulation can become highly complex, and these "are only a few uncertainties that quickly come to mind." *Caperton v. A. T. Massey Coal Co., 556 U.S. ___, ___, 129 S. Ct. 2252, 2272, 173 L. Ed. 2d 1208, 1231(2009)* [***321] (ROBERTS, C. J., dissenting).

The difficulty of finding answers to these questions is exceeded only by the importance of doing so. Firearms cause well over 60,000 deaths and injuries in the United States each year. Those who live in urban areas, police officers, women, and children, all may be particularly at risk. And gun regulation may save their lives. Some experts have calculated, for example, that Chicago's handgun ban has saved several hundred lives, perhaps close to 1,000, since it was enacted in 1983. Other experts argue that stringent gun regulations "can help protect police officers operating on the front lines against gun violence," have reduced homicide rates in Washington, D. C., and Baltimore, and have helped to lower New York's crime and homicide rates.

[**1012] At the same time, the opponents of regulation cast doubt on these studies. And who is right? Finding out may require interpreting studies that are only indirectly related to a particular regulatory statute, say one banning handguns in the home. Suppose studies find more accidents and suicides where there is a handgun in the home than where there is a long gun in the home or no gun at all? To what extent [***322] do such studies justify a ban? What if opponents of the ban put forth counter studies?

In answering such questions judges cannot simply refer to judicial homilies, such as Blackstone's 18th-century perception that a man's home is his castle. See 4 Blackstone 223. Nor can the plurality so simply reject, by mere assertion, the fact that "incorporation will require judges to assess the costs and benefits of firearms restrictions." *Ante*, at 44. How can the Court assess the strength of the government's regulatory interests without addressing issues of empirical fact? How can the Court determine if a regulation is appropriately tailored without considering its impact? And how can the Court determine if there are less restrictive alternatives without considering what will happen if those alternatives are implemented?

Perhaps the Court could lessen the difficulty of the mission it has created for itself by adopting a jurisprudential approach similar to the many state courts that administer a state constitutional right to bear arms. See *infra*, at 19-20 (describing state approaches). But the Court has not yet done so. Cf. *Heller, 544 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 57-64)* (rejecting an "'interest-balancing' [***323] approach" similar to that employed by the States); *ante*, at 44 (plurality opinion). Rather, the Court has haphazardly created a few simple rules, such as that it will not touch "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." *Heller, 544 U.S., at ___, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637, 678* ; *Ante,* at 39 (plurality opinion). But why these rules and not others? Does the Court know that these regulations are justified by some special gun-related risk of death? In fact, the Court does not know. It has simply invented rules that sound sensible without being able to explain why or how Chicago's handgun ban is different.

[*3128] The fact is that judges do not know the answers to the kinds of empirically based questions that will often determine the need for particular forms of gun regulation. Nor do they have readily available "tools" for finding and evaluating the technical material submitted by others. *District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. ___, ___ , 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009) (slip op., at 21)*; [***324] see also *Turner Broadcasting, 520 U.S., at 195-196.* Judges cannot easily make empirically based predictions; they have no way to gather and evaluate the data required to see if such predictions are accurate; and the nature of litigation and concerns about *stare decisis* further make it difficult for judges to change course if predictions prove inaccurate. Nor can judges rely upon local community views and values when reaching judgments in circumstances where prediction [**1013] is difficult because the basic facts are unclear or unknown.

At the same time, there is no institutional need to send judges off on this "mission-almost-impossible." Legislators are able to "amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey, 380 U.S. 63, 67, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965).* They are far better suited than judges to uncover facts and to understand their relevance. And legislators, unlike Article III judges, can be held democratically responsible for their empirically based and value-laden conclusions. We have thus repeatedly affirmed our preference for "legislative not judicial solutions" to this kind of problem, see, *e.g., Patsy v. Board of Regents of Fla., 457 U.S. 496, 513, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982)*, just [***325] as we have repeatedly affirmed the Constitution's preference for democratic solutions legislated by those whom the people elect.

In *New State Ice Co. v. Liebmann, 285 U.S. 262, 310-311, 52 S. Ct. 371, 76 L. Ed. 747 (1932)*, Justice Brandeis stated in dissent:

> "Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the *Fourteenth Amendment*, or the States which ratified it, intended to deprive us of the power to correct [the social problems we face]."

There are 50 state legislatures. The fact that this Court may already have refused to take this wise advice with respect to Congress in *Heller* is no reason to make matters worse here.

Third, the ability of States to reflect local preferences and conditions -- both key virtues of federalism -- here has particular importance. The incidence of gun ownership varies substantially [***326] as between crowded cities and uncongested rural communities, as well as among the different geographic regions of the country. Thus, approximately 60% of adults who live in the relatively sparsely populated Western States of Alaska, Montana, and Wyoming report that their household keeps a gun, while fewer than 15% of adults in the densely populated Eastern States of Rhode Island, New Jersey, and Massachusetts say the same.

The nature of gun violence also varies as between rural communities and cities. Urban centers face significantly greater levels of firearm crime and homicide, while rural communities have proportionately [*3129] greater problems with nonhomicide gun deaths, such as suicides and accidents. And idiosyncratic local factors can lead to two cities finding themselves in dramatically different circumstances: For example, in 2008, the murder rate was 40 times higher in New Orleans than it was in Lincoln, Nebraska.

It is thus unsurprising that States and local communities have historically differed about the need for gun regulation as well as about its proper level. Nor is it surprising that "primarily, and historically," the law has treated the exercise of police powers, including [***327] gun control, as "matter[s] of local concern." *Medtronic, 518 U.S., at* [**1014] *475, 116 S. Ct. 2240, 135 L. Ed. 2d 700* (internal quotation marks omitted).

Fourth, although incorporation of any right removes decisions from the democratic process, the incorporation of this particular right does so without strong offsetting justification -- as the example of Oak Park's handgun ban helps to show. See Oak Park, Ill., Municipal Code, *§ 27-2-1 (1995)*. Oak Park decided to ban handguns in 1983, after a local attorney was shot to death with a handgun that his assailant had smuggled into a courtroom in a blanket. Brief for Oak Park Citizens Committee for Handgun Control as *Amicus Curiae* 1, 21 (hereinafter Oak Park Brief). A citizens committee spent months gathering information about handguns. *Id.,* at 21. It secured 6,000 signatures from community residents in support of a ban. *Id.,* at 21-22. And the village board enacted a ban into law. *Id.,* at 22.

Subsequently, at the urging of ban opponents the Board held a community referendum on the matter. *Ibid.* The citizens committee argued strongly in favor of the ban. *Id.,* at 22-23. It pointed out that most guns owned in Oak Park were handguns and that handguns were misused more often than citizens [***328] used them in self-defense. *Id.,* at 23. The ban opponents argued just as strongly to the contrary. *Ibid.* The public decided to keep the ban by a vote of 8,031 to 6,368. *Ibid.* And since that time, Oak Park now tells us, crime has decreased and the community has seen no accidental handgun deaths. *Id.,* at 2.

Given the empirical and local value-laden nature of the questions that lie at the heart of the issue, why, in a Nation whose Constitution foresees democratic decisionmaking, is it so *fundamental* a matter as to require taking that power from the people? What is it here that the people did not know? What is it that a judge knows better?

* * *

In sum, the police power, the superiority of legislative decisionmaking, the need for local decisionmaking, the comparative desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations all argue against incorporation. Where the incorporation of other rights has been at issue, *some* of these problems have arisen. But in this instance *all* these problems are present, *all* at the same time, and *all* are likely to be present in most, perhaps nearly all, of [***329] the cases in which the constitutionality of a gun regulation is at issue. At the same time, the important factors that favor incorporation in other instances -- *e.g.*, the protection of broader constitutional objectives -- are not present here. The upshot is that all factors militate

against incorporation -- with the possible exception of historical factors.

III

I must, then, return to history. The plurality, in seeking to justify incorporation, asks whether the interests the *Second Amendment* [*3130] protects are "'deeply rooted in this Nation's history and tradition.'" *Ante*, at 19 (quoting *Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*; internal quotation marks omitted). It looks to selected portions of the Nation's history for the answer. And it finds an affirmative reply.

[**1015] As I have made clear, I do not believe history is the only pertinent consideration. Nor would I read history as broadly as the majority does. In particular, since we here are evaluating a more particular right -- namely, the right to bear arms for purposes of private self-defense -- general historical references to the "right to keep and bear arms" are not always helpful. Depending upon context, early historical sources may mean to refer to [***330] a militia-based right -- a matter of considerable importance 200 years ago -- which has, as the majority points out, "largely faded as a popular concern." *Ante*, at 22. There is no reason to believe that matters of such little contemporary importance should play a significant role in answering the incorporation question. See *Apodaca, 406 U.S., at 410, 92 S. Ct. 1628, 32 L. Ed. 2d 184* (incorporation "inquiry must focus upon the function served" by the right in question in "contemporary society"); *Wolf v. Colorado, 338 U.S. 25, 27, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949)* (incorporation must take into account "the movements of a free society" and "the gradual and empiric process of inclusion and exclusion" (internal quotation marks omitted)); cf. U.S. Const., Art. I, § 910 (prohibiting federal officeholders from accepting a "Title, of any kind whatever, from [a] foreign State" -- presumably a matter of considerable importance 200 years ago).

That said, I can find much in the historical record that shows that some Americans in some places at certain times thought it important to keep and bear arms for private self-defense. For instance, the reader will see that many States have constitutional provisions protecting gun possession. But, as far as I can tell, [***331] those provisions typically do no more than guarantee that a gun regulation will be a *reasonable* police power regulation. See Winkler, Scrutinizing the *Second Amendment, 105 Mich. L. Rev. 683, 686, 716-717 (2007)* (the "courts of every state to consider the question apply a deferential 'reasonable regulation' standard") (hereinafter Winkler, Scrutinizing); see also *id., at 716-717* (explaining the difference between that standard and ordinary rational-basis review). It is thus altogether unclear whether such provisions would prohibit cities such as Chicago from enacting laws, such as the law before us, banning handguns. See *id., at 723*. The majority, however, would incorporate a right that is likely *inconsistent* with Chicago's law; and the majority would almost certainly *strike down* that law. Cf. *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 57-64)* (striking down the District of Columbia's handgun ban).

Thus, the specific question before us is not whether there are references to the right to bear arms for self-defense throughout this Nation's history -- of course there are -- or even whether the Court should incorporate a simple constitutional requirement that firearms regulations not unreasonably [***332] burden the right to keep and bear arms, but rather whether there is a consensus that *so substantial* a private self-defense right as the one described in *Heller* applies to the States. See, *e.g., Glucksberg, supra, at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* (requiring "a careful description" of the right at issue when deciding whether it is "deeply rooted in this Nation's history and tradition" (internal quotation marks omitted)). On this question, the reader will have to make up his or her own mind about [**1016] the historical record that I describe in part below. In my view, that [*3131] record is insufficient to say that the right to bear arms for private self-defense, as explicated by *Heller*, is fundamental in the sense relevant to the incorporation inquiry. As the evidence below shows, States and localities have consistently enacted firearms regulations, including regulations similar to those at issue here, throughout our Nation's history. Courts have repeatedly upheld such regulations. And it is, at the very least, possible, and perhaps likely, that incorporation will impose on every, or nearly every, State a different right to bear arms than they currently recognize -- a right that threatens to destabilize settled state legal principles. [***333] Cf. *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 57-64)* (rejecting an "'interest-balancing' approach" similar to that employed by the States).

I thus cannot find a historical consensus with respect to whether the right described by *Heller* is "fundamental" as our incorporation cases use that term. Nor can I find sufficient historical support for the majority's conclusion that that right is "deeply rooted in this Nation's history and tradition." Instead, I find no more than ambiguity and uncertainty that perhaps even expert historians would find difficult to penetrate. And a historical record that is so ambiguous cannot itself provide an adequate basis for incorporating a private right of self-defense and applying it against the States.

The Eighteenth Century

The opinions in *Heller* collect much of the relevant 18th-century evidence. See *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 5-32)*; *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637*(STEVENS, J., dissenting) (slip op., at 5-31); *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637* (BREYER, J., dissenting) (slip op., at 4-7). In respect to the relevant question -- the "deeply rooted nature" of a right to keep and bear arms for purposes of private self-defense -- that evidence is inconclusive, particularly when augmented as follows:

First, [***334] as I have noted earlier in this opinion, and JUSTICE STEVENS argued in dissent, the history discussed in *Heller* shows that the *Second Amendment* was enacted primarily for the purpose of protecting militia-related rights. See *supra*, at 4; *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 5-31)*. Many of the scholars and historians who have written on the subject apparently agree. See *supra*, at 2-5.

Second, historians now tell us that the right to which Blackstone referred, an important link in the *Heller* majority's historical argument, concerned the right of Parliament (representing the people) to form a militia to oppose a tyrant (the King) threatening to deprive the people of their traditional liberties (which did not include an unregulated right to possess guns). Thus, 18th-century language referring to a "right to keep and bear arms" does not *ipso facto* refer to a private right of self-defense -- certainly not unambiguously so. See English Historians' Brief 3-27; see also *supra*, at 2-5.

Third, scholarly articles indicate that firearms were heavily regulated at the time of the framing -- perhaps more heavily regulated than the Court in *Heller* believed. For example, one scholar writes that "[h]undreds [***335] of [**1017] individual statutes regulated the possession and use of guns in colonial and early national America." Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms, *25 Law & Hist. Rev. 139, 143 (2007)*. Among these statutes was a ban on the private firing of weapons in Boston, as well as comprehensive restrictions on similar conduct in Philadelphia and New York. See Acts and Laws of Massachusetts, p. 208 (1746); 5 J. Mitchell, & H. Flanders, Statutes at Large of Pennsylvania From 1682 to 1801, pp. [*3132] 108-109 (1898); 4 Colonial Laws of New York ch. 1233, p. 748 (1894); see also *Churchill, supra, at 162-163* (discussing bans on the shooting of guns in Pennsylvania and New York).

Fourth, after the Constitution was adopted, several States continued to regulate firearms possession by, for example, adopting rules that would have prevented the carrying of loaded firearms in the city, *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 5-7)* (BREYER, J., dissenting); see also *id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 59-60)*. Scholars have thus concluded that the primary Revolutionary era limitation on a State's police power to regulate guns appears to be only that regulations were "aimed [***336] at a legitimate public purpose" and "consistent with reason." Cornell, Early American Gun Regulation and the *Second Amendment*, *25 Law & Hist. Rev. 197, 198 (2007)*.

The Pre-Civil War Nineteenth Century

I would also augment the majority's account of this period as follows:

First, additional States began to regulate the discharge of firearms in public places. See, *e.g.*, Act of Feb. 17, 1831, § 6, reprinted in 3 Statutes of Ohio and the Northwestern Territory 1740 (S. Chase ed. 1835); Act of Dec. 3, 1825, ch. CCXCII, § 3, 1825 Tenn. Priv. Acts 306.

Second, States began to regulate the possession of concealed weapons, which were both popular and dangerous. See, *e.g.*, C. Cramer, Concealed Weapon Laws of the Early Republic 143-152 (1999) (collecting examples); see also 1837-1838 Tenn. Pub. Acts ch. 137, pp. 200-201 (banning the wearing, sale, or giving of Bowie knives); 1847 Va. Acts ch. 7, § 8, p. 110, ("Any free person who shall habitually carry about his person, hidden from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, from the use of which the death of any person might probably ensue, shall for every offense be punished by [a] fine not exceed fifty dollars").

State [***337] courts repeatedly upheld the validity of such laws, finding that, even when the state constitution granted a right to bear arms, the legislature was permitted to, *e.g.*, "abolish" these small, inexpensive, "most dangerous weapons entirely from use," even in self-defense. *Day v. State, 37 Tenn. 496, 500 (1857)*; see also, *e.g.*, *State v. Jumel, 13 La. Ann. 399, 400 (1858)* (upholding concealed weapon ban because it "prohibited only a *particular mode* of bearing arms which is found dangerous to the peace of society"); *State v. Chandler, 5 La. Ann. 489, 489-490 (1850)* (upholding concealed weapon ban and describing the law as "absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons"); *State v. Reid, 1 Ala. 612, 616-617 (1840)*.

[**1018] *The Post-Civil War Nineteenth Century*

It is important to read the majority's account with the following considerations in mind:

First, the Court today properly declines to revisit our interpretation of the *Privileges or Immunities Clause.* See *ante,* at 10. The Court's case for incorporation must thus rest on the conclusion that the right to bear arms is "fundamental." But the very evidence that it advances in support [***338] of the conclusion that Reconstruction-era Americans strongly supported a private self-defense right shows with equal force that Americans wanted African-American citizens to have the *same* rights to possess guns as did white citizens. *Ante,* at 22-33. Here, for example is what Congress said when it enacted a *Fourteenth Amendment* predecessor, the Second Freedman's Bureau Act. It wrote that the statute, in order to secure "the constitutional right to [*3133] bear arms . . . for all citizens," would assure that each citizen:

> "shall 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, [by securing] . . . to . . . all the citizens of [every] . . . State or district without *respect to race or color, or previous condition of slavery."* § 14, 14 Stat. 176-177 (emphasis added).

This sounds like an *antidiscrimination* provision. See Rosenthal, The New Originalism Meets the *Fourteenth Amendment*: Original Public Meaning and the Problem of Incorporation, *18 J. Contemp. Legal Issues 361, 383-384 (2009)* (discussing evidence that [***339] the Freedmen's Bureau was focused on discrimination).

Another *Fourteenth Amendment* predecessor, the Civil Rights Act of 1866, also took aim at *discrimination.* See § 1, 14 Stat. 27 (citizens of "every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right [to engage in various activities] and to full and equal benefit of all laws . . . as is enjoyed by white citizens"). And, of course, the *Fourteenth Amendment* itself insists that all States guarantee their citizens the "equal protection of the laws."

There is thus every reason to believe that the *fundamental* concern of the Reconstruction Congress was the eradication of discrimination, not the provision of a new substantive right to bear arms free from reasonable state police power regulation. See, *e.g.,* Brief for Municipal Respondents 62-69 (discussing congressional record evidence that Reconstruction Congress was concerned about discrimination). Indeed, why would those who wrote the *Fourteenth Amendment* have wanted to give such a right to Southerners who had so recently waged war against the North, and who continued to disarm and oppress recently freed African-American [***340] citizens? Cf. Act of Mar. 2, 1867, § 6, 14 Stat. 487 (disbanding Southern militias because they were, *inter alia,* disarming the freedmen).

Second, firearms regulation in the later part of the 19th century was common. The majority is correct that the Freedmen's Bureau points to a right to bear arms, and it stands to reason, as the majority points out, that "[i]t would have been nonsensical for Congress to guarantee the . . . [**1019] equal benefit of a . . . right that does not exist." *Ante,* at 32. But the majority points to no evidence that there existed during this period a fundamental right to bear arms for private self-defense immune to the reasonable exercise of the state police power. See Emberton, The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South, *17 Stan. L. & Pol'y Rev. 615, 621-622 (2006)* (noting that history shows that "nineteenth-century Americans" were "not opposed to the idea that the state should be able to control the use of firearms").

To the contrary, in the latter half of the 19th century, a number of state constitutions adopted or amended after the Civil War explicitly recognized the legislature's general ability to limit the [***341] right to bear arms. See *Tex. Const., Art. I, § 13* (1869) (protecting "the right to keep and bear arms," "under such regulations as the legislature may prescribe"); *Idaho Const., Art. I, § 11* (1889) ("The people have the right to bear arms . . .; but the Legislature shall regulate the exercise of this right by law"); *Utah Const., Art. I, § 6* (1896) (same). And numerous other state constitutional provisions adopted during this period explicitly granted the legislature various types of regulatory power over firearms. See Brief for Thirty-Four Professional Historians et al. as *Amici Curiae* [*3134] 14-15 (hereinafter Legal Historians' Brief).

Moreover, four States largely banned the possession of all nonmilitary handguns during this period. See 1879 Tenn. Pub. Acts ch. 186, § 1 (prohibiting citizens from carrying "publicly or privately, any . . . belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand"); 1876 Wyo. Comp. Laws ch. 52, § 1 (forbidding "concealed or ope[n]" bearing of "any fire arm or other deadly weapon, within the limits of any city, town or village"); Ark. Act of Apr. 1, 1881, ch. 96, [***342] § 1 (prohibiting the "wear[ing] or carry[ng]" of "any pistol . . . except such pistols as are used in the army or navy," except while traveling or at home); Tex. Act of Apr. 12, 1871, ch. 34 (prohibiting the carrying of pistols unless there are "immediate and pressing" rea-

sonable grounds to fear "immediate and pressing" attack or for militia service). Fifteen States banned the concealed carry of pistols and other deadly weapons. See Legal Historians' Brief 16, n. 14. And individual municipalities enacted stringent gun controls, often in response to local conditions -- Dodge City, Kansas, for example, joined many western cattle towns in banning the carrying of pistols and other dangerous weapons in response to violence accompanying western cattle drives. See Brief for Municipal Respondents 30 (citing Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876)); D. Courtwright, The Cowboy Subculture, in Guns in America: A Reader 96 (J. Dizard et al. eds. 1999) (discussing how Western cattle towns required cowboys to "check" their guns upon entering town).

Further, much as they had during the period before the Civil War, state courts routinely upheld such restrictions. See, *e.g., English v. State, 35 Tex. 473 (1871)*; [***343] *Hill v. State, 53 Ga. 472, 475 (1874)*; *Fife v. State, 31 Ark. 455, 461 (1876)*; *State v. Workman, 35 W. Va. 367, 373, 14 S.E. 9 (1891)*. The Tennessee Supreme Court, in upholding a ban on possession of nonmilitary handguns and certain other weapons, summarized [**1020] the Reconstruction understanding of the states' police power to regulate firearms:

> "Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; *and where certain weapons are forbidden to be kept or used by the law of the land*, in order to the prevention of *[sic]* crime -- a great public end -- *no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or willful desire to use a particular weapon in his particular self-defense*. The law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully prescribed by this statute. The object being to banish these weapons from the community by an absolute prohibition for the prevention of crime, no man's particular safety, if such case could exist, ought to be [***344] allowed to defeat this end." *Andrews v. State, 50 Tenn. 165, 188-189 (1871)* (emphasis added).

The Twentieth and Twenty-First Centuries

Although the majority does not discuss 20th- or 21st-century evidence concerning the *Second Amendment* at any length, I think that it is essential to consider the recent history of the right to bear arms for private self-defense when considering whether the right is "fundamental." To that end, many States now provide state constitutional protection for an individual's right to keep and bear arms. See Volokh, [*3135] State Constitutional Rights to Keep and Bear Arms, *11 Tex. Rev. L. & Pol. 191, 205 (2006)* (identifying over 40 States). In determining the importance of this fact, we should keep the following considerations in mind:

First, by the end of the 20th century, in every State and many local communities, highly detailed and complicated regulatory schemes governed (and continue to govern) nearly every aspect of firearm ownership: Who may sell guns and how they must be sold; who may purchase guns and what type of guns may be purchased; how firearms must be stored and where they may be used; and so on. See generally Legal Community Against Violence, Regulating [***345] Guns In America (2008), available at http://www.lcav.org/publications-briefs/regulating_guns. asp (all Internet materials as visited June 24, 2010, and available in Clerk of Court's case file) (detailing various arms regulations in every State).

Of particular relevance here, some municipalities ban handguns, even in States that constitutionally protect the right to bear arms. See Chicago, Ill., Municipal Code, § 8-20-050(c) (2009); Oak Park, Ill., Municipal Code, §§ 27-2-1, 27-1-1 (1995); Toledo, Ohio, Municipal Code, ch. 549.25 (2010). Moreover, at least seven States and Puerto Rico ban assault weapons or semiautomatic weapons. See *Cal. Penal Code Ann. § 12280(b)* (West Supp. 2009); *Conn. Gen. Stat. Ann. § 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. J. Stat. Ann. § 2C:39-5* (West Supp. 2010); *N. Y. Penal Law Ann. § 265.02(7)* (West Supp. 2008); 25 Laws P. R. Ann. *§ 456m* (Supp. 2006); see also *18 U.S.C. § 922(o)* (federal machinegun ban).

[**1021] Thirteen municipalities do the same. See Albany, N. Y., City Code § 193-16(A) (2005); Aurora, Ill., Code of Ordinances § 29-49(a) (2009); Buffalo, N. [***346] Y., City Code § 180-1(F) (2000); Chicago, Ill., Municipal Code § 8-24-025(a) (2010); Cincinnati, Ohio, Municipal Code § 708-37(a) (2008); Cleveland, Ohio, Codified Ordinances § 628.03(a) (2008); Columbus, Ohio, City Code § 2323.31 (2007); Denver, Colo., Municipal Code § 38-130(e) (2008); Morton Grove, Ill., Village Code § 6-2-3(A); N. Y. C. Admin. Code *§ 10-303.1* (2009); Oak Park, Ill., Village Code § 27-2-1

(2009); Rochester, N. Y., City Code § 47-5(F) (2008); Toledo, Ohio, Municipal Code § 549.23(a). And two States, Maryland and Hawaii, ban assault pistols. See *Haw. Rev. Stat. Ann. § 134-8*; *Md. Crim. Law Code Ann. § 4-303* (Lexis 2002).

Second, as I stated earlier, state courts in States with constitutions that provide gun rights have almost uniformly interpreted those rights as providing protection only against *unreasonable* regulation of guns. See, *e.g.,* Winkler, Scrutinizing 686 (the "courts of every state to consider" a gun regulation apply the "'reasonable regulation'" approach); *State v. McAdams, 714 P.2d 1236, 1238 (Wyo. 1986)*; *Robertson v. City & County of Denver, 874 P.2d 325, 328 (Colo. 1994).*

When determining reasonableness those courts have normally adopted a highly deferential [***347] attitude towards legislative determinations. See Winkler, Scrutinizing 723 (identifying only six cases in the 60 years before the article's publication striking down gun control laws: three that banned "the transportation of any firearms for any purpose whatsoever," a single "permitting law," and two as-applied challenges in "unusual circumstances"). Hence, as evidenced by the breadth of existing regulations, States and local governments maintain substantial flexibility to regulate firearms -- much as they seemingly have throughout the Nation's history -- [*3136] even in those States with an arms right in their constitutions.

Although one scholar implies that state courts are less willing to permit total gun prohibitions, see Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, *56 UCLA L. Rev. 1443, 1458 (2009)*, I am aware of no instances in the past 50 years in which a state court has struck down as unconstitutional a law banning a particular class of firearms, see Winkler, Scrutinizing 723.

Indeed, state courts have specifically upheld as constitutional (under their state constitutions) firearms regulations that have included [***348] handgun bans. See *Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 499, 470 N.E.2d 266, 273, 83 Ill. Dec. 308 (1984)* (upholding a handgun ban because the arms right is merely a right "to possess some form of weapon suitable for self-defense or recreation"); *Cleveland v. Turner, No. 36126,1977 Ohio App. LEXIS 9391, 1977 WL 201393, *5 (Ohio Ct. App., Aug. 4, 1977)* (handgun ban "does not absolutely interfere with the right of the people to bear arms, but rather proscribes possession of a specifically defined category of handguns"); *State v. Bolin 378 S. C. 96, 99, 662 S. E. 2d 38, 39 (2008)* (ban on handgun possession by persons under 21 did not infringe arms right because they can "posses[s] other types of guns"). Thus, the majority's decision to incorporate the private self-defense right recognized in *Heller* [**1022] threatens to alter state regulatory regimes, at least as they pertain to handguns.

Third, the plurality correctly points out that *only a few* state courts, a "paucity" of state courts, have specifically upheld handgun bans. *Ante,* at 39. But which state courts have struck them down? The absence of supporting information does not help the majority find support. Cf. *United States v. Wells, 519 U.S. 482, 496, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997)* (noting [***349] that it is "treacherous to find in congressional silence alone the adoption of a controlling rule of law" (internal quotation marks omitted)). Silence does not show or tend to show a consensus that a private self-defense right (strong enough to strike down a handgun ban) is "deeply rooted in this Nation's history and tradition."

* * *

In sum, the Framers did not write the *Second Amendment* in order to protect a private right of armed self-defense. There has been, and is, no consensus that the right is, or was, "fundamental." No broader constitutional interest or principle supports legal treatment of that right as fundamental. To the contrary, broader constitutional concerns of an institutional nature argue strongly against that treatment.

Moreover, nothing in 18th-, 19th-, 20th-, or 21st-century history shows a consensus that the right to private armed self-defense, as described in *Heller*, is "deeply rooted in this Nation's history or tradition" or is otherwise "fundamental." Indeed, incorporating the right recognized in *Heller* may change the law in many of the 50 States. Read in the majority's favor, the historical evidence is at most ambiguous. And, in the absence of any other support [***350] for its conclusion, ambiguous history cannot show that the *Fourteenth Amendment* incorporates a private right of self-defense against the States.

With respect, I dissent.

APPENDIX

Sources Supporting Data in Part II-B

Popular Consensus

Please see the following sources to support the paragraph on popular opinion on pages 9-10:

> [*3137] . Briefs filed in this case that argue against incorporation include: Brief for United States Conference of Mayors as *Amicus Curiae* 1, 17-33 (organization representing "all United States

cities with populations of 30,000 or more"); Brief for American Cities et al. as *Amici Curiae* 1-3 (brief filed on behalf of many cities, *e.g.*, Philadelphia, Seattle, San Francisco, Oakland, Cleveland); Brief for Representative Carolyn McCarthy et al. as *Amici Curiae* 5-10; Brief for State of Illinois et al. as *Amici Curiae* 7-35.

. Wlkinson, Of Guns, Abortions, and the Unraveling Rule of Law, *95 Va. L. Rev. 253, 301 (2009)* (discussing divided public opinion over the correct level of gun control).

Data on Gun Violence

Please see the following sources to support the sentences concerning gun violence on page 13:

. Dept. of Justice, Bureau of Justice Statistics, M. Zawitz & K. [**1023] Strom, Firearm Injury [***351] and Death from Crime, 1993-1997, p. 2 (Oct. 2000) (over 60,000 deaths and injuries caused by firearms each year).

. Campbell, et al., Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study, 93 Am. J. of Pub. Health 1089, 1092 (2003) (noting that an abusive partner's access to a firearm increases the risk of homicide eightfold for women in physically abusive relationship).

. American Academy of Pediatrics, Firearm-Related Injuries Affecting the Pediatric Population, 105 Pediatrics 888 (2000) (noting that in 1997 "firearm-related deaths accounted for 22.5% of all injury deaths" for individuals between 1 and 19).

. Dept. of Justice, Federal Bureau of Investigation, Law Enforcement Officers Killed & Assaulted, 2006, (Table) 27 (noting that firearms killed 93% of the 562 law enforcement officers feloniously killed in the line of duty between 1997 and 2006), online at http://www.fbi.gov/ucr/killed/2006/ table27.html.

. Dept. of Justice, Bureau of Justice Statistics, D. Duhart, Urban, Suburban, and Rural Victimization, 1993-1998, pp. 1, 9 (Oct. 2000) (those who live in urban areas particularly at risk of firearm violence).

. Wintemute, The Future of Firearm [***352] Violence Prevention, 281 JAMA 475 (1999) ("half of all homicides occurred in 63 cities with 16% of the nation's population").

Data on the Effectiveness of Regulation

Please see the following sources to support the sentences concerning the effectiveness of regulation on page 13:

. See Brief for Professors of Criminal Justice as *Amici Curiae* 13 (noting that Chicago's handgun ban saved several hundred lives, perhaps close to 1,000, since it was enacted in 1983).

. Brief for Association of Prosecuting Attorneys et al. as *Amici Curiae* 13-16, 20 (arguing that stringent gun regulations "can help protect police officers operating on the front lines against gun violence," and have reduced homicide rates in Washington, D. C., and Baltimore).

. Brief for United States Conference of Mayors as *Amici Curiae* 4-13 (arguing that gun regulations have helped to lower New York's crime and homicide rates).

[*3138] *Data on Handguns in the Home*

Please see the following sources referenced in the sentences discussing studies concerning handguns *in the home* on pages 13-14:

. Brief for Organizations Committed to Protecting the Public's Health, Safety, and Well-Being as *Amici Curiae* in Support of Respondents 13-16 (discussing [***353] studies that show handgun ownership in the home is associated with increased risk of homicide).

. Wiebe, Firearms in US Homes as a Risk Factor for Unintentional Gunshot Fatality, 35 Accident Analysis and Prevention 711, 713-714 (2003) (showing that those who die in firearms accidents are nearly four times more likely than average to have a gun in their home).

Kellerman et al., Suicide in the Home in Relation to Gun Ownership, [**1024] 327 New England J. Medicine 467, 470 (1992) (demonstrating that "homes with one or more handguns were associated with a risk of suicide almost twice as high as that in homes containing only long guns").

Data on Regional Views and Conditions

Please see the following sources referenced in the section on the diversity of regional views and conditions on page 16:

. Okoro, et al., Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings From the Behavioral Risk Factor Surveillance System, 2002, 116 Pediatrics 370, 372 (2005) (presenting data on firearm ownership by State).

. *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637* (BREYER, J., dissenting) (slip op., at 19-20) (discussing various sources showing that gun violence varies by state, [***354] including Wintemute, The Future of Firearm Violence Prevention, 281 JAMA 475 (1999)).

. *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637* (BREYER, J., dissenting) (slip op., at 19-20) (citing Branas, Nance, Elliott, Richmond, & Schwab, Urban-Rural Shifts in Intentional Firearm Death, 94 Am. J. Public Health 1750, 1752 (2004)) (discussing the fact that urban centers face significantly greater levels of firearm crime and homicide, while rural communities have proportionately greater problems with non-homicide gun deaths, such as suicides and accidents).

. Dept. of Justice, Federal Bureau of Investigation, 2008 Crime in the United States, tbl. 6 (noting that murder rate is 40 times higher in New Orleans than it is in Lincoln, Nebraska).

EXHIBIT “16”

LEXSEE 181 KAN. 870

State of Kansas, ex rel. Donald E. Martin, County Attorney of Wyandotte County, Kansas, Plaintiff, v. The City of Kansas City, Kansas, a Municipal Corporation; Paul F. Mitchum, Mayor-Commissioner; Earl B. Swarner, Commissioner of Finance, Health and Public Property; Joseph P. Regan, Commissioner of Boulevards, Parks and Streets; and Quindaro Township, Wyandotte County, Kansas, a body politic and corporate, Defendants

No. 40,292

Supreme Court of Kansas

181 Kan. 870*; *317 P.2d 806*; *1957 Kan. LEXIS 443

November 9, 1957, Opinion Filed

PRIOR HISTORY: [***1] Original proceeding in quo warranto.

DISPOSITION: Judgment for plaintiff.

SYLLABUS

SYLLABUS BY THE COURT

1. Municipal Corporations -- *Annexation -- Functions of Court and Legislature.* The advisability of enlarging the territorial limits of a city is a legislative function which cannot be delegated to a court, and if an ordinance annexing territory is attacked, the court's duty is only to determine whether under the facts the city has statutory authority to enact the ordinance.

2. Municipal Corporations -- *Extent of Granted Powers.* Cities are creations of the legislature and can exercise only the power conferred by law; they take no power by implication and the only power they acquire in addition to that expressly granted is that necessary to make effective the power expressly conferred.

3. Municipal Corporations -- *"Platted Land."* "Platted land," as the term is used in G. S. 1955 Supp., 13-1602a, is land subdivided into lots and blocks.

4. Municipal Corporations -- *"Block."* The word "block," as used in 13-1602a, ordinarily refers to a space rectangular in shape, enclosed by streets and used or intended to be used for building purposes.

5. Words and [***2] Phrases -- *"Words Defined."* As used in 13-1602a, the word "within" is usually defined as being "inside the limits of," and the word "mainly" is defined as "principally," "chiefly," or "in the main."

6. Municipal Corporation -- *Annexation of Unplatted Land -- Requirements.* Where annexation of unplatted land is attempted under 13-1602a, more than one-half of the perimeter of the unplatted land sought to be annexed must have a common boundary with the city.

7. Municipal Corporation -- *Annexation of Unplatted Land -- Nature of Requirement.* 13-1602a imposes a geographical requirement, rather than an economic and sociological one.

8. Courts -- *Judicial Legislation.* Courts should not judicially legislate so as to broaden the plain letter of the statute.

COUNSEL: *Arthur J. Stanley, Jr.,* of Kansas City, argued the cause, and *Donald E. Martin,* of Kansas City, county attorney, and *Newell George,* of Kansas City, assistant county attorney, and *Leonard O. Thomas,* of Kansas City, were with him on the briefs for the plaintiff.

J. W. Mahoney, of Kansas City, argued the cause, and *Charles W. Brenneisen, David W. Carson, Joseph T. Carey* and *Francis* [***3] *J. Donnelly,* all of Kansas City, appeared with him on the briefs for defendant city of Kansas City.

JUDGES: The opinion of the court was delivered by Wertz, J. Robb, J. dissenting. Fatzer, J., concurs in the foregoing dissenting opinion. Hall, J., dissenting. Fatzer, J., concurs in the foregoing dissent.

OPINION BY: WERTZ

OPINION

[*871] [**808] This is a proceeding in the nature of quo warranto brought in the name of the state [**809] of Kansas on relation of the county attorney of Wyandotte county against the city of Kansas City, a municipal corporation, and the mayor and city commissioners thereof, to question the validity of city ordinance No. 40,220, whereby the citysought to annex a tract of land within Quindaro township. This tract consists of approximately 2300 acres adjacent to the city and is generally referred to as Fairfax Industrial District.

This court appointed Mr. Milton Zacharias of Wichita as commissioner to hear the evidence. The commissioner, in his advisory capacity (*State, ex rel., v. Zale Jewelry Co., 179 Kan. 628, 298 P. 2d 283*), made findings of fact and conclusions of law and declared that the ordinance in question was invalid and that defendants [***4] (hereinafter referred to as the city or defendant city) should be ousted of all authority in the Fairfax area.

[*872] The facts, as found by the commissioner, are largely undisputed. Kansas City is a city of the first class with a population of less than 165,000. The Fairfax Industrial District sought to be annexed consists of approximately 2300 acres of land in Wyandotte county, situated between the northeast boundary line of the city and the Missouri river. Of the district's total perimeter of 40,790 feet, 16,040 feet form a common boundary with Kansas City. A small portion of the boundary adjoins Quindaro township in Wyandotte county, while the remainder of the perimeter is formed by the Missouri river which bends around the district. To visualize the situation more clearly, reference is made to a drawing of the entire district in relation to the city, found in *State, ex rel., v. City of Kansas City, 169 Kan. 702, 222 P. 2d 714.*

The district is an urban area with restrictive provisions in the warranty deeds granted by its developers limiting use of the land to manufacturing plants, warehouses and other types of businesses requiring railroad facilities. All but a [***5] hundred acres of the district has been sold to industrial firms and developed. Many of the employees of the industries located in Fairfax live in Kansas City. Streets in the district are constructed and connect generally to the public streets of Kansas City, with the exception of a connection across the Fairfax bridge to Platte county, Missouri. Kansas City has constructed various approaches to the district's roads. The district has its own sewers and dikes, and municipally owned utilities in Kansas City sell electricity and water to the Fairfax industries. Quindaro township and the industries within the district provide fire protection, although the Kansas City fire department has supplemented this service.

On these facts the commissioner concluded that there were substantial economic and sociological ties between the Fairfax area and Kansas City, and that "The existence of the district and the recognition thereof by the city have been mutually advantageous to both."

On June 2, 1925, a purported plat of the Fairfax Drainage District, signed by representatives of the Kansas City Industrial Land Company, early developers of the industrial district, was filed with the office of [***6] the register of deeds of Wyandotte county. The plat, expressly filed for record "for taxation purposes," embraced 1282 acres of the 2300 acres of the industrial district. It indicated the ownership of various parcels of land but did not describe the property [*873] by blocks and lots. Conveyances within the industrial district, both before and after filing of this plat, were by metes and bounds and the land was carried on the county clerk's books by tract numbers, not by block and lot numbers. Ordinance No. 40,220, here in question, sought to incorporate the area by reference to metes and bounds, rather than by description of a subdivision platted into blocks and lots.

The city's attempt to annex a portion of the industrial district in ordinance No. 35,841, enacted April 4, 1949, was struck down by this court in *State, ex rel., v. City of Kansas City, supra.*

The statutory authority here invoked is found in G. S. 1949, 13-1602 and 13-1602a, and G. S. 1955 Supp., 13-1602a. The provisions of these statutes applicable here are [**810] identical and, in effect, set forth requirements which must be met by a city for four types of annexation. G. S. 1955 Supp., 13-1602a [***7] provides:

[1] "Whenever any land adjoining or touching the limits of any city has been subdivided into blocks and lots, or [2] whenever any unplatted piece of land lies within (or mainly within) any city, or [3] any tract not exceeding twenty acres is so situated that two-thirds of any line or boundary thereof lies upon or touches the boundary line of such city, said lands, platted or unplatted, may be added to, taken into and made a part of such city by ordinance duly passed . . . [4] In adding territory to any city, if it shall become necessary for the purpose of making the boundary line straight or harmonious, a portion of a piece of land may be taken into such city, so

long as such portion of the piece taken in does not exceed twenty acres . . ."

The commissioner concluded that the statute contained four limited grants of authority and that the city failed to meet the requirements of any of them. He found that the purported plat, discussed *supra,* was not a subdivision into blocks and lots for purposes of applying the first section of the statute. He concluded that the area sought to be annexed was not within or mainly within Kansas City within the meaning of the [***8] statute and that the statutory requirements were in geographical terms and precluded consideration of economic and sociological factors. He noted that neither of the last two sections quoted, *supra,* was applicable, inasmuch as the area sought to be annexed was larger than twenty acres and was not sought for the purpose of making the city's boundary straight or harmonious. Finally, he concluded that the denial of the writ of quo warranto on grounds of hardship and inequity was not justified.

Following the announcement of the commissioner's report, plaintiff filed motions to confirm these findings and for judgment of [*874] ouster. Defendant city filed its motion to modify certain findings of fact and conclusions of law and for additional findings, as well as a motion for a new trial. The commissioner, upon hearing the motions, sustained plaintiff's motion for judgment and overruled defendant's motions, filing his report, together with transcript of the evidence and the exhibits, with this court. The case was regularly set for argument and was heard upon the briefs and oral arguments of the parties.

In this appeal, we are confronted with the construction and interpretation [***9] of the following two provisions of G. S. 1955 Supp., 13-1602a: [1] "Whenever any land adjoining or touching the limits of any city has been subdivided into blocks and lots, or [2] whenever any unplatted piece of land lies within (or mainly within) any city, . . . said lands . . . may be . . . taken into . . . such city by ordinance duly passed."

At the outset, with relation to contentions later considered, it may be stated that the advisability of enlarging the territorial limits of the city is a legislative function which cannot be delegated to the court and if an ordinance annexing territory is attacked, the court's duty is only to determine whether under the facts the city has statutory authority to enact the ordinance. (*Ruland v. City of Augusta, 120 Kan. 42, 242 Pac. 456*; *State, ex rel., v. City of Topeka, 175 Kan. 488, 264 P. 2d 901*; *State, ex rel., v. Kansas City, 122 Kan. 311, 252 Pac. 714.*)

Cities are creations of the legislature and can exercise only the powers conferred by law; they take no power by implication and the only powers they acquire in addition to those expressly granted are those necessary to make effective the power expressly conferred. ([***10] *State, ex rel., v. City of Topeka, supra*; *State, ex rel., v. City of Topeka, 176 Kan. 240, 270 P. 2d 270*; *Kansas Power & Light Co. v. City of Great Bend, 172 Kan. 126, 238 P. 2d 544.*)

[**811] Defendant city contends that a part of the territory sought to be annexed was subdivided into blocks and lots within the meaning of the statute. Plaintiff contends that the purported plat did not meet the statutory qualifications.

It is noted that the statute appears to define platted lands as land subdivided into "blocks and lots." Whether the Fairfax Industrial District or any part was so subdivided is a crucial question when determining the validity of this plat. The facts reveal that the proffered plat is not a complete representation of the industrial [*875] district but covers only some 1282 acres of the Fairfax Drainage District. The plat was never used for conveyance purposes. The ordinance did not attempt to annex the property as a subdivision. Transfers of property were always made by metes and bounds description. The plat was filed in 1925 and its use was specifically limited to facilitating description of acreage for taxation purposes. It discloses four [***11] roads within the entire district. The plat does not show blocks, streets and alleys which conform to those of adjoining Kansas City. It was not filed without reservation. It shows that the Kansas City Industrial Land Company did not dedicate for public use any streets, alleys or public highways, except as indicated thereon. Other forms of way were private property and were held by the company for its own use. It cannot be said that the plat complies with the provisions of G. S. 1949, 13-1413 in relation to platting and subdividing a tract of land. It further appears from the plat that there were embraced therein some fifteen tracts of land of assorted shapes which ranged in size from one to 161.38 acres and some of which were not bound by any road or street. The plat discloses no lots or blocks but only tracts by number.

We have interpreted the word "block" to mean a space in a city usually rectangular in shape, enclosed by streets and used or intended to be used for building purposes. While blocks do not have to be any particular size or shape, there are certain standards to which a lot or block must in some measure conform. It cannot be said that the tracts of the size, [***12] shape and area disclosed on the purported plat could be construed as "blocks." Courts apply to words the definitions already given them by common usage. According to all dictionaries and the popular understanding everywhere, a "block" is a portion of a city surrounded by streets. In common practice, city plats are made to conform with this understanding and the legislature had in mind blocks so constituted and not tracts arbitrarily designated as

such by the donor of a plat. (*Bowlus v. Iola, 82 Kan. 774, 109 Pac. 405*; *McGrew v. Kansas City, 64 Kan. 61, 67 Pac. 438.*) For a compilation of cases on this subject, see *Berndt v. City of Ottawa, 179 Kan. 749, 298 P. 2d 262.*

We agree with our commissioner that the area sought to be annexed had not been subdivided into lots and blocks within the meaning of the statute in question.

Next, it must be decided if this unplatted land is "within or mainly within" the city so as to be annexable. There has been [*876] little litigation on this point, but the context of the statute indicates that "within" must be equivalent to "surrounded by" the city. It would be natural, for example, to provide for annexation where the city [***13] has grown around unannexed unplatted lands.

The word "within" has been defined as "being inside the limits of." (Ballentine's Law Dictionary, 2nd Ed., p. 1367; 97 C. J. S. Within, p. 330.) The word "mainly" has been defined as "principally," "chiefly," "in the main." (38 C. J. Mainly, p. 334; 54 C. J. S. Mainly, p. 897.) If "within" means surrounded, "mainly within" a city would mean that a common perimeter of more than fifty per cent was present. To impute any other meaning would obliterate any distinction between the test for annexing platted (such as adjoining or touching) and unplatted lands. Unquestionably, the legislature intended a distinction.

As we have discussed the statute, physical connection is the test of what is [**812] "within or mainly within" a city. In the instant case, only forty per cent of Fairfax's total perimeter adjoins defendant city's boundary. Since the city cannot grow into the Missouri river and surround the district any farther, it contends (1) that the Missouri river should be counted as city boundary, or at least (2) that the city has surrounded Fairfax Industrial District as much as possible and thus Fairfax is "within or mainly within" the [***14] city. We cannot agree with either contention. It must be presumed that the legislature was completely aware of this situation and chose to make no exceptions to the plain terms of the statute. This court is not justified in adding additional words and, as a consequence, giving a new meaning to the statute. Since the legislature imposed a requirement which must read in strictly mathematical terms and since it made no exceptions, this court would be usurping legislative functions if it allowed an exception to be carved out of the statute because of the peculiar geographical situation involved in this case.

Our cases dealing with unplatted lands assume that more than one-half of the perimeter of the unplatted land sought to be annexed must have a common boundary with the city. (See *State, ex rel., v. City of Atchison, 92 Kan. 431, 140 Pac. 873*; *State, ex rel., v. City of Hutchinson, 109 Kan. 484, 207 Pac. 440*; *State, ex rel., v. Kansas City, 122 Kan. 311, 252 Pac. 714.*)

Several arguments may be made to show that the statute imposes a geographical requirement, rather than an economic and sociological [*877] one. G. S. 1949, 12-501, *et seq.* provides a method [***15] for annexation of adjacent land by city petition to the board of county commissioners which may grant the petition if it finds that annexation is advisable. It is clear that in determining advisability, factors of economic interaction and mutual benefit must be considered. Where the legislature intended such factors to be considered, it declared this intention specifically. In 13-1602a, it indicated no such purpose. Also, the holding of this court in *State, ex rel., v. City of Topeka, 172 Kan. 745, 243 P. 2d 218*, that a city of the first class with a commission form of government may annex under *either* 13-1602a *or* 12-501, *et seq.* indicates that 13-1602a does not supersede 12-501, *et seq.* and in effect provides different and alternative requirements.

Furthermore, use of an economic and sociological test would bring the court into the realm of deciding questions of the advisability or prudence of the extension of a city's boundaries, a function which this court has expressly declared to be legislative in nature. (*Ruland v. City of Augusta, supra.*) The terms of 13-1602a are clear and definite. They should not and cannot be enlarged or extended by this court [***16] with the aid of inferences, implication and strained interpretations. The language of the statute cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purposes for which the statute was enacted. The policy of legislative enactment is for the legislature and not for the courts. (*State v. One Bally Coney Island No. 21011 Gaming Table, 174 Kan. 757, 760, 258 P. 2d 225.*)

We agree with our commissioner that the area sought to be annexed does not lie "within or mainly within" the city as contemplated by 13-1602a.

It is further urged by the city that the court should deny in its discretion the writ of quo warranto on the ground that it is inequitable and unjust, that a failure to so deny would work a hardship on the city. This same contention was made in the case of *State, ex rel., v. City of Kansas City, 169 Kan. 702, 717, 222 P. 2d 714*, wherein we said:

"It is true the court has a measure of discretion in quo warranto proceedings. (*See, State, ex rel., v. Allen County Comm'rs, 143 Kan. 898, 57 P. 2d 450*, syl. 3, and the cases collected at page 902; also, *Gas Service Co. v. Consolidated Gas Utilities Corp., 145 Kan.* [***17] *423, 65 P. 2d 584*; *State, ex rel.,* [**813] *v. Grenola Rural High School Dist., 157 Kan. 614, 142 P. 2d 695*,

and cases collected in the American Digest System, Quo Warranto, Key No. 6.) This is a judicial discretion. [*878] It is not to be used without reason and does not authorize a court to ignore a valid applicable statute which has been promptly invoked."

In the instant case timely action was taken to question the validity of the ordinance and it would be inequitable to deny the writ under the circumstances of this case. From an examination of the entire record, we are of the opinion that the defendant city had no authority under the statute (G. S. 1955 Supp., 13-1602a) to enact the ordinance. As a result, judgment must be rendered for plaintiff, holding the ordinance in question to be invalid.

It is so ordered.

DISSENT BY: ROBB; HALL

DISSENT

Robb, J. (dissenting):

I cannot agree with the majority opinion on the proposition that this court would have to resort to *legislating* in order to rule otherwise than it is doing in this case. I think the legislature was trying to refrain from being too specific and it desired to leave the courts some discretion in determining [***18] the equities of a particular situation. When this court adopts a standard of any kind in an effort to interpret legislative intent, it is, in truth, *legislating* -- under the rule of the majority opinion herein. In view of this theory, I am unable to see how the court can adopt so arbitrary a standard of computation as to say, in effect, that the words *"within (or mainly within)"* mean that the common boundary of a city and the boundary of the land to be added must constitute more than half the perimeter of the land sought to be annexed. That, in my opinion, is *legislating* just as much as any other interpretation of the legislative intent could be.

Keeping in mind what I think is meant by the legislative intent, I approach the question by considering the previous statutes on this subject.

In G. S. 1889, Volume 1, Chapter 18, Article 2, (552) Extend limits, § 8, we find the following:

"No unplatted territory of over five acres shall be taken into said city against the protest of the owner thereof, unless the same is *circumscribed* by platted territory that is taken into said city." (p. 199.) (My emphasis.)

In 1903 the legislature passed the following (G. S. 1905, [***19] Chapter 18, Article 2, § 741, Extending limits, § 9):

". . . or whenever any unplatted piece of land lies *within, or mainly within,* any city . . . said lands . . . may be added to, taken into and made a part of such city by ordinance duly passed." (p. 163.) (My emphasis.)

[*879] Then the 1907 legislature passed the following (G. S. 1909, Chapter 17, Article 21, § 1220, Annexing territory, § 353):

". . . or whenever any unplatted piece of land lies *within (or mainly within)* any city . . . said lands . . . may be added to, taken into and made a part of such city by ordinance duly passed." (p. 288.) (My emphasis.)

The above provision of the statute remains the same to this day (G. S. 1955 Supp. 13-1602a), as quoted in the majority opinion.

The term "circumscribed," as used in the old law, had and continues to have a definite meaning which is accepted and understood by everyone. When something is "circumscribed," it is entirely surrounded. The legislature did not continue the use of that word, which had such a connotation of definiteness, but instead substituted the word "within" whereby it must have intended something with more flexibility in its meaning than the [***20] word "circumscribed" had. The lawmakers did not stop there but also added "(*or mainly within*)" to be sure that the terminology of the statute had enough flexibility to leave something to the discretion of a court which might be called upon to determine what the legislature intended by this part of the statute. It is apparent the legislature did [**814] not intend to use "circumscribed" nor convey that meaning to the statute and to my way of interpreting the majority opinion, it says "within" means "circumscribed" and "mainly within" means "over 50% circumscribed."

I have not overlooked the use of *commas* instead of parentheses before and after the term "or mainly within" in the intervening statute (G. S. 1905, *supra*) but that does not affect my opinion in the matter. The legislature, it seems to me, intended and expected the courts to exercise great discretion in determining the applicability of this statute and it must be remembered that *all the elements* of this statute, as well as other pertinent statutes, are to be considered in arriving at that determination.

Cities are creatures of the legislature and can grow only by legislative fiat, as interpreted by [***21] the courts. For authorities and a more thorough discussion of the powers of courts to interpret legislation and to determine the legislative intent, see 5 Hatcher's Kansas Digest, rev. ed., Statutes, §§ 70, 71, 72, 73, 74, 76, 77, 89; 9 West's Kansas Digest, Statutes, §§ 174, 176, 179, 181, 183, 184, 185, 187, 190, 199, 205, 206, 212.

[*880] I can only conclude from the above authorities and my own interpretation of the statute that the majority opinion places too strict an interpretation on the

statue in question. The Fairfax Industrial District is "*mainly within*" the city of Kansas City, Kansas, and the city had the power, under G. S. 1955 Supp 13-1602a to pass the ordinance that it did and I would enter judgment in favor of defendants for costs.

Hall, J., (dissenting):

I am unable to concur in the opinion of the majority that the Fairfax Industrial District does not lie "within or mainly within" the city of Kansas City. I believe that it does and that ordinance 40,220 is valid as a proper exercise of the city's authority to annex under G. S. 1955 Supp., 13-1602a.

I agree with paragraphs 1, 2, and 8 of the Syllabus of the opinion that the advisability of enlarging [***22] the territorial limits of the city, and providing therefor, is a legislative function which cannot be delegated to a court; that cities are creatures of the legislature and can exercise only the power conferred by law; and that courts should not judicially legislate so as to broaden the plain letter of a statute.

I disagree with the result of the majority opinion because its interpretations of the annexation statute in the case at bar (13-1602a) are not a proper application of these rules of law.

In determining whether or not the Fairfax Industrial District had been subdivided into "blocks and lots" so as to come within the statute, the majority opinion applies the test stated in Syllabus 4 that the word "block" as used in 13-1602a ordinarily refers to a space rectangular in shape, enclosed by streets and used or intended to be used for building purposes, citing in support thereof *Bowlus v. Iola, 82 Kan. 774, 109 Pac. 405*; *McGrew v. Kansas City, 64 Kan. 61, 67 Pac. 438*; *Berndt v. City of Ottawa, 179 Kan. 749, 298 P. 2d 262.*

These cases are all interpretations of G. S. 1949, Sections 12-601 and 12-602, otherwise known as the general paving law. These sections provide [***23] that assessments for pavement shall be made on the property to the middle of the "block." In the early interpretations of the word "block" under this statute nothing was said about them being rectangular or used or intended to be used for building. In the Bowlus case, Justice Burch said:

[*881] ". . . According to all the dictionaries and the popular understanding everywhere a block is a portion of a city surrounded by streets. In common practice city plats are made to conform to this understanding, and the legislature had in mind blocks so constituted, and not tracts arbitrarily designated as blocks by the donor of a plat. . . ." (p. 776.)

[**815] In the later cases, particularly *Berndt v. City of Ottawa, supra*, the court defined the word "block" as follows:

"Ordinarily the word 'block' as used in G. S. 1949, 12-601 and 12-602, refers to a space in a city, usually rectangular, enclosed by streets and used or intended for buildings (following *Wilson v. City of Topeka, 168 Kan. 236, 212 P. 2d 218*)."

Syllabus 4 here follows the definition in the Berndt case.

These decisions are neither persuasive nor *stare decisis* of the definition of "lots and blocks" as [***24] the term is used in the annexation statute G. S. 1955 Supp., 13-1602a.

The annexation statute simply provides that whenever any land adjoining or touching the limits of any city has been subdivided into "blocks and lots" it may be annexed. The standards of the above cases are impractical of application to the statute here. The Bowlus case describes a "block" as a portion of a city surrounded by streets. This is a fair test under the paving assessment law but can hardly apply under the annexation law where the "block" to be annexed is not yet a portion of the city. Likewise, the same impractical result follows under the Berndt definition. The annexation statute says nothing about "blocks" being "rectangular in shape, enclosed by streets and used or intended to be used for building purposes." It is understandable that this kind of a definition may be helpful in the application of the paving law but it is totally beyond the scope and requirements of the annexation statute. Contrary to the position of the majority opinion there is nothing in the statute which requires certain arbitrary standards of common usage to which a "block or lot" must in some measure conform. There is also [***25] no basis whatsoever to place the annexation statute in *pari materia* with the tax statutes G. S. 1949, 79-405, 79-406 and 79-407, under which this plat was allegedly filed, the platting statute G. S. 1949, 13-1413, or for that matter any other statute.

As a matter of fact in these times land is being platted on more esthetic lines than ever before. "Blocks and lots" may be of all sizes, shapes and descriptions. Many "blocks" may be dedicated for parks or recreational areas and may lie in between rows of [*882] houses and not be enclosed by streets or alleys. Are they not to be considered "blocks and lots" within the statute because they fail to comply with an arbitrary standard of common usage?

Section 13-1602a provides in clear and unambiguous language that land adjacent or touching the limits of any city which has been subdivided into "lots and blocks" may be annexed. We should not judicially

change the plain words of the statute by adding descriptive adjectives of limitation such as we have done here.

In the instant case it is doubtful even under more liberal interpretation that the Fairfax Industrial District has been subdivided into "blocks and lots" to come within [***26] the purview of the statute but the law of this case goes far beyond the determination of this fact and as stated in Syllabus 4 is a serious limitation to annexation not intended by the legislature.

In determining whether or not the Fairfax Industrial District is "within or mainly within" the city of Kansas City the majority opinion first defines the meaning of the words "within and mainly within."

The court then states that:

"Our cases dealing with unplatted lands assume that more than one-half of the perimeter of the unplatted land sought to be annexed must have a common boundary with the city. . . ."

citing in support thereof, *State, ex rel., v. City of Atchison, 92 Kan. 431, 140 Pac. 873*; *State, ex rel., v. City of Hutchinson, 109 Kan. 484, 207 Pac. 440*; *State, ex rel., v. Kansas City, 122 Kan. 311, 252 Pac. 714.*

This rule is then applied and inasmuch as less than one-half of the total perimeter of the Fairfax Industrial District lies adjacent to the city the opinion concludes [**816] that the area is not "within or mainly within" the city.

Under the cases cited the assumption that more than one-half of the perimeter of unplatted land must have a common boundary [***27] with the city is unwarranted. These cases turn on other points. In fact the precise question of the meaning of "within or mainly within" has never been decided in this state. This is a case of first impression.

It will be noted that the definitions of the words "mainly" and "within" in the majority opinion are based upon the general references of Ballentine's Law Dictionary, Corpus Juris, and Corpus Juris Secundum. Surprising as it may seem the words really have not been defined in relation to annexation statutes. They are defined in *McGill v. Baumgart, 233 Wis. 86, 288 N. W. 799*, but this [*883] definition adds nothing additional to the definitions in the general reference books.

The point is that in determining the interpretation and application of the words "within and mainly within" this court is not bound by any precedent and has the freedom of decision such a situation implies. The question was raised in *State, ex rel., v. City of Kansas City, 169 Kan. 702, 222 P. 2d 714*, but the court did not decide it.

"Defendant next argues that Fairfax Industrial District is a proper subject of annexation and that it lies within or mostly within the city. The contention [***28] is not important here. The ordinance in question did not attempt to annex Fairfax Industrial District to the city. It attempted to annex only a part of Fairfax Industrial District, the part specifically described in the ordinance. While there was much evidence received by our commissioner pertaining to the Fairfax Industrial District as a whole its only purpose was to show the general situation and the history of the development of the district. These are the only purposes for which such evidence can be considered here. We must necessarily limit our decision to the authority of the city to annex the particular property described in the ordinance, in view of our statute (G. S. 1935, 13-1602) under which the city acted." (p. 717.)

Here again Section 13-1602a provides in clear and unambiguous language that unplatted land lying "within or mainly within" a city may be annexed. We should not judicially substitute the fixed mathematical requirement of "more than one-half the perimeter" for the words "within or mainly within." This too is a limitation on annexation not intended by the legislature.

There is nothing difficult in either the definition or application of the words "within [***29] and mainly within." Under the definitions of the commonly accepted reference books set out in the majority opinion the application must necessarily depend upon the facts and circumstances of the given case. It should not depend alone on a mathematical calculation. Following the rules of law laid down in paragraphs 1, 2, and 8 of the Syllabus this court has a duty to inquire as to the authority of the city to act. Beyond that we should not substitute our judgment on the facts and circumstances for that of the city in the application of the words "within and mainly within" in the absence of a clear abuse of discretion.

We certainly should not require more of cities under this statute than we require in others. The test of "arbitrary, capricious and unreasonable" is an almost universal one in the review of acts of public bodies.

In the instant case the city certainly had authority to act under the statute.

[*884] The Fairfax Industrial District is bounded by the Missouri River which winds around the district on the north and east, by a small portion of Quindaro Township to the west, and the balance by the city.

[**817] Under a total perimeter test as applied by the majority, [***30] the city, of course, does not occupy fifty percent of the total boundary, but there are other facts and circumstances which the city considered

in enacting the ordinance. Most important of all is the fact that the city has reached *its greatest possible surroundment* of the area. The Fairfax Industrial District cannot grow into the river nor can it extend itself into Missouri. The river which forms the state boundary presents a natural and jurisdictional barrier both to the district and to the city. The city actually occupies 24,040 feet of the possible 24,590 feet of non-river boundary. This comes to ninety-six percent. For this and other reasons the city decided the district is "mainly within" the city. Can we say such a judgment is unreasonable and a clear abuse of discretion? I think not.

There is no basis to presume the legislature was aware of this situation and intended that special statutes would be necessary to achieve annexation. The same problem will arise whenever any city attempts to annex land which is contiguous to it and which borders to a state boundary. There is no reasonable ground for presuming that the legislature intended to exclude *any* case involving [***31] unplatted lands from the purview of the statute, or that it intended specifically to exclude a case involving a state boundary.

The situation differs from the one in which the legislature did make special provision for annexation of areas across a county line from a city. There, statutory authority was provided to allow a city to go *beyond* a county boundary and annex land in an adjacent county. Where state boundaries are concerned, the city can never do more than annex *up to* the boundary. No statutory provision could effect a contrary result.

It is more reasonable to presume that the legislature intended the statute to provide for every case involving unplatted lands. Whether or not the legislature contemplated the instant case or cases like it, it is within the accepted scope of the judicial function to apply a general statute to a specific case. In doing so, the court does not legislate.

EXHIBIT “17”

LEXSEE 50 TENN. 165

JAMES ANDREWS v. THE STATE, THE STATE v. FRANK O'TOOLE, AND THE STATE v. ELBERT CUSTER.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF TENNESSEE, JACKSON

50 Tenn. 165; *1871 Tenn. LEXIS 83*; *3 Heisk. 165*

June 7, 1871, Decided

PRIOR HISTORY: [**1] The case of The State v. Andrews, was tried in the Circuit Court of Gibson county, at February Term, 1871, before GID. B. BLACK, J., and upon a conviction, defendant appealed.

O'Toole was indicted in the Circuit Court of Carroll, where, at May Term, 1871, he moved to quash before JAMES D. PORTER, J., on the ground that the Act of 1870, c. 13, was unconstitutional, and because the indictment did not charge that the pistol was a belt pistol, or pocket pistol. The indictment being quashed on both grounds, the District Attorney, J. D. DUNLAP, appealed to this Court.

Custer was indicted in the Circuit Court for Henry county, at September Term, 1870; and at January Term, 1871, J. D. PORTER, J., presiding, defendant submitted, was fined, and ordered to be imprisoned. Thereupon, the District Attorney, DUNLAP, moved that he be required to give sureties to keep the peace, which being refused, he appealed for the State.

DISPOSITION: Reversed and remanded.

HEADNOTES

1. CARRYING ARMS. *Constitution.* The Act of 1870, c. 13, to prohibit the carrying of deadly weapons, is constitutional.

2. CONSTITUTIONAL LAW. *Constitution of U.S. Amendments not restrictions on States.* The Constitution of the United States, Art. 2, of Amendments, declaring the right of the citizen to bear arms, is a restriction alone upon the United States, and has no application to the State Governments.

3. SAME. *Right to bear arms. Common defense.* The right to bear arms for the common defense does not mean the right to bear them ordinarily or commonly, for individual defense, but has reference to the right to bear arms for the defense of the community against invasion or oppression.

4. SAME. *Same. Right to keep and use.* The citizen has, at all times, the right to keep the arms of modern warfare, and to use them in such manner as they may be capable of being used, without annoyance and hurt to others, in order that he may be trained and efficient in their use.

5. SAME. *Same. Same. Regulations of. Arms of warfare.* The right to keep arms of warfare can not be prohibited by the Legislature under the permissive clause of the Constitution of 1870, allowing the Legislature to *regulate* the "*wearing*" of arms. The use of such arms may be restricted as to manner, time or place, due regard being had to the right to keep and bear, for the constitutional purpose, but can not be prohibited.

6. SAME. *Right to prohibit other arms.* The right to keep or bear other arms, not being protected by the Constitution, may be absolutely prohibited.

COUNSEL: ALVIN HAWKINS, for Andrews and O'Toole, insisted that, by Article *2 of the amendments to the Constitution of the United States*, the right to bear arms was protected. Also by Art. 1, s. 26, of the Constitution of 1834. He relied on Aymette [**2] v. The State, 2 Hum., 154; cited the Constitution of 1870, Art. 1, s. 26; insisted that the power to regulate did not involve the power to prohibit, and that this act was a prohibition. That in Aymette's case the arms carried were

not arms of warfare, the wearing of which the Legislature had the power to prohibit; that this is the only point decided in that case--all else is dictum. He insisted that the words relied upon by Judge Green as restrictive, i. e., "for the common defense," could not be of any effect, as the right was guaranteed without any such restriction in the Constitution of the United States; that the necessity was not only to keep them at all times, but to be inured to their use by constantly bearing them about with them; that the power in the Constitution of 1870 to regulate the wearing of arms, implies a right to wear as well as to bear arms, and that this right was subject only to be regulated, not destroyed.

J. N. THOMASON, for Custer, insisted that the indictment was bad, for not showing what sort of pistol was carried. He insisted upon the protection of the Constitution of the United States, and of the State, and that the Legislature had no power over the [**3] arms of civilized warfare, but might prohibit the carrying of other arms.

Attorney General HEISKELL, for the State, insisted that Article *2, of the amendments to the Constitution of the United States* had no application to States; that it was an imputation on the statesmanship of any convention to suppose that they meant to put a constitutional limitation on the power of the people to restrict the privilege (curse) of carrying deadly weapons. Aymett's case negatives this construction, and puts on it a meaning worthy of statesmen, protecting rights of freemen, not of ruffians and cut-throats. To attribute to the Convention of 1870, such an intention, in view of the state of things then existing, would be to impute to them utter incapacity. The Constitution of 1870 contains an express power to regulate the wearing of arms, not to regulate the mode, but the thing, the subject; equivalent to adopt rules concerning, to pass laws relative to. To regulate is not necessarily to permit. Regulations are simply rules. Rules concerning a thing may be mandatory, directory, restrictive or prohibitory--affecting the mode or going to the substance. If they can not prohibit carrying arms, they [**4] may, by regulation, determine what arms may be carried, what shall be proscribed; may declare where they may be carried, and when they may be carried, as well as declare the mode. If weapons of warfare are protected by the Constitution, still they are subject, by the exception, to regulation in respect to times, places and modes. In this act they restrict the time to journeys out of the county, but do not restrict the mode.

The legislative power is the power of the whole people, acting by their representatives. If they choose in that mode, to declare their willingness to part with a portion of their own liberty, in order that by the same law the evil minded may be restrained, who shall say nay? In the exercise of this great power by the people, they are not to be held to have tied their own hands, except where the Constitution makes it clear that they so intended.

The protection of minorities is one object of constitutional provisions. The protection of majorities is committed to the Legislature. They may protect themselves from the diabolical minorities by any act to which they are willing to submit themselves. The courts will not strain the Constitution to restrain legislation, [**5] but in a doubtful case will defer to the legislative judgment.

In the case of Aymette v. The State, Judge Green takes a proper view of the Constitution. In Alabama, about the same time, the same view was taken in the case of *The State v. Reid, 1 Ala., 612.* In each the Constitution is treated as an instrument worthy of statesmen, and construed in the light of History; but in both there are points which will not bear critical examination. These cases strike out the true principle that it is the bearing of arms, not for private broils and purposes of blood, but in defense of a common cause; as citizen soldiers bearing arms for their defense, in common with each other; not commonly; i. e., on ordinary occasions. They looked to history for the occasions when the people met, bearing arms for the common defense; when they extorted from King John the great charter; when they vanquished Charles I; when they dethroned James II. They refer to the laws to restrict carrying arms in certain places, and to certain persons, which gave rise to no complaint, remonstrance or repeal; they refer to laws by which communities and classes were disarmed by discriminating regulations; and such laws were [**6] declared against, but in the very declaration, the right to legislate on the subject, is recognized. It was this great political right that our fathers aimed to protect; not the claims of the assassin and the cut-throat to carry the implements of his trade. They would as soon have protected the burglar's jimmy and skeleton key.

The keeping of arms is protected, but that right is not infringed by this law. The citizen may keep arms in his house, may carry them about his own premises, may buy and carry them home, may take them to have them repaired. This is not carrying them in the sense of the statute. Of a porter carrying a box of pistols in his wheelbarrow or on his shoulder, we would not say he carries arms; of a man carrying the separated parts of a pistol in a basket or bundle, we would not say he carries a pistol. The statute is to have a reasonable construction. "Carry arms" is a military command. To carry arms, or to bear arms, is something different from merely supporting the weight, or removing from place to place.

The clause in the Constitution of 1870 was introduced to avoid controversy over the adverse views in the cases of Simpson and of Aymette, not to imply [**7] anything.

JUDGES: FREEMAN, J., delivered the opinion of the Court, NELSON, J. NICHOLSON, C. J., and DEADERICK, J., concurring. SNEED, J., TURNEY, J., dissenting.

OPINION BY: FREEMAN; NELSON

OPINION

[*170] FREEMAN, J., delivered the opinion of the Court.

The questions presented for our decision in these cases, involve an adjudication of the constitutionality of [*171] the act of the Legislature of Tennessee, passed June 11, 1870, entitled "An act to preserve the peace and prevent homicide."

The first section provides, "that it shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver. Any person guilty of a violation of this section shall be subject to presentment or indictment, and on conviction, shall pay a fine of not less than ten, nor more than fifty dollars, and be imprisoned at the discretion of the court, for a period of not less than thirty days, nor more than six months; and shall give bond in a sum not exceeding one thousand dollars, to keep the peace for the next six months after such conviction."

The second section imposes upon all the peace officers of the State the duty of seeing this act enforced. [**8] The third section makes certain exceptions in favor of officers and policemen, while *bona fide* engaged in their official duties in execution of process, or while searching for, or engaged in arrest of criminals, and in favor of persons *bona fide* assisting officers of the law, and persons on a journey out of their county or State.

These are the leading provisions of this statute, and present the points of attack made upon it in argument at the bar.

It is first insisted, that it is in violation of, and repugnant to the second article of the Amendments to the Constitution of the United States, which is, that "a well regulated militia being necessary to the security of a free state, the right of the people to *keep* and *bear* arms shall not be infringed.

[*172] On the other hand, it is maintained by the Attorney General, that these amendments have no application to the States, and spend their force by limiting the powers of the Federal Government; and are, in their nature, simple restraints imposed by the States upon the government created by them, and therefore we can not look to this article in order to test the validity of the acts in question. Upon the face of [**9] this article, it might have been plausibly insisted that it would have been operative upon, and control the action of the State, as well as of the Federal Government; and this position would apparently be strengthened by the other provision of the Constitution of the United States, Art. 6, s. 2., that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. It will be seen, however, that it is the "Constitution, and laws made in pursuance thereof," that are the supreme law of the land, so that we are to turn to that instrument, and ascertain what, by its fair construction and exposition, was intended to be allowed or prohibited, and to what powers its limitations and restrictions were applicable.

With this view, we examine the question in reference to the proper application of the article of the amendment under consideration.

The case of *Barron* v. *The Mayor and City Council of the City of Baltimore*, 7 Pet. 465, Curtis' ed., presented the question of [**10] the taking of private property, by the corporation [*173] of the city, as it was assumed for public use. It was insisted, in favor of the jurisdiction of the Supreme Court of the United States, to review the decision of the State court, that the case was within and arose under the provision of the Constitutional amendments, Art. 5, prohibiting the taking of private property for public use, without just compensation. That this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. The question was discussed with his usual ability, by Chief Justice Marshall, and he lays down the proposition: "That the Constitution was ordained and established by the people of the United States, for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States formed such a government for the United States as they supposed best adapted to their [**11] situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, necessarily applicable to the government created by the instrument. They are limitations of the power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes." The learned

Judge, after arguing the question at some length, says: "If in every inhibition intended to act on State power, [*174] in the original Constitution, words are employed to express that intent; some strong reason must be shown for departing from this safe and judicious course in framing the amendments, before that departure can be assumed." He then goes on to demonstrate that no such reason existed. He says: "Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been called by the [**12] discontented State, and the required improvements would have been made by itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention."

The Court, therefore, held that the provision of the 5th amendment, declaring that private property shall not be taken for public use without just compensation, was intended solely as a limitation on the power of the Government of the United States, and was not applicable to legislation of the States. See, also, 5 Wall. 479-80, and numerous other cases decided by the Supreme Court of the United States, cited in note to case of *Barron* v. *City of Baltimore*, Curtis' ed., 468.

We need cite no authority to sustain the proposition that, upon a question involving the construction of the Constitution of the United States, or the just power of that government under said Constitution, the [*175] decisions of the United States are binding on this Court, as well as all other courts of the States.

The State Legislature is not, then, limited in its powers on this subject by this [**13] article of the Constitution of the United States; it is a limitation, whatever be its construction and meaning, upon the powers of the other government, ordained and established by the people of the States themselves, or their Conventions or Legislatures.

We come now to the Constitution of the State of Tennessee, and endeavor to see what restrictions or limitations the sovereign people of Tennessee have chosen to place upon themselves, in reference to this subject, for the general good.

First, it may be assumed as almost an axiom in our law, with reference to the Legislatures, or law-making body of the States, that there is no limitation upon their powers, except such as are found either in the Constitution of the United States, or of the State itself. Plenary power in the Legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power, is an exception: Cooley, Const. Lim., 88, 89; *People v. Draper, 15 N.Y. 532.*

We do not, however, hold the power of the Legislature to be supreme for all purposes, when not in terms prohibited by one or the other of these Constitutions. We find limitations upon the powers of State Legislatures, [**14] as clearly defined by fair construction and implication, and as binding, as if expressed in so many words.

The division or separation of the powers of government in our States, between the three departments, [*176] legislative, judicial and executive, involves restraint upon the action of the Legislature, that is imperative, and may be fairly arrived at with sufficient certainty by the application of the principle that it is the Legislature that is the law-making power. The well-settled common law definition of a law is, a rule of *action* prescribed by the law-making power. It must, then, of necessity, (subject to possible exceptions,) be an enactment operative in the future, in so far as it is to be a rule of action prescribed for the people of the State. No enactment of a Legislature can, in the nature of things, reach back, and control or give direction to an act already accomplished. It was complete from the moment of its birth, so to speak, and can not be influenced or affected by another act, subsequent in time.

This view, however, is only incidentally mentioned, as presenting a ground of limitation on the powers of State Legislatures.

The Constitution of Tennessee, [**15] of 1834, Art. 1, s. 24, of the Bill of Rights, is: "That the sure and certain defense of a free people is a well-regulated militia; and as standing armies in time of peace are dangerous to freedom, they ought to be avoided, as far as the circumstances and safety of the community will admit; and that, in all cases, the military shall be kept in strict subordination to the civil authority." Section 25 exempts citizens, except such as are in the army of the United States, or militia in actual service, from punishment by martial law. Then follows section 26, which provides "that the free white men of this State have a right to *keep* and *bear* arms for their common defense."

[*177] Section 24, in the Constitution of 1870, is the same as in the Constitution of 1834.

Section 26 is: "That the *citizens* of this State have a *right* to *keep* and bear arms for *their* common defense. But the Legislature shall have power by law, to regulate the wearing of arms, with a view to *prevent* crime."

What is the fair and legitimate meaning of this clause of the Constitution, and what limitations does it impose on the power of the Legislature to regulate this right? is the question [**16] for our consideration.

What rights are guaranteed by the first clause of this Art. 26, "that the citizens have a right to keep and to bear arms for their common defense?" We may well look at any other clause of the same Constitution, or of the Constitution of the United States, that will serve to throw any light on the meaning of this clause. The first clause of section 24 says, "that the sure defense of a free people is a well-regulated militia." We then turn to Art. *2, of amendments to the Constitution of the United States*, where we find the same principle laid down in this language: "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 abridged." We find that, necessarily, the same rights, and for similar reasons, were being provided for and protected in both the Federal and State Constitutions; in the one, as we have shown, against infringement by the Federal Legislature, and in the other, by the Legislature of the State. What was the object held to be so desirable as to require that its attainment should be guaranteed by being inserted in the fundamental law of [*178] the land? It was the efficiency [**17] of the people as soldiers, when called into actual service for the security of the State, as one end; and in order to this, they were to be allowed to *keep* arms. What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted; and as they are to be kept, evidently with a view that the citizens making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use, in order to attain to this efficiency. The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination to the general ends of civil society; but, as a right, to be maintained in all its fullness.

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man [**18] would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

But farther than this, it must be held, that the right to keep arms, involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in [*179] times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.

Again, in order to arrive at what is meant by this clause of the State Constitution, we must look at the nature of the thing itself, the right to keep which is guaranteed. It is "arms;" that is, such weapons as are properly designated as such, as the term is understood in the popular language of the country, and such as are adapted to the ends indicated above; that is, the efficiency of the citizen as a soldier, when called on to make good "the defence of a free people;" and these arms he may use as a citizen, in all the usual modes to which they are adapted, [**19] and common to the country.

What, then, is he protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms; and that under the Constitution the right to *keep* such arms, can not be *infringed* or *forbidden* by the Legislature. Their *use*, however, to be subordinated to such regulations and limitations as are or may be authorized by the law [*180] of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right.

What limitations, then, may the Legislature impose [**20] on the use of such arms, under the second clause of the 26th section, providing: "But the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime?"

In the case of *Aymette* v. *The State*, 2 Hum. 159, Judge Greene said, that, "the convention, in securing the public political right in question, did not intend to take away from the Legislature all power of regulating the social relations of the citizen upon this subject. It is true, it is somewhat difficult to draw the precise line where legislation must cease, and where the political right begins, but it is *not* difficult to state a case where the right of the Legislature would exist." This was said in reference to the clause of the Constitution of 1834.

The Convention of 1870, knowing that there had been differences of opinion on this question, have conferred on the Legislature in this added clause, the right to regulate the wearing of arms, with a view to prevent crime.

It is insisted by the Attorney General, as we understand his argument, [1] that this clause confers power on the Legislature to prohibit absolutely the wearing of all and every kind of arms, under all [**21] circumstances. [*181] To this we can not give our assent. The power to regulate, does not fairly mean the power to prohibit; on the contrary, to regulate, necessarily involves the existence of the thing or act to be regulated. When applied to conduct or the doing of a thing, it must, of necessity, mean some check upon, or direction given to that conduct or course of action, implying the act being performed, but subject to certain limitations or restraints, either as to manner of doing it, or time, or circumstances under which it is or may be done. Adopt the view of the Attorney General, and the Legislature may, if it chooses, arbitrarily prohibit the carrying all manner of arms, and then, there would be no act of the citizen to regulate.

1 It will be seen, by reference to the argument, that the judge has not in this and the following paragraphs, caught its spirit with his wonted accuracy. And see p. 199 in note.

But the power is given to regulate, with a view to prevent crime. The enactment of the Legislature [**22] on this subject, must be guided by, and restrained to this end, and bear some well defined relation to the *prevention* of crime, or else it is unauthorized by this clause of the Constitution.

It is insisted, however, by the Attorney General, that, if we hold the Legislature has no power to prohibit the wearing of arms absolutely, and hold that the right secured by the Constitution is a private right, and not a public political one, then the citizen may carry them at all times and under all circumstances. This does not follow by any means, as we think.

While the private right to keep and use such weapons as we have indicated as arms, is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the [*182] ordinary mode in which used in the country, and at the usual times and places. Such restrictions are implied upon their use as are thus indicated.

Therefore, a man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them, nor necessary in order to his familiarity with them, and his training and efficiency in [**23] their use. As to arms worn, or which are carried about the person, not being such arms as we have indicated as arms that may be kept and used, the wearing of such arms may be prohibited if the Legislature deems proper, absolutely, at all times, and under all circumstances.

It is insisted by the Attorney General, that the right to keep and bear arms is a political, not a civil right. In this we think he fails to distinguish between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.

It is said by the Attorney General, that the Legislature may prohibit the use of arms common in warfare, but not the use of them in warfare; but the idea of the Constitution is, the keeping and use of such arms as are useful either in warfare, or in preparing the citizen for their use in warfare, by training him as a citizen, [**24] to their use in times of peace. In reference to the second [*183] article of the Amendments to the Constitution of the United States, Mr. Story says, vol. 2, s. 1897: "The importance of this article will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defense of a free country against sudden foreign invasion, domestic insurrection, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up a large military establishment and standing armies in times of peace, both from the enormous expense with which they are attended, and the facile means which they afford to ambitious rulers to subvert the government, or trample upon the rights of the people. The right of the citizen to keep and bear arms, has justly been considered as the palladium of the liberties of the republic, since it offers a strong moral check against usurpation and arbitrary power of rulers; and will in general, even if these are successful in the first instance, enable the people to resist and triumph over them."

We cite this passage as throwing light upon what was intended to be guaranteed to the people of the States, [**25] against the power of the Federal Legislature, and at the same time, as showing clearly what is the meaning of our own Constitution on this subject, as it is evident the State Constitution was intended to guard the same right, and with the same ends in view. So that, the meaning of the one, will give us an understanding of the purpose of the other.

The passage from Story, shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to, and to be exercised and enjoyed [*184] by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.

Mr. Story adds, in this section: "Yet though this truth would seem to be so clear, (the importance of a

militia,) it can not 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 is it practicable," he asks, "to keep the people duly armed without some organization, 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 [**26] protection intended by this clause of our national bill of rights."

We may for a moment, pause to reflect on the fact, that what was once deemed a stable and essential bulwark of freedom, "a well regulated militia," though the clause still remains in our Constitutions, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.

As we understand the able opinion of Judge Green, in the case of *Aymette* v. *State*, 2 Hum. 158, he holds the same general views on this question, which are to be found in this opinion. He says: "As the object for which the right to keep and bear arms is secured is of a general nature, to be exercised by the people in a body for their common defense, so the arms--the right to keep which is secured--are such as are usually employed in civilized warfare, and constitute the ordinary military equipment. If the citizens have these arms [*185] in their hands, they are prepared in the best possible manner, to repel any encroachments upon their rights by those in authority."

He says, on p. 159: "The Legislature, therefore, have [**27] a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defense." And we add, that this right to keep arms, though one secured by the Constitution, with such incidents as we have indicated in this opinion, yet it is no more above regulation for the general good than any other right. The right to hold property is secured by the Constitution, and no man can be deprived of his property "but by the judgment of his peers, or the law of the land." If the citizen is possessed of a horse, under the Constitution it is protected and his right guaranteed, but he could not, by virtue of this guaranteed title, claim that he had the right to take his horse into a church to the disturbance of the people; nor into a public assemblage in the streets of a town or city, if the Legislature chose to prohibit the latter and make it a high misdemeanor.

The principle on which all right to regulate the use in public of these articles of property, is, that no man can so use his own as to violate the rights of others, or of the community of which he is a member.

So we may say, [**28] with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish [*186] him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no wrong to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restrictions on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

We may here refer to the cases of *Bliss* v. *Commonwealth*, 2 Littell, Ky. 90; *State* v. *Reid*, Alabama R., 612, and case of *Nunn* v. *State of Georgia*, 1 Kelly 243, as containing much of interesting and able discussion of these questions; in the two last of which the general line of argument found in this opinion is maintained. The Kentucky opinion takes a different view, with which we can not agree. We have not followed precisely either of these cases, but have laid down our own views on the questions presented, aided, however, greatly [**29] by the reasoning of these enlightened courts.

We hold, then, that the Act of the Legislature in question, so far as it prohibits the citizen "either publicly or privately to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol," is constitutional. As to the pistol designated as a revolver, we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such, and therefore hold this to be a matter to be settled by evidence as to what character of weapon [*187] is included in the designation "revolver." We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon--skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand, consistently with the views herein expressed. It will be seen the statute forbids by its terms, the carrying of the weapon publicly or privately, without regard to time or place, or circumstances, and in effect is an absolute [**30] prohibition against keeping such a weapon, and not a regulation of the use of it. Under this statute, if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired, or return with it, should take it from his room into the street to shoot a rabid dog that threatened his child, he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute. [2]

2 See *Page* v. *State. Post* 198, in note.

In a word, as we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It therefore, in this respect, violates the constitutional right to keep arms, and the incidental right to use them in the ordinary mode of using such arms and is inoperative.

If the Legislature think proper, they may by a proper law regulate the carrying of this weapon publicly, or [*188] abroad, in such a manner as may be deemed most conducive to the public peace, and the protection [**31] and safety of the community from lawless violence. We only hold that, as to this weapon, the prohibition is too broad to be sustained. [3]

3 See Act of 1871, c. 90.

The question as to whether a man can defend himself against an indictment for carrying arms forbidden to be carried by law, by showing that he carried them in self-defense, or in anticipation of an attack of a dangerous character upon his person, is one of some little difficulty. The real question in such case, however, is not the right of self-defense, as seems to be supposed, (for that is conceded by our law to its fullest extent,) but the right to use weapons, or select weapons for such defense, which the law forbids him to keep or carry about his person. If this plea could be allowed as to weapons thus forbidden, it would amount to a denial of the right of the Legislature to prohibit the keeping of such weapons; for, if he may lawfully use them in self-defense, he may certainly provide them, and keep them, for such purpose; and thus the plea of [**32] right of self-defense will draw with it, necessarily, the right to keep and use everything for such purpose, however pernicious to the general interest or peace or quiet of the community. Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; and where certain weapons are forbidden to be kept or used by the law of the land, in order to the prevention [*189] of crime--a great public end--no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or willful desire to use a particular weapon in his particular self-defense. The law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully proscribed by this statute. The object being to banish these weapons from the community by an absolute prohibition for the prevention of crime, no man's particular safety, if such case could exist, ought to be allowed to defeat this end. Mutual sacrifice of individual rights is the bond of all social organizations, and prompt and willing obedience [**33] to all laws passed for the general good, is not only the duty, but the highest interest of every man in the land.

The principle we have laid down is sustained by a well established rule of the law of nations in the conduct of war. While the general rule is, that one belligerent may do his enemy all the injury he can, and for such purpose may lawfully kill him, yet the use of poisoned weapons is forbidden by the law of nations, on the ground that higher ends are thereby subserved, and the rights of sovereign belligerent nations even should be made subordinate to these ends: Vattel Law of Nations, top p. 361. So while the right of self-defense is one at all times to be maintained, yet as to the means used to attain this end, they must be subordinated to the higher claims of the general good of the community.

We admit extreme cases may be put, where the rule may work harshly, but this is the result of all general rules; that they may work harshly sometimes in individual [*190] cases. By our system, however, allowing the Attorney General to enter *nolle prosequi*, with the assent of the Court, there is but little danger of the law being enforced in any such cases to the detriment [**34] of any one; and if such case should occur, an application to Executive clemency may fairly be assumed as the remedy provided by the Constitution to meet all such exigencies.

In the case of *The State* v. *Andrews*, one of the cases now under investigation, it is stated in bill of exceptions, that a "plea of self-defense" was filed, demurred to, and demurrer overruled. We can not notice the action of the court on this question, as the plea is not set out so that we can see its allegations and judge of their merits

It was proposed, however, to prove, "that there was a set of men in the neighborhood of defendant during the time he had carried his pistol, and before, seeking the life of defendant." This testimony was objected to, and objection sustained by the court. We can not see from this statement that the court erred, as the character of the weapon is nowhere shown; and it may have been such a weapon, as we have held above, to have been properly forbidden to be carried at all. If so, then it was no defense to the indictment.

The proof, however, showed that he had been in the habit of carrying a pistol since the war. In such a case, he could not claim that he was really in peril [**35] of life or limb or great bodily harm, so imminent as to present any element of self-defense in justification of his carrying his pistol.

The law of the land gave him ample protection, if he had chosen to seek its aid by authorizing, on proper application, [*191] the arrest of the parties, and sureties to keep the peace, or confinement in prison, to prevent

the threatened injury. No court can assume that the law, in such case, would be powerless to give the needed protection. And we hold, that it is not only the highest duty of all, to submit to the law, and seek its protection, thus doing reverence to its mandates, but that this involves no humiliation, nor element of cowardice. On the contrary, it marks the highest moral courage to do right, notwithstanding passion and pride may urge us to the contrary course. He who subordinates his pride and his passions to the high behests of social duty, has shown himself as possessing the highest attribute of a noble manhood, sacrifice of self and pride, for the public good, in obedience to law.

In this view of the case, the question of what circumstances will justify a party in carrying arms, such as the Constitution permits him to keep, [**36] in legitimate self-defense, is hardly fairly before us. We may say, that the clause of the Constitution authorizing the Legislature to regulate the wearing of arms with a view to prevent crime, could scarcely be construed to authorize the Legislature to prohibit such wearing, where it was clearly shown they were worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm, circumstances essential to make out a case of self-defense. It might well be maintained they were not worn under such circumstances in order to crime, or that such purpose existed, or that the wearing under the circumstances indicated, of a weapon that might lawfully be kept, had any direct tendency to produce [*192] crime. On the contrary, the purpose would be to prevent the commission of crime on the part of another.

If the party is protected in the keeping and use of such arms as we have indicated, only to be restrained by such regulations as may be enacted by the Legislature, with a view to prevent crime, it would seem that the use of such a weapon for defense of the person when in actual peril, the end being a lawful one, ought not, upon any sound principle, [**37] to subject a party to punishment. However, when the Legislature shall enact a law regulating the wearing of weapons constitutionally allowed to be kept and used, as held in this opinion, the question may be presented fairly, and can be decided.

There was a motion to quash the indictment in each one of these cases, which was overruled. The indictment in each case only charges that the parties carried a pistol, without specifying the character of the weapon, whether belt or pocket pistol, or revolver. This was too indefinite a charge on such a statute, however literally it might be construed. There should be such specifications in the indictment as will enable the court to see that the weapon forbidden by the statute has been worn, and to inform the defendant of the character of weapon for the carrying of which he is to be held to answer.

For this error the cases will be reversed; the indictments quashed, and remanded to the Circuit Courts to be further proceeded in.

NICHOLSON, C. J., and DEADERICK, J., concurred in [*193] the general views of the opinion. SNEED, J., dissented from so much of the opinion as questioned the right of the Legislature to prohibit the wearing of arms [**38] of any description, or sought to limit the operation of the act of 1870.

NELSON, J., delivered the following opinion:

Concurring, as I do, in much of the reasoning of the majority of the Court, and believing that the object of the Legislature, in passing the act of 1870, was to promote the public peace, I am, nevertheless, constrained by a sense of duty to observe, that, in my opinion, that statute is in violation of one of the most sacred rights known to the Constitution. Ever since the opinions were promulgated, it has been my deliberate conviction that the exposition of the Constitution by Judge Robert Whyte, in *Simpson* v. *The State*, 5 Yerg. 360, was much more correct than that of Judge Green in *Aymette* v. *The State*, 2 Hum. 155. The expression in the case last named, that the citizens do not need, for the purpose of repelling encroachments upon their rights, "the use of those weapons which are usually employed in private broils, and are efficient only in the hands of the robber and assassin," is, in my view, an unwarrantable aspersion upon the conduct of many honorable men who were well justified in using them in self-defense. *Ibid* [**39] , 158. The provision contained in the declaration of rights in the Constitution of 1834, that "that the free white men of this State have a right to keep and bear arms for their common defense," is not restricted to *public* defense, as held in *Aymette* v. *The State*, 2 Hum. 158. [*194] Had such been the intention, the definite article "the," would have been employed, instead of the personal pronoun "their," which is used in a personal sense, and was intended to convey the idea of a right belonging equally to more than one, general in its nature, and universally applicable to all the citizens. The word "bear" was not used alone in the military sense of carrying arms, but in the popular sense of wearing them in war or in peace. The word "arms," means "instruments or weapons of offense or defense," and is not restricted, by any means, to public warfare.

The declaration of rights, section 26, in the Constitution of 1870, omits the words "free white men," and contains an additional provision, which should be construed in connection with the previous decisions of this court, the conflict in which was well known to the framers of that instrument. After declaring [**40] "that the citizens of this State have a right to keep and to bear arms for their common defense," it is added: "But the

Legislature shall have power, by law, to regulate the *wearing* of arms with a view to prevent crime." The word "bear" was manifestly employed in the Constitution of 1870, to convey the idea of carrying arms either for public or private defense; otherwise, it was unnecessary to add the provision that the Legislature shall have power "to regulate the *wearing* of arms with the view to prevent crime." The habit, or custom, intended to be regulated, was not that of bearing arms fit only to be used in war, and which, from the publicity with which such arms are carried, needed but little, if any, regulation. It was well known to the Convention, that [*195] a very large number of citizens had become accustomed, during the late civil war, to carry pistols and other weapons not ordinarily used in warfare, and had retained this habit after the close of the war, and that dangerous wounds, as well as frequent homicides, were the result of its universal prevalence; and the object of conferring express power to regulate the mode of wearing them, was not to destroy the [**41] right, but so to control it that the Legislature, by declaring that such arms should be worn publicly and not secretly upon the person, might prevent those crimes which are often committed by armed men in taking the lives of their unarmed adversaries. To "regulate" does not mean to destroy, but "to adjust by rule," "to put in good order," to produce uniformity of motion or of action; and, under this provision, there can be no question that, while the Legislature has no power to prohibit the wearing of arms, it has the right to declare that, if worn upon the person, they shall be worn in a public manner. The act of 1870, instead of regulating, *prohibits* the wearing of arms, and is, therefore, in my opinion, unconstitutional and void.

In *Bliss* v. *Commonwealth*, 2 Lit. 90, the statute to prevent persons wearing concealed arms; was held unconstitutional, as infringing the right of the people to bear arms in defense of themselves and the State. See Cooley Const. Lim., 350; *Cockrum v. The State, 24 Tex. 394*. The words "in defense of themselves and the State," are equivalent to the words "for their common defense," and but for the power to regulate, ingrafted [**42] upon the Constitution of 1870, should be interpreted here as they [*196] were in Kentucky: "The words '*rules and regulations*," in the Constitution of the United States, are usually employed in the Constitution in speaking of some particular specified power, which it means to confer on the government, and not, as we have seen, when granting general powers of legislation: as, to make rules for the government and regulation of the land and naval forces; to '*regulate*' commerce; to establish an uniform rule of naturalization; to coin money and '*regulate*' the value thereof. In all these, as in respect to the Territories, the words are used in a restricted sense:' Paschal's Anno. Const., 238; *Scott v. Sandford, 19 How. 393*; 2 Story's Const., 3d ed., 196, 213.

Neither the old nor the new Constitution confers the right to keep, or to bear, or to wear arms, for the purpose of aggression. The right exists only for the purpose of defense; and this is a right which no constitutional provision or legislative enactment can destroy. The right to the enjoyment of life is one of the "inalienable rights" with which the Declaration of Independence declares that all [**43] men are endowed by their Creator. And one of the most classical and elegant of all legal commentators declared, in regard to the great right of self-defense, that the law, in this case, respects the passions of the human mind, and (when external violence is offered to a man himself, or to those to whom he bears a near connection,) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of the law is by no means an adequate remedy for injuries accompanied with [*197] force, since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man, immediately, to oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society:" 3 Black. Com., 34, m. In accordance with this view, I hold that when a man is really and truly endangered by a lawless assault, and the fierceness of the attack is such as to require immediate resistance in order to save his own life, [**44] he may defend himself with *any weapon whatever*, whether seized in the heat of the conflict, or carried for the purpose of self-defense. He is not bound to humiliate or, perchance, to perjure himself, in the slow and often ineffectual process of "swearing the peace," or to encourage the onslaught of his adversary by an acknowledgment of timidity or cowardice. It is deeply to be regretted that any peaceful citizen should be placed in a condition making it necessary for him to carry arms for his own protection, and that a purpose, laudable and honorable in itself, is often perverted by "lewd fellows of the baser sort" to purposes of assassination or revenge. But some of the most important elements in nature, such, for example, as fire and water, may be so misused and perverted. Yet we do not prohibit or destroy their use. We endeavor only to regulate it.

In the purer and better days of the Republic, "a well-regulated militia was regarded as necessary to the security of a free state;" and it was declared in the first amendment to our National Constitution, that "the [*198] right of the people to keep and to bear arms should not be infringed."

So, "by the Anglo-Saxon laws, or [**45] rather by one of the primary and indispensable conditions of political society, every freeholder, if not every freeman, was

bound to defend his country against hostile invasion;" and by the statute of Winchester, 13 Edw. I., every man between the ages of 15 and 60 was to be assessed and sworn to keep armor according to the value of his lands and goods: for 15 pounds and upward in rent, or 40 marks in goods, a hauberk, an iron breast-plate, a sword, a knife and a horse; for smaller property, less extensive [*199] arms. See Hallam's Cons. Hist., 311. These laws were subsequently repealed or modified in the interests of despotic power. And Mr. Tucker, in his notes to Blackstone, says that "whoever examines the forest and game laws in the British Code, will readily perceive that the right of keeping arms is taken away from the people of England." See 1 Sharsw. Black. 143. A jealous concern for public liberty and personal security animated our patriotic ancestors to encourage the use of arms. It was once the policy, too, of our State Government to foster a martial spirit among the people, and to train them to the use of arms, not only for the purpose of [*200] national defense, [**46] but also in cases of necessity, for the defense of their own persons. The tendency now appears to be the other way, and passive obedience and slavish submission to wrong and outrage would seem to be the growing spirit of the times. While "shooting matches" were once encouraged by the Legislature, as a proper method of accustoming the citizens to the use of arms, the timid course of existing legislation is to make the peace warrant the only potent weapon of defense, and to teach the people to "*have peace*" upon any terms, no matter how degrading. *

* NOTE. KNOXVILLE, Nov. 4, 1871.

THOMAS PAGE *v.* THE STATE.

CARRYING ARMS. *Act of* 1870 *construed.* It is not every removal of a pistol or other weapon from place to place, that constitutes a "carrying" within the meaning of the act of 1870, c. 13, which prohibits carrying arms. To constitute the offense, the weapons must be carried as "arms."

Criminal Court, May Term, 1871. M. L. HALL, J., presiding.

PROSSER, for the plaintiff in error, insisted, that under the Constitution the citizen was protected in an unlimited right to carry all kinds of arms without reference to size or quality, and had the right to keep and to bear arms at all times; the Legislature having the right to say how he shall wear them, but not to prohibit. The act of 1870 takes from the citizen the right to familiarize himself with the use of arms of the smaller class, and so infringes the Constitution.

Attorney General HEISKELL, for the State, insisted that carrying weapons carrying arms, means going armed. *To carry*, has many senses; to carry a scar; to carry a tune; to carry a loan. The word is not happily selected; but the objection is not, that it does not bear the exact meaning the Legislature intended to convey, but that it has other meanings, tending to confuse. A man may carry a wheelbarrow load of pistols to a shop; may carry them for repair, as merchandize; may carry in bundles, or boxes, or baskets; may carry pistols hunting, or to a gallery or tree to practice. In none of these cases would he be carrying them in the sense of the law. The law so construed, does not infringe the right to keep arms, or practice with them, or bear them for the common defense. Where a law admits of a construction consistent with the Constitution, it must be so construed: *Bristoe v. Evans, 2 Tenn. 341, 345*; *Bank of State* v. *Cooper*, 2 Yer. 596, 623; *Townsend* v. *Shipp*, Cooke, 294, 301; *L. & N. Railroad Co.* v. *Davidson Co.*, 1 Sneed 637, 671; *Fisher* v. *Dabbs*, 6 Yer. 119, 135.

"Common defense," in the Constitution, has one of two senses. It can not have both. It either means defense as a community, or the individual defense of each man commonly, or on ordinary occasions. Now we know that it was intended to embrace the idea of general defense; it can not, therefore, mean the other, unless it be used in a double sense, in two opposite and distinct senses. The bearing of arms, then, is only protected on the occasions and when used in a manner appropriate to the public defense, as a citizen soldier. To keep for that purpose, necessarily includes the right to keep at all times and under all circumstances; but to bear for that use, means to bear on such occasions, at such times, and in such manner, as may be appropriate to that end. Not to *wear* weapons. It must mean after the fashion of a soldier, not after the manner of a cut-throat.

NICHOLSON, C. J., delivered the opinion of the Court.

Page was indicted for carrying a belt pistol, a pocket and revolver. Upon his trial, on the plea of not guilty, he was convicted, fined and sentenced to imprisonment. He has appealed to this Court. It appears from the evidence in the bill of exceptions, that Page was seen coming from his home along the big road, about a mile distant from his house, carrying in his hand, swinging by his side, a pistol called a revolver, about eight inches long, but that it was not such weapon as is used as a weapon of war. He was not on a journey, nor was he a public officer. No other instance of his carrying a pistol is proven. He approached prosecu-

tor, presented the pistol and threatened to shoot him. Was this such a carrying of a weapon as is prohibited by the act of 1870, c. 13? Shankland, 95. The evidence fully establishes the fact, that the pistol carried by Page was not an arm for war purposes; and therefore, under the ruling of this Court in the case of *Andrews* v. *The State*, decided at Jackson, it was a weapon, the carrying of which the Legislature could constitutionally prohibit. But the question here is, what is the meaning intended by the Legislature to be conveyed by the word "carry"? It will be observed, that the prohibitory clause of the Constitution uses the words, "keep and bear arms," &c. The Legislature has avoided using this language, but has used a word, which, as connected with weapons, conveys the idea of "wearing weapons," or "going armed." When we use the expression, "he carries arms," we mean "he goes armed," or "he wears arms." This is manifestly the sense in which the word was used by the Legislature, and we know of no other single word which could more clearly convey the meaning intended to be conveyed, than the word "carry." In this sense, Page was not only literally carrying a forbidden weapon, but he was "carrying" it, that is, "he was going armed," contrary to the true meaning of the statute.

It will be observed, that the interpretation which we give to the word "carry," meets and carries out the manifest purpose of the Legislature, which was, not only to make criminal the habitual carrying or wearing of dirks, sword-canes, Spanish stilettos, belt or pocket pistols, or revolvers, but, also, to make criminal a single act of wearing or carrying one of these weapons, when it is so worn, or carried, with the intent of thus going armed.

But we are far from understanding the Legislature as intending to make every act of carrying one of these weapons criminal. Under the constitution, every man has a right to own and keep these weapons, nor is this right interferred with by the prohibition against "carrying" them, in the sense in which the Legislature uses the word. To constitute the carrying criminal, the intent with which it is carried must be that of going armed, or being armed, or wearing it for the purpose of being armed. In the case before us, the intent with which Page was carrying his pistol was fully developed. He was carrying it that he might be armed, as was shown by his threatened assault upon the prosecutor. It would probably be difficult to enumerate all the instances in which one of these weapons could be carried innocently, and without criminality. It is sufficient here to say, that, without the intent or purpose of being or going armed, the offense described in this statute can not be committed.

We think the facts proven, in the case before us, bring the plaintiff in error within the offense defined in the statute, and that his conviction was fully warranted by the evidence.

The judgment is affirmed.

[**47] [*201] Regretting, as I do, that the nobler objects of bearing and wearing arms are too often and too horribly perverted, I can not approve legislation which seems to foster and encourage a craven spirit on the part of those who are disposed to obey the laws, and leaves them to the tender mercies of those who set all law at defiance.

I concur in the foregoing dissenting opinion.

TURNEY, J.

EXHIBIT “18”

LEXSEE 69 MD. APP. 377

Erik E. SCHRADER v. STATE of Maryland

No. 240, September Term, 1986

Court of Special Appeals of Maryland

69 Md. App. 377*; *517 A.2d 1139*; *1986 Md. App. LEXIS 430

December 4, 1986

PRIOR HISTORY: [***1] Appeal From The Circuit Court for Montgomery County, Irma S. Raker, Judge.

DISPOSITION: JUDGMENT AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.

COUNSEL: Bernard P. Horn (John V. Long and Long & Long, P.A. on the brief), Bethesda, for appellant.

John S. Bainbridge, Jr., Assistant Attorney General (Stephen H. Sachs, Attorney General, Baltimore, Andrew L. Sonner, State's Attorney for Montgomery County and Constance A. Junghans, Assistant State's Attorney for Montgomery County on the brief, Rockville), for appellee.

JUDGES: Garrity, Bloom, and Karwacki, JJ.

OPINION BY: KARWACKI

OPINION

[*380] [**1141] Erik E. Schrader, the appellant, was convicted at a bench trial in the Circuit Court for Montgomery County (Irma S. Raker, J.) of conspiracy to establish an illegal pyramid promotional scheme in violation of *Md.Code (1957, 1982 Repl.Vol., 1985 Supp.), Article 27, § 233D.* He was sentenced to a one year term of imprisonment, which was suspended, five years of supervised probation, and a fine of $ 10,000 to be paid within 60 days.

The General Assembly enacted Article 27, *§ 233D* by Chapter 507 of the Acts of 1984, which took effect on July 1, 1984. *Section 233D(a)(4)* defines a "pyramid promotional [***2] scheme" as

> any plan or operation by which a participant gives consideration for the opportunity to receive compensation to be derived primarily from any person's introduction of other persons into participation in the plan or operation rather than from the sale of goods, services, or other intangible property by the participant or other persons introduced into the plan or operation.

Subsection (b) states that "[a] person may not establish, operate, advertise, or promote a pyramid promotional scheme." Violation of that prohibition renders a person guilty of a misdemeanor punishable by fine and/or imprisonment. Article 27, *§ 233D(c).*

Pyramiding is a type of multi-level marketing operation which theoretically serves as a method of distributing a company's products to the public. Annot., *54 A.L.R.3d 217, 219 (1973).* Participants in the operation are spread out over various distribution levels through which products are resold until they reach the consumer. *Id.* However, because "one profits merely by being a link in the product distribution chain, the emphasis is on recruiting more investor-distributors rather than on retailing products." Note, [*381] [***3] *Pyramid Schemes: Dare to be Regulated,* 61 Georgetown L.J. 1257, 1259 (1973).

A participant's recruitment of others into the pyramid operation results in creation of that participant's "downline," consisting of those persons recruited by the

participant himself and by the participant's recruits. The downline is created by recruiting a preestablished number of individuals into the first level of the operation, each of whom then recruits an equal number of additional persons. The original participant moves up to the next level of the operation each time the bottom level of recruits in his downline is completed, with the process ideally continuing until the original participant's downline reaches a maximum figure determined by the number of levels in the pyramid. A participant may earn commissions from the sale of products to the distributors within his downline, but commissions are also received from entry fees paid by new recruits into one's downline.

The type of pyramid operation with which *§ 233D* is concerned is one in which a participant's compensation is "derived primarily" from the participant's recruitment of others into the operation rather than from the sale of goods [***4] or services. With that consideration in mind, we now review the evidence in this case.

On February 4, 1985, the Montgomery County Police Department received a complaint concerning C.I. Systems ("CIS"), which was owned and operated by the appellant. Initiating an investigation into the company, Montgomery County Vice and Intelligence Officer John Sheridan called a telephone number obtained from a CIS flyer and heard a recorded message to the effect that "C.I. Systems would act as a consultant for a person that became involved. One could earn $ 300 to $ 700 a month in approximately three months. [**1142] This amount could double every six to nine months." The recording further advised that "[n]o selling was involved, and four to six hours per week is all that it would be necessary to work." Two additional telephone [*382] numbers, one in Virginia and the other in Maryland, were then provided. Officer Sheridan called the Maryland number and heard another recording, this one giving directions to CIS meetings at an office located in Bethesda, Maryland and requesting that callers leave their names and the date of the meeting they would attend. Officer Sheridan gave an undercover [***5] name and stated that he would attend the meeting on February 6, 1985.

On February 6, Officer Sheridan attended a meeting at the address indicated in the second recorded message. Conducting the meeting was one Robert Schaffer, who identified himself as a member of CIS's board of directors. [1] Mr. Schaffer informed those gathered at the meeting that an initial payment of $ 45 could result in earnings of $ 300 to $ 700 a month within 3-6 months and of $ 2,000 a month within 6-12 months, without any selling required. He also advised that Erik Schrader was the founder and head of CIS.

1. Mr. Schaffer was named as an unindicted co-conspirator in the charging document ultimately filed against the appellant.

Eight days later, on February 14, 1985, Officer Sheridan attended a second meeting at the same location. The meeting was again conducted by Robert Schaffer, who this time explained the various recruiting methods used by CIS. Among the methods discussed were flyers, tear-off slips, advertisements in newspapers [***6] and magazines, and the wearing of buttons to prompt inquiries from others. Mr. Schaffer stated that a $ 65 fee was required to join CIS, at which time flyers could be purchased at a special initial rate of $ 25 per 1,000. He then explained in further detail the overall nature of the operation, which involved the recruitment of others into the enterprise at different "levels." [2] According to Officer Sheridan's testimony at the appellant's [*383] trial, recruitment was emphasized as the focus of the operation; selling and the product line were incidental. To the extent products were involved, participants in the programs were generally buyers rather than sellers. [3]

2. These "levels" were the companies or programs which made up the components of the CIS operation. The programs were identified as: the Flyer Program, Morn'n Sun, Success Synergistics, the Silver Letter Program, Yurika Foods, and the VIP Program.

3. Depending on the program, participants were entitled to purchase or, in certain programs, required to purchase such items as cosmetics, silver bars, food products, and diamonds.

[***7] On March 23, 1985, Officer Sheridan attended a third meeting, this one at the CIS home office in Springfield, Virginia. The appellant was introduced at this meeting as the president of CIS. He spoke about a new plan he was introducing that would allow someone, for a payment of $ 475, to go directly into the VIP Program without progressing through the other programs. Again, the explanation of the program indicated that recruitment of others was the primary means by which participants could earn money.

Based on Officer Sheridan's investigation, search warrants were obtained for the CIS offices in Maryland and Virginia. [4] The ensuing searches resulted in the seizure of various records and documents from those offices.

4. The Virginia search warrant was applied for and executed by the police department of Fairfax County, Virginia.

William L. Holmes, a special agent with the Federal Bureau of Investigation, testified for the State at the appellant's trial as "an expert on the examination and interpretation [***8] of records for pyramid schemes." Based on his review of the materials seized from the CIS offices, Agent Holmes gave extensive testimony over two days, outlining the way in which CIS and its connected programs worked. He concluded that the various programs promoted by CIS -- the [**1143] Flyer Program, Morn'n Sun, Success Synergistics, the Silver Letter Program, Yurika Foods, and the VIP Program -- were interrelated parts of the same system.

At the trial judge's request, Agent Holmes presented an overview of the CIS operation. Agent Holmes testified that an individual had to join the Flyer Program in order to [*384] qualify for Morn'n Sun. Once qualified for Morn'n Sun, the participant was to recruit other individuals to participate in that program. In Phase One of Morn'n Sun, a participant recruited three individuals, each of whom then recruited three additional persons, for a total of nine. In the third level of Phase One, those nine individuals each recruited three more persons, who became part of the original participant's downline. This completed Phase One for the original participant, who then advanced to Phase Two of Morn'n Sun, which involved similar multi-level [***9] recruitment. The participant would continue to build his downline by bringing people into successive levels of Phase Two, followed by the same process in Phase Three. The participant received commissions based upon his recruitment of others into certain levels, but Agent Holmes explained that it was necessary to bring over seven million people into the organization in order to gain full commission benefits. With respect to payment of commissions, the trial judge had the following exchange with Agent Holmes:

> THE COURT: So, in your view, the only thing a participant has to do to get money or commissions is to keep bringing people in.
>
> THE WITNESS: That's correct.
>
> THE COURT: He gets more people, he gets more people, and he gets more.
>
> THE WITNESS: That's correct.

Agent Holmes further testified that a participant was required to join Success Synergistics and the Silver Letter Program within six months after entry into the Flyer Program. In return for an initial payment, Success Synergistics and Silver Letter distributed training aids, such as a newsletter and an instructional cassette, which enabled an individual to continue operating in Morn'n Sun. The next [***10] stage of the CIS operation was Yurika Foods, which, according to Agent Holmes, was distinguishable from the other CIS programs in that advancement was based on the volume of food sales rather than on the number of individuals recruited. The final CIS program was the VIP Program, [*385] which was another recruitment operation similar to Morn'n Sun except that VIP involved five phases rather than three and a greater investment by participants.

Agent Holmes, when asked whether his review of the records seized from the CIS offices revealed any evidence that the programs involved the sale of products to anyone other than participants in the program, responded, "No, ma'am, I did not." On the ultimate issue of whether the CIS operation constituted a pyramid promotional scheme, the following colloquy took place:

> [PROSECUTOR]: Agent Holmes, if a pyramid promotional scheme is defined as an operation to which a participant gives consideration or money for the opportunity to receive money or compensation which is derived primarily from introducing other people into the same program, rather than from the sale of goods -- based on that definition, what would your opinion of CI [***11] Systems be?
>
> [AGENT HOLMES]: That all of the designated programs would fit within that category except Yurika Foods.

Moreover, Agent Holmes testified that, in his opinion, even if the various programs were separately owned and operated, CIS would still be a pyramid operation because it was "using those companies to facilitate the down liner system or programs."

In addition to Agent Holmes and Officer Sheridan, the State called one other witness, Richard Retta, who testified about his personal experience as a member of CIS. According to Mr. Retta, the only time a participant received products was when he [**1144] first joined and paid the initial fee of $ 45. [5] Mr. Retta received commissions for getting new recruits to join the company. He was not required to sell [*386] any products. For a fee of $ 50, CIS kept track of Mr. Retta's "down line" of recruits.

> 5. In Mr. Retta's case, he received two seven or eight ounce vials of shampoo. He received no additional products except a magazine subscription when he later joined Success Synergistics. Even that magazine was not really a product so

much as a training manual for persons who joined Success Synergistics.

[***12] After the State rested its case, the appellant moved for judgment of acquittal. In conjunction with that motion, he filed what he titled a "Motion to Declare Maryland Code, Article 27 Sections [sic] 233(D) Unconstitutionally Vague as Applied to this Defendant." The trial court treated the latter motion as a motion to dismiss and denied it. After the motion for judgment of acquittal was also denied, the appellant chose to rest his case without offering any evidence. Following closing arguments, the trial court found the appellant guilty of conspiring with Robert Schaffer to establish an illegal pyramid promotional scheme.

The appellant's contentions on appeal can be reduced to the following:

> I. The trial court erred in denying the appellant's motion seeking to have Article 27, *§ 233D* declared unconstitutionally vague as applied to him.
>
> II. The trial court erred in according the testimony of the State's expert witness any evidentiary value because that testimony was based on documents which were not admitted into evidence for their truth.
>
> III. The evidence was insufficient to support the appellant's conviction.

I.

At the conclusion of the State's case, [***13] the appellant moved for judgment of acquittal and also filed a "Motion to Declare Maryland Code Article 27 Sections [sic] 233(D) Unconstitutionally Vague as Applied to this Defendant." The latter motion was supported by a memorandum of authorities. The trial judge treated the latter motion as one to dismiss the prosecution and excused its untimeliness under Rule 4-252 over the objection of the prosecutor. After considering the written and oral arguments of counsel, the motion was denied. Under these circumstances, we believe the issue has been preserved for our review. *Cf.* [*387] *Vuitch v. State, 10 Md.App. 389, 393-401, 271 A.2d 371 (1970), cert. denied, 261 Md. 729, cert. denied, 404 U.S. 868, 92 S.Ct. 44, 30 L.Ed.2d 112 (1971)*, where this Court declined to consider a constitutional attack upon a penal statute where there had been no pretrial motion to dismiss filed pursuant to former Rule 725 b. There the issue was raised for the first time in a motion for judgment of acquittal at the conclusion of the State's case, and the record failed to indicate that the trial judge had considered the constitutional issue in denying the defendant's motion for judgment [***14] of acquittal.

The appellant correctly asserts that legislative acts creating crimes must be clear and certain. [6] As stated by the Supreme Court, such laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222, 227 (1972).* Furthermore, "where a statute imposes criminal penalties, the standard of certainty is higher" than the standard applicable to statutes imposing only civil penalties. *Kolender v. Lawson, 461 U.S. 352, 359 n. 8, 103 S.Ct. 1855, 1859, n. 8, 75 L.Ed.2d 903, 910 (1983).*

> 6. The requirement of precision in penal statutes is an element of the constitutional guarantee of due process of law found in the *Fourteenth Amendment of the United States Constitution* and in *Article 24 of the Maryland Declaration of Rights.*

A comprehensive discussion of the void-for-vagueness doctrine is found in *Bowers* [**1145] *v. State, 283* [***15] *Md. 115, 389 A.2d 341 (1978).* The Court of Appeals there stated:

> The cardinal requirement is that a penal statute "be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).* "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its [*388] application, violates the first essential of due process of law." *Id.* The Fifth and Fourteenth Amendments guarantee that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618* [619], *83 L.Ed. 888 (1939). Accord, Hynes v. Mayor of Oradell, 425 U.S. 610, 620, 96 S.Ct. 1755* [1760], *48 L.Ed.2d 243 (1976); United States v. Mazurie, 419 U.S. 544, 553, 95 S.Ct. 710* [715], *42 L.Ed.2d 706 (1975); Smith v. Goguen, 415*

U.S. 566, 572 n. 8, 94 S.Ct. 1242 [***16] [1247 n. 8], *39 L.Ed.2d 605 (1974)*; *Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294* [2298], *33 L.Ed.2d 222 (1972)*; *Bouie v. City of Columbia, 378 U.S. 347, 350-51, 84 S.Ct. 1697* [1700-01], *12 L.Ed.2d 894 (1964)*; *United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808* [811], *98 L.Ed. 989 (1954)*; *Winters v. New York, 333 U.S. 507, 515-16* [670-71], *68 S.Ct. 665, 92 L.Ed. 840 (1948)*. *See generally* Note, *The Void-For-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.Rev. 67 (1960).

In assessing the constitutionality of a statute assailed as overly uncertain either in respect of the acts it purports to prohibit or the persons to whom it applies, courts typically consider two basic criteria. The first of these may be described as the fair notice principle and is grounded on the assumption that one should be free to choose between lawful and unlawful conduct. Due process commands that persons of ordinary intelligence and experience be afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly.

. . . . .

A statute may also be stricken for vagueness if it fails to provide legally fixed [***17] standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the penal laws.

> [*389] "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford, 408 U.S. at 108-109 [92 S.Ct. at 2299]*; *accord, Papachristou v. City of Jacksonville, 405 U.S. 156, 170, 92 S.Ct. 839* [847], *31 L.Ed.2d 110 (1972)*.
>
> This is not to say, of course, that a criminal statute is void merely because it allows for the exercise of some discretion on the part of law enforcement and judicial officials. It is only where a statute is so broad as to be susceptible to irrational and selective patterns of enforcement that it will be held unconstitutional under this second arm of the vagueness principle. *See Giaccio v. Pennsylvania, 382 U.S. 399, 402-403, 86 S.Ct. 518* [520-521], *15 L.Ed.2d 447 (1966)*.
>
> As a general rule, the constitutionality of a statutory provision under attack on void-for-vagueness grounds must [***18] be determined strictly on the basis of the statute's application to the particular facts at hand. *United States v. Powell, 423 U.S. 87, 92, 96 S.Ct. 316* [319], *46 L.Ed.2d 228 (1975)*; *United States v. Mazurie, 419 U.S. at 550 [95 S.Ct. at 714]*; *United States v. National Dairy Corp., 372 U.S. 29, 32-33, 83 S.Ct. 594* [597-598], *9 L.Ed.2d 561 (1963)*. Thus, it will usually be immaterial that the statute is of questionable [**1146] applicability in foreseeable marginal situations, if a contested provision clearly applies to the conduct of the defendant in a specific case. *United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538* [1541], *91 L.Ed. 1877 (1947)*.

Id. at 120-22, 389 A.2d 341.

The appellant's contention that Article 27, *§ 233D* is unconstitutionally vague as applied to him centers around the definition of "pyramid promotional scheme" in subsection (a)(4). The major thrust of the appellant's vagueness argument seems to be that *§ 233D(a)(4)* is impermissibly vague because "it fails to provide legally fixed standards [*390] and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, [***19] apply and administer" the statute. *Bowers v. State, supra, 283 Md. at 121, 389 A.2d 341.* Nevertheless, because the appellant also expresses concern about the clarity with which the statute defines "pyramid promotional scheme," we first examine whether it affords "fair notice" of what type of operation is prohibited.

A. Fair Notice

As defined in *§ 233D(a)(4)*, a pyramid promotional scheme is an operation in which a participant's compensation is "to be derived primarily from" recruitment of other participants into the operation rather than from the sale of goods or services. The word at issue in the statute is "primarily." The Court of Appeals in *Bowers* explained that "[a] statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning." *Id. at 125, 389 A.2d 341.* We believe the word "primarily," as used in *§ 233D(a)(4)*, possesses a common and generally accepted meaning. Webster's New World Dictionary (2d College ed. 1982) defines "primarily" as "mainly; principally." [***20] In quantifiable terms, "primarily" is commonly understood to suggest a figure representing more than 50 percent. Thus, the definition of "pyramid promotional scheme" in *§ 233D(a)(4)* imposes a standard requiring that participants in a pyramid operation derive more than 50 percent of their compensation from recruitment for the operation to fall within the definition. We find nothing ambiguous about the term "primarily" as used in that definition.

An Illinois anti-pyramid statute using the word "primarily" survived a similar attack based on vagueness grounds. The Illinois statute defined a "pyramid sales scheme" to include

> any plan or operation whereby a person in exchange for money or other thing of value acquires the opportunity to [*391] receive a benefit or thing of value, which is *primarily* based upon the inducement of additional persons, by himself or others, regardless of number, to participate in the same plan or operation and is not *primarily* contingent on the volume or quantity of goods, services, or other property sold or distributed or to be sold or distributed to persons for purposes of resale to consumers.

Ill.Rev.Stat. (1983), Ch. 121 [***21] 1/2, Par. 261(g) (emphasis added). In *People ex rel. Hartigan v. Dynasty System Corp., 128 Ill.App.3d 874, 83 Ill.Dec. 937, 471 N.E.2d 236 (1984)*, that statute was challenged as void for vagueness on grounds that "the word 'primarily' does not inform a person of reasonable intelligence of what conduct is prohibited by the Act." *Id. 83 Ill.Dec. at 942, 471 N.E.2d at 241.* Rejecting that argument, the Illinois court reasoned that "'[p]rimarily' means 'pre-eminently' or 'fundamentally'" and that the term "is certainly less broad than other terms contained in the Act which have withstood void for vagueness challenges." *Id.* The Court held that "the term 'primarily' provides fair notice to those who are subject to the act of the schemes and ventures which are prohibited." *Id. 83 Ill.Dec. at 943, 471 N.E.2d at 242.*

In 1983, the Utah legislature, apparently in an effort to cure potential vagueness [**1147] problems in that state's 1973 anti-pyramid law, *added* the word "primarily" to the definition of a pyramid scheme. Utah Code (1953, 1983 Supp.), § 76-6a-2(4).

> . . . [T]he Act attempts to cure potential problems of constitutional vagueness by defining [***22] a pyramid scheme as "any sales device or plan" in which a person provides consideration "for compensation or the right to receive compensation which is derived *primarily* from the introduction of other persons into the sales device or plan rather than from the sale of goods, services or other property." Thus, even if a multilevel plan involves a product that profitably may be sold to the consumer, it is still an illegal pyramid if the promised profits are derived [*392] primarily from recruitment. That definition does not appear to be unconstitutionally vague because it distinguishes more clearly than the 1973 law between genuine multilevel marketing plans and pyramid schemes by requiring that compensation be derived *primarily* from introduction of others into the scheme, rather than including organizations that pay *any* compensation derived from introduction of others into the scheme.

Utah Legislative Survey, 1984 Utah L.Rev. 115, 215-16 (footnotes omitted) (emphasis in original).

The word "primarily," as used in the definition of "pyramid promotional scheme" in *§ 233D(a)(4)*, has a sufficiently definite meaning to afford a person of ordinary intelligence [***23] and experience a reasonable opportunity to know what is prohibited by the statute. We therefore hold that *§ 233D* provides adequate notice of the type of pyramid operations which are prohibited.

B. *Adequate Guidelines*

The appellant also argues that the statute fails to set forth any objective standards for police, judicial officers, triers of fact and others who must enforce it. Rather, he asserts, the statute requires the use of subjective standards for the purpose of ascertaining whether the com-

pensation of participants in an allegedly illegal pyramid promotional scheme is derived primarily from recruitment rather than from sales of goods or services. We disagree.

The question of the source of the primary compensation of participants in a multi-level marketing operation is a matter of sufficiency of the evidence offered to prove guilt under *§ 233D.* "Primarily" is an adequate benchmark for enforcement of the statute and evaluation of prosecutions brought for its violations.

II.

The appellant posits that the testimony of Agent Holmes, who was the State's first witness, totally lacked evidentiary value because he premised his expert opinions upon the [*393] documents [***24] seized from the CIS offices in Maryland and Virginia. Because, in the appellant's view, these documents were not admitted into evidence for their truth, Agent Holmes' testimony based upon them should not have been accorded any evidentiary weight. The appellant cites in particular the expert's reliance on "the hypothetical truth of a plan contained on a document called the 'downliner.'" According to the appellant, neither of the State's other witnesses (Officer Sheridan and Mr. Retta) who testified from personal knowledge authenticated this document, nor did they describe the CIS operation in a manner consistent with the operation outlined in the document.

The short answer to the appellant's argument is that the documents at issue were admitted into evidence without limitation. The appellant contends that the documents were admitted into evidence subject to a stipulation that they were not to be considered for the truth of what they contained, but only for the purpose of showing they were found at the CIS offices. The record belies his contention:

> THE COURT: Have they been received in evidence? Is there a stipulation that all these documents --
>
> [**1148] MS. JUNGHANS [***25] [PROSECUTOR]: Yes, that they all --
>
> THE COURT: (continuing) -- are admissible into evidence?
>
> MS. JUNGHANS: (continuing) -- the contents of the boxes; that is what the stipulation was, yes.
>
> MR. HORN [DEFENSE]: Yes, we stipulated that the --
>
> THE COURT: All exhibits A through E will be received in evidence?
>
> MR. HORN: For the purpose of showing that they were located at those offices.
>
> THE COURT: Well, is there any objection on relevancy grounds?
>
> MR. HORN: No.
>
> THE COURT: Let me understand the stipulation. The stipulation is that they were all seized from the two offices and that they are admissible into evidence.
>
> MR. HORN: For the limited purpose of saying that they were there. That is all we are --
>
> [*394] THE COURT: You do not object to them being received in evidence?
>
> MR. HORN: No, Your Honor.
>
> THE COURT: They will be received.

Based on that exchange, we could easily conclude that no objection to the evidence was registered and that its admissibility is thus not before this Court. Rule 1085; *Standifur v. State, 64 Md.App. 570, 578, 497 A.2d 1164 (1985), cert. granted, 305 Md. 175, 501 A.2d 1323 (1986).* [***26]

Moreover, we note that the appellant's argument actually concerns the weight to be accorded the expert testimony of Agent Holmes. The appellant did not challenge the credentials of Agent Holmes as an expert, nor did he object to Agent Holmes' expression of the opinion that CIS constituted a pyramid promotional scheme. The admissibility of expert testimony is a matter largely within the discretion of the trial court. *Johnson v. State, 303 Md. 487, 515, 495 A.2d 1 (1985); Waltermeyer v. State, 60 Md.App. 69, 79, 480 A.2d 831, cert. denied, 302 Md. 8, 485 A.2d 249 (1984).* The weight to be accorded it is left to the trier of fact. *Fitzwater v. State, 57 Md.App. 274, 281-82, 469 A.2d 909 (1984).* We perceive no error in allowing Agent Holmes, once qualified as an expert in interpreting records of pyramid operations, to testify as to his opinion regarding the CIS operation. *Cf. Spriggs v. State, 226 Md. 50, 52, 171 A.2d 715 (1961).*

III.

Finally, we review the sufficiency of the evidence to support the appellant's conviction. The standard for reviewing sufficiency of the evidence in criminal cases is

"whether after viewing the evidence in the light most favorable [***27] to the prosecution *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bloodsworth v. State, 307 Md. 164, 167, 512 A.2d 1056 (1986).*

> Criminal conspiracy requires a combination of two or more persons, who by some concerted action seek to [*395] accomplish some criminal act or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

Rhoades v. State, 56 Md.App. 601, 612, 468 A.2d 650 (1983), cert. granted, 299 Md. 492, 474 A.2d 917, cert. dismissed, 300 Md. 792, 481 A.2d 238 (1984). No formal agreement need be shown to make out a conspiracy; the State must present only so much evidence as would "allow the fact finder to infer that the parties tacitly agreed to commit an unlawful act." *Id.* We believe the testimony of Officer Sheridan served as sufficient evidence that the appellant and Robert Schaffer worked together in furtherance of the objectives of CIS. The only question remaining is whether the evidence established that those objectives were in violation of the anti-pyramid law.

We believe the evidence was sufficient. The [***28] boxes of documentary evidence seized from the CIS offices in Maryland and Virginia demonstrate that the business was essentially nothing more than a recruitment scheme. The testimony of both Officer Sheridan and Mr. Retta indicated [**1149] that participants were told they did not have to concern themselves with selling anything; rather, they could earn money by recruiting others into the operation. In the opinion of the State's expert witness, the appellant's operation was one primarily for recruiting people into the pyramid and not for selling products. According to the expert, the individual programs promoted by CIS, even if separate business entities, were used by CIS "to facilitate the down liner system or programs." We conclude that there was ample evidence to support the finding of the trial judge that the appellant was guilty of conspiring to violate Article 27, *§ 233D.*

JUDGMENT AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.