IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Respondents, **v.** **THE STATE OF CALIFORNIA; KAMALA D. HARRIS, in her official capacity as Attorney General for the State of California; AND THE CALIFORNIA DEPARTMENT OF JUSTICE,** Defendants and Appellants.	Case No. F062490

Fresno County Superior Court, Case No. 10CECG02116
The Honorable Jeff Hamilton, Judge

JOINT APPENDIX
VOLUME VII
Pages JA001697-JA001966

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
PETER A. KRAUSE
Supervising Deputy Attorney General
ROSS C. MOODY
Deputy Attorney General
State Bar No. 142541
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1376
Fax: (415) 703-1234
E-mail: Ross.Moody@doj.ca.gov
Attorneys for Appellants State of California, Kamala Harris, and the California Departme Justice

INDEX OF JOINT APPENDIX

CHRONOLOGICAL

INDEX OF JOINT APPENDIX

CHRONOLOGICAL

INDEX OF JOINT APPENDIX

CHRONOLOGICAL

INDEX OF JOINT APPENDIX

CHRONOLOGICAL

INDEX OF JOINT APPENDIX

CHRONOLOGICAL

INDEX OF JOINT APPENDIX

CHRONOLOGICAL

INDEX OF JOINT APPENDIX

CHRONOLOGICAL

INDEX OF JOINT APPENDIX

CHRONOLOGICAL

INDEX OF JOINT APPENDIX

CHRONOLOGICAL

INDEX OF JOINT APPENDIX

ALPHABETICAL

INDEX OF JOINT APPENDIX

ALPHABETICAL

INDEX OF JOINT APPENDIX

ALPHABETICAL

INDEX OF JOINT APPENDIX

ALPHABETICAL

INDEX OF JOINT APPENDIX

ALPHABETICAL

INDEX OF JOINT APPENDIX

ALPHABETICAL

INDEX OF JOINT APPENDIX

ALPHABETICAL

INDEX OF JOINT APPENDIX

ALPHABETICAL

There are no even-numbered page between JA002879 and JA003423 in the Joint Appendix. This gap was created by a production error at the numbering stage. Rather than print blank pages with these numbers, they have been omitted.

EXHIBIT "15"

LEXSEE 130 S.CT. 3020

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

No. 08-1521

SUPREME COURT OF THE UNITED STATES

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

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

NOTICE:

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

PRIOR HISTORY: [***1]

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

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

DISPOSITION: Reversed and remanded.

SYLLABUS

[*3021] Two years ago, in *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637*, this Court held that the *Second Amendment* protects the right to keep and bear arms for the purpose of self-defense and struck down a District of Columbia law that banned the possession of handguns in the home. Chicago (hereinafter City) and the village of Oak Park, a Chicago suburb, have laws effectively banning handgun possession by almost all private citizens. After *Heller*, petitioners filed this federal suit against the City, which was consolidated with two related actions, alleging that the City's handgun ban has left them vulnerable to criminals. They sought a declaration that the ban and several related City ordinances violate the *Second* and *Fourteenth Amendments*. Rejecting petitioners' argument that the ordinances are unconstitutional, the court noted that the Seventh Circuit previously had upheld the constitutionality of a handgun ban, that *Heller* had explicitly refrained from opining on whether the *Second Amendment* applied to the States, and that the court had a duty to follow established Circuit [***2] precedent. The Seventh Circuit affirmed, relying on three 19th-century cases -- *United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588*, *Presser v. Illinois, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615*, and *Miller v. Texas, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812* -- which were decided in the wake of this Court's interpretation of the *Fourteenth Amendment's* Privileges or Immunities Clause in the *Slaughter-House Cases, 83 U.S. 36, 16 Wall. 36, 21 L. Ed. 394*.

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

567 F.3d 856, reversed and remanded.

JUSTICE ALITO delivered the opinion of the Court with respect to Parts I, II-A, II-B, II-D, III-A, and III-B, concluding that the *Fourteenth Amendment* incorporates the *Second Amendment* right, recognized in *Heller*, to keep and bear arms for the purpose of self-defense. Pp. 5-9, 11-19, 19-33.

(a) Petitioners base their case on two submissions. Primarily, they argue that the right to keep and bear arms is protected by the Privileges or Immunities Clause of the *Fourteenth Amendment* and that the *Slaughter-House Cases'* narrow interpretation of the Clause should now be rejected. As a secondary argument, they contend that the *Fourteenth Amendment's Due Process Clause* incorporates the *Second Amendment* right. Chicago and Oak Park (municipal respondents) [***3] maintain that a right set out in the *Bill of Rights* applies to the States only when it is an indispensable attribute of *any* '"civilized"' legal system. If it is possible to imagine a

civilized country that does not recognize the right, municipal respondents assert, that right is not protected by due process. And since there are civilized countries that ban or strictly regulate the private possession of handguns, they maintain that due process does not preclude such measures. Pp. 4-5.

(b) The *Bill of Rights*, including the *Second Amendment*, originally applied only to the Federal Government, not to the States, see, *e.g., Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 7 Pet. 243, 247, 8 L. Ed. 672*, but the constitutional Amendments adopted in the Civil War's aftermath fundamentally altered the federal system. Four years after the adoption of the *Fourteenth Amendment*, this Court [*3022] held in the *Slaughter-House Cases*, that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws," *16 Wall., at 79, 83 U.S. 36, 21 L. Ed. 394*, and that the fundamental rights predating the creation of the Federal Government were not protected [***4] by the Clause, *id., at 76, 83 U.S. 36, 21 L. Ed. 394*. Under this narrow reading, the Court held that the Privileges or Immunities Clause protects only very limited rights. *Id., at 79-80, 83 U.S. 36, 21 L. Ed. 394*. Subsequently, the Court held that the *Second Amendment* applies only to the Federal Government in *Cruikshank, 92 U.S. 542, 23 L. Ed. 588*, *Presser, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615*, and *Miller, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812*, the decisions on which the Seventh Circuit relied in this case. Pp. 5-9.

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

(1) In the late 19th century, the Court began to hold that the *Due Process Clause* prohibits the States from infringing *Bill of Rights* protections. See, *e.g., Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232*. Five features of the approach taken during the ensuing era are noted. First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining v. New Jersey, 211 U.S. 78, 99, 29 S. Ct. 14, 53 L. Ed. 97*. Second, the Court explained that the only rights due process protected against state infringement were those "of such a nature that they [***5] are included in the conception of due process of law." *Ibid.* Third, some cases during this era "can be seen as having asked . . . if a civilized system could be imagined that would not accord the particular protection" asserted therein. *Duncan v. Louisiana, 391 U.S. 145, 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*. Fourth, the Court did not hesitate to hold that a *Bill of Rights* guarantee failed to meet the test for *Due Process Clause* protection, finding, *e.g.,* that freedom of speech and press qualified, *Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138*; *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357*, but the grand jury indictment requirement did not, *Hurtado, supra.* Finally, even when such a right was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from those provided against abridgment by the Federal Government. Pp. 11-13.

(2) Justice Black championed the alternative theory that *§ 1 of the Fourteenth Amendment* totally incorporated all of the *Bill of Rights*' provisions, see, *e.g., Adamson v. California, 332 U.S. 46, 71-72, 67 S. Ct. 1672, 91 L. Ed. 1903* (Black, J., dissenting), but the Court never has embraced that theory. Pp. 13-15.

(3) The Court eventually moved in the direction [***6] advocated by Justice Black, by adopting a theory of selective incorporation by which the *Due Process Clause* incorporates particular rights contained in the first eight Amendments. See, *e.g., Gideon v. Wainright, 372 U.S. 335, 341, 83 S. Ct. 792, 9 L. Ed. 2d 799*. These decisions abandoned three of the characteristics of the earlier period. The Court clarified that the governing standard is whether a particular *Bill of Rights* protection is fundamental to our Nation's particular scheme of ordered liberty and system of justice. *Duncan, supra, at 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*. The Court eventually held that almost all of the *Bill of Rights*' guarantees met the requirements for protection under the *Due Process Clause*. The Court also held that *Bill of Rights* protections [*3023] must "all . . . be enforced against the States under the *Fourteenth Amendment* according to the same standards that protect those personal rights against federal encroachment." *Malloy v. Hogan, 378 U.S. 1, 10, 84 S. Ct. 1489, 12 L. Ed. 2d 653*. Under this approach, the Court overruled earlier decisions holding that particular *Bill of Rights* guarantees or remedies did not apply to the States. See, *e.g., Gideon, supra,* which overruled *Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595*. Pp. 15-19.

(d) The *Fourteenth Amendment* makes the [***7] *Second Amendment* right to keep and bear arms fully applicable to the States. Pp. 19-33.

(1) The Court must decide whether that right is fundamental to the Nation's scheme of ordered liberty, *Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491*, or, as the Court has said in a related context, whether it is "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772*. *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal

systems from ancient times to the present, and the *Heller* Court held that individual self-defense is "the central component" of the *Second Amendment* right. *554 U.S., at ___, ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637.* Explaining that "the need for defense of self, family, and property is most acute" in the home, *ibid.*, the Court found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *id., at ___, ___-___, 128 S. Ct. 2783, 171 L. Ed. 2d 637.* It thus concluded that citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." *Id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637. Heller* also clarifies that this right is "deeply rooted in this Nation's history and traditions," *Glucksberg, supra, at 721.* [***8] *Heller* explored the right's origins in English law and noted the esteem with which the right was regarded during the colonial era and at the time of the ratification of the *Bill of Rights.* This is powerful evidence that the right was regarded as fundamental in the sense relevant here. That understanding persisted in the years immediately following the *Bill of Rights*' ratification and is confirmed by the state constitutions of that era, which protected the right to keep and bear arms. Pp. 19-22.

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

(i) By the 1850's, the fear that the National Government would disarm the universal militia had largely faded, but the right to keep and bear arms was highly valued for self-defense. Abolitionist authors wrote in support of the right, and attempts to disarm "Free-Soilers" in "Bloody Kansas," met with outrage that the constitutional right to keep and bear arms had been taken from the people. After the Civil War, the Southern States engaged [***9] in systematic efforts to disarm and injure African Americans, see *Heller, supra, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637.* These injustices prompted the 39th Congress to pass the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866 to protect the right to keep and bear arms. Congress, however, ultimately deemed these legislative remedies insufficient, and approved the *Fourteenth Amendment.* Today, it is generally accepted that that Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act. See *General Building Contractors Assn., Inc. v. Pennsylvania,* [*3024] *458 U.S. 375, 389, 102 S. Ct. 3141, 73 L. Ed. 2d 835.* In Congressional debates on the proposed Amendment, its legislative proponents in the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Evidence from the period immediately following the Amendment's ratification confirms that that right was considered fundamental. Pp. 22-31.

(ii) Despite all this evidence, municipal respondents argue that Members of Congress overwhelmingly viewed *§ 1 of the Fourteenth Amendment* as purely an antidiscrimination rule. But while *§ 1* does contain an antidiscrimination rule, *i.e.,* the *Equal Protection Clause,* [***10] it can hardly be said that the section does no more than prohibit discrimination. If what municipal respondents mean is that the *Second Amendment* should be singled out for special -- and specially unfavorable -- treatment, the Court rejects the suggestion. The right to keep and bear arms must be regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner. Pp. 30-33.

JUSTICE ALITO, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded, in Parts II-C, IV, and V, that the *Fourteenth Amendment's Due Process Clause* incorporates the *Second Amendment* right recognized in *Heller.* Pp. 10-11, 33-44.

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

(b) Municipal respondents' remaining arguments are rejected [***11] because they are at war with *Heller*'s central holding. In effect, they ask the Court to hold the right to keep and bear arms as subject to a different body of rules for incorporation than the other *Bill of Rights* guarantees. Pp. 33-40.

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

JUSTICE THOMAS agreed that the *Fourteenth Amendment* makes the *Second Amendment* right to keep and bear arms that was recognized in *District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637,* fully applicable to the States. However, he asserted, there is a path to this conclusion that is more straightforward and more faithful to the *Second Amendment's* text and history. The Court is correct in describing the *Second Amendment* right as "fundamental" to the American scheme of ordered liberty, *Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491,* and "deeply rooted in this Nation's history and tradi-

tions," *Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.* But the *Fourteenth Amendment's Due Process Clause*, which speaks only to "process," cannot impose the type of substantive restraint on state legislation that the Court asserts. Rather, the right to keep and bear arms is enforceable against the States because it is a privilege [***12] of American citizenship recognized by *§ 1 of the Fourteenth Amendment*, which provides, *inter alia:* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In interpreting this language, it is important to recall that constitutional provisions are "'written to be understood by the voters.'" *Heller, 554 U.S., at ___, [*3025] 128 S. Ct. 2783, 171 L. Ed. 2d 637.* The objective of this inquiry is to discern what "ordinary citizens" at the time of the *Fourteenth Amendment's* ratification would have understood that Amendment's Privileges or Immunities Clause to mean. *Ibid.* A survey of contemporary legal authorities plainly shows that, at that time, the ratifying public understood the Clause to protect constitutionally enumerated rights, including the right to keep and bear arms. Pp. 1-34.

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

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

JUDGES: ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, II-D, III-A, and III-B, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined, and an opinion with respect to Parts II-C, IV, and V, in which ROBERTS, C. J., and SCALIA and KENNEDY, JJ., join. SCALIA, J., filed a concurring opinion. THOMAS, J., filed [***13] an opinion concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined.

OPINION BY: ALITO

OPINION

[*3026] [**903] JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, II-D, III-A, and III-B, in which THE CHIEF JUSTICE, JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, and an opinion with respect to Parts II-C, IV, and V, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join.

Two years ago, in *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)*, we held that the *Second Amendment* protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the *Second Amendment* has no application to the States. We have previously held that most of the provisions of the *Bill of Rights* apply with full force to both the Federal [***14] Government and the States. Applying the standard that is well established in our case law, we hold that the *Second Amendment* right is fully applicable to the States.

I

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

Chicago enacted its handgun ban to protect its residents "from the loss of property and injury or death from firearms." See Chicago, Ill., Journal of Proceedings of the [***15] City Council, p. 10049 (Mar. 19, 1982). The Chicago petitioners and their *amici*, however, argue that the handgun ban has left them vulnerable to criminals. Chicago Police Department statistics, we are told, reveal that the City's handgun murder rate has actually increased since the ban was enacted [1] and that Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities. [2]

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

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

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

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

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

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

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

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

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

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

II

A

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

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

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

B

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

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

Four years after the adoption of the *Fourteenth Amendment*, this Court was asked to interpret the Amendment's reference to "the privileges or immunities [***21] of citizens of the United States." The *Slaughter-House Cases, supra*, involved challenges to a Louisiana law permitting the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans. Justice Samuel Miller's opinion for the Court concluded that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id., at 79, 83 U.S. 36, 21 L. Ed. 394.* The Court held that other fundamental rights -- rights that predated the creation of the Federal Government and that "the State governments were created to establish and secure" -- were not protected by the Clause. *Id., at 76, 83 U.S. 36, 21 L. Ed. 394.*

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

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

Under the Court's narrow reading, the Privileges or Immunities Clause protects such things as the right

> "to come to the seat of government to assert any claim [a citizen] may have upon that [***23] government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions . . . [and to] become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Id., at 79-80, 83 U.S. 36, 21 L. Ed. 394* (internal quotation marks omitted).

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

. fundamental," including the right of every man to pursue his profession without the imposition of unequal or discriminatory restrictions. *Id., at 96-97, 83 U.S. 36, 21 L. Ed. 394.* Justice Bradley's dissent observed that "we are not bound to resort to implication . . . to [***24] find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." *Id., at 118, 83 U.S. 36, 21 L. Ed. 394.* Justice Bradley would have construed the Privileges or Immunities Clause to include those rights enumerated in the Constitution as well as some unenumerated rights. *Id., at 119, 83 U.S. 36, 21 L. Ed. 394.* Justice Swayne described the majority's narrow reading of the Privileges or Immunities Clause as "turn[ing] . . . what was meant for bread into a stone." *Id., at 129, 83 U.S. 36, 21 L. Ed. 394* (dissenting opinion).

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

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

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

7 See Lane, *supra,* at 106.

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

The Court reversed all of the convictions, including those relating to the deprivation of the victims' right to bear arms. *Cruikshank, 92 U.S., at 553, 559, 544-545, 23 L. Ed. 588.* The Court wrote that the right of bearing arms for a lawful purpose "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence." *Id., at 553, 544-545, 23 L. Ed. 588.* "The *second amendment,*" the Court continued, "declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress." *Ibid.* "Our later decisions in *Presser v. Illinois, 116 U.S. 252, 265, 6 S. Ct. 580, 29 L. Ed. 615 (1886),* and *Miller v. Texas, 153 U.S. 535, 538, 14 S. Ct. 874, 38 L. Ed. 812 (1894),* reaffirmed that the *Second Amendment* applies only to the Federal Government." *Heller, 554 U.S., at ___, n. 23, 128 S. Ct. 2783, 171 L. Ed. 2d 637.*

C

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

We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the [*3031] *Fourteenth Amendment* against state infringement has been analyzed under the *Due Process Clause* of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.

At the same time, however, this Court's decisions in *Cruikshank,* [**909] *Presser,* and *Miller* do not preclude us from considering whether the *Due Process Clause of the Fourteenth Amendment* makes the *Second*

Amendment right binding on the States. See *Heller, 554 U.S., at ___, n. 23, 128 S. Ct. 2783, 171 L. Ed. 2d 637.* [***28] None of those cases "engage[d] in the sort of *Fourteenth Amendment* inquiry required by our later cases." *Ibid.* As explained more fully below, *Cruikshank*, *Presser*, and *Miller* all preceded the era in which the Court began the process of "selective incorporation" under the *Due Process Clause*, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.

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

D

1

In [***29] the late 19th century, the Court began to consider whether the *Due Process Clause* prohibits the States from infringing rights set out in the *Bill of Rights*. See *Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884)* (due process does not require grand jury indictment); *Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897)* (due process prohibits States from taking of private property for public use without just compensation). Five features of the approach taken during the ensuing era should be noted.

First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining v. New Jersey, 211 U.S. 78, 99, 29 S. Ct. 14, 53 L. Ed. 97 (1908).*

Second, the Court explained that the only rights protected against state infringement by the *Due Process Clause* were those rights "of such a nature that they are included in the conception of due process of law." *Ibid.* See also, *e.g., Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947); Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942); Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937); Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).* While it was "possible that some of the personal [***30] rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action," the Court stated, this was "not because those rights are enumerated in the first eight Amendments." *Twining, supra, at 99, 29 S. Ct. 14, 53 L. Ed. 97.*

[*3032] The Court used different formulations [**910] in describing the boundaries of due process. For example, in *Twining*, the Court referred to "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *211 U.S., at 102, 29 S. Ct. 14, 53 L. Ed. 97* (internal quotation marks omitted). In *Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934)*, the Court spoke of rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." And in *Palko*, the Court famously said that due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." *302 U.S., at 325, 58 S. Ct. 149, 82 L. Ed. 288.*

Third, in some cases decided during this era the Court "can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular [***31] protection." *Duncan v. Louisiana, 391 U.S. 145, 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).* Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, B. & Q. R. Co., supra, at 238, 17 S. Ct. 581, 41 L. Ed. 979.* Similarly, the Court found that due process did not provide a right against compelled incrimination in part because this right "has no place in the jurisprudence of civilized and free countries outside the domain of the common law." *Twining, supra, at 113, 29 S. Ct. 14, 53 L. Ed. 97.*

Fourth, the Court during this era was not hesitant to hold that a right set out in the *Bill of Rights* failed to meet the test for inclusion within the protection of the *Due Process Clause*. The Court found that some such rights qualified. See, *e.g., Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925)* (freedom of speech and press); *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)* (same); *Powell, supra* (assistance of counsel in capital cases); *De Jonge, supra* (freedom of assembly); *Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)* (free exercise of religion). But others [***32]

did not. See, *e.g.*, *Hurtado, supra* (grand jury indictment requirement); *Twining, supra* (privilege against self-incrimination).

Finally, even when a right set out in the *Bill of Rights* was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgment by the Federal Government. To give one example, in *Betts* the Court held that, although the *Sixth Amendment* required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, the *Due Process Clause* required appointment of counsel in state criminal proceedings only where "want of counsel in [the] particular case . . . result[ed] in a conviction lacking in . . . fundamental fairness." *316 U.S., at 473, 62 S. Ct. 1252, 86 L. Ed. 1595*. Similarly, in *Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949)*, the Court held that the "core of the *Fourth Amendment*" was implicit in the concept of ordered liberty and thus "enforceable against the States through the *Due Process Clause* [**911] " but that the exclusionary rule, which applied in federal cases, did not apply to the States. *Id., at 27-28, 33, 69 S. Ct. 1359, 93 L. Ed. 1782*.

2

An alternative theory [***33] regarding the relationship between the *Bill of Rights* and [*3033] *§ 1 of the Fourteenth Amendment* was championed by Justice Black. This theory held that *§ 1 of the Fourteenth Amendment* totally incorporated all of the provisions of the *Bill of Rights*. See, *e.g.*, *Adamson, supra, at 71-72, 67 S. Ct. 1672, 91 L. Ed. 1903* (Black, J., dissenting); *Duncan, supra, at 166, 88 S. Ct. 1444, 20 l. Ed. 2d 491* (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the *Fourteenth Amendment* espoused the view that the Amendment made the *Bill of Rights* applicable to the States and, in so doing, overruled this Court's decision in *Barron*. [9] *Adamson, 332 U.S., at 72, 67 S. Ct. 1672, 91 L. Ed. 1903* (dissenting opinion). [10] Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory.

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

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

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

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

[*3034] [**912] 3

While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," *i.e.*, the Court [***37] began to hold that the *Due Process Clause* fully incorporates particular rights contained in the first eight Amendments. See, *e.g.*, *Gideon v. Wainright, 372 U.S. 335, 341, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)*; *Malloy v. Hogan, 378 U.S. 1, 5-6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)*; *Pointer v. Texas, 380 U.S. 400, 403-404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)*; *Washington v. Texas, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)*; *Duncan, 391 U.S., at 147-148, 88 S. Ct. 1444, 20 L. Ed. 2d 491*; *Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)*.

The decisions during this time abandoned three of the previously noted characteristics of the earlier period. [11] The Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection." *Duncan, 391 U.S., at 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*. Instead, the Court inquired whether a particular *Bill of Rights* guarantee is fundamental to *our* scheme of ordered liberty and system of justice. *Id., at 149, and n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491*; see also *id., at 148, 88 S. Ct. 1444, 20 L. Ed. 2d 491* (referring to those "fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions" (emphasis added; internal quotation marks omitted)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III

With this framework in mind, we now turn directly to the question whether the *Second Amendment* right to

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

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

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

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

B

1

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

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

After the Civil War, many of the over 180,000 African Americans who [**917] served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks. See *Heller, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (slip op., at 42)*; E. Foner, Reconstruction: America's Unfinished Revolution 1863-1877, p. 8 (1988) (hereinafter Foner). The laws of some States formally prohibited African Americans from possessing firearms. For example, a Mississippi law provided that "no freedman, free [***51] negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife." Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, in 1 Documentary History of Reconstruction 289 (W. Fleming ed. 1950); see also Regulations for Freedmen in Louisiana, in *id.*, at 279-280; H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866) (describing a Kentucky law); E.

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

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

[*3039] Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves. In the first session of the 39th Congress, Senator Wilson told his colleagues: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country." 39th Cong. Globe 40 (1865). The Report of the Joint Committee on Reconstruction -- which was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents shortly after Congress approved the *Fourteenth Amendment* [***53] [19] -- contained numerous examples of such abuses. See, *e.g.*, Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, pp. 219, 229, 272, pt. 3, pp. 46, 140, pt. 4, pp. 49-50 (1866); see also S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 23-24, 26, 36 (1865). In one town, the "marshal [took] all arms from returned colored soldiers, and [was] very prompt in shooting the blacks whenever an opportunity occur[red]." H. R. Exec. Doc. No. 70, at 238 (internal quotation marks omitted). As Senator Wilson put it during the debate on a failed proposal to disband Southern militias: "There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are [**918] perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description." 39th Cong. Globe 915 (1866). [20]

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

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

Union Army commanders took steps to secure the right of all citizens to keep and bear arms, [21] but the 39th Congress concluded [*3040] that legislative action was necessary. Its efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental.

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

The most explicit evidence of Congress' aim appears in § 14 of the Freedmen's Bureau Act of 1866, which provided that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery." 14 Stat. 176-177 [***56] (emphasis added). [22] Section 14 thus explicitly guaranteed that "all the citizens," black and white, would have "the constitutional right to bear arms."

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

The Civil Rights Act of 1866, 14 Stat. 27, which was considered at the same time as the Freedmen's Bureau Act, similarly sought to protect the right of all citizens to keep and bear arms. [23] Section 1 of the Civil Rights Act guaranteed the "full and equal [**919] benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." *Ibid.* This language was virtually identical to language in § 14 of the Freedmen's Bureau Act, 14 Stat. 176-177 ("the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal"). And as noted, the latter provision went on to explain that one of [***57] the "laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal" was "the constitutional right to bear arms." *Ibid.* Representative Bingham believed that the Civil Rights Act protected the same rights as enumerated in the Freedmen's Bureau bill, which of course explicitly mentioned the right to keep and bear arms. 39th Cong. Globe 1292. The unavoidable conclusion is that the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect "the constitutional [*3041] right to bear arms" and not simply to prohibit discrimination. See also Amar, *Bill of Rights* 264-265 (noting that one of the "core purposes of the Civil Rights Act of 1866 and of the *Fourteenth Amendment* was to redress the grievances" of freedmen who had been stripped of their arms and to "affirm the full and equal right of every citizen to self-defense").

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

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

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

In debating the *Fourteenth Amendment*, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Senator Samuel Pomeroy described three "indispensable" "safe-

guards of liberty under our form of Government." 39th [***60] Cong. Globe 1182. One of these, he said, was the right to keep and bear arms:

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

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

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

Evidence from the period immediately following the ratification of the *Fourteenth Amendment* only confirms that the right to keep and bear arms was considered fundamental. In an 1868 speech addressing the disarmament of freedmen, Representative Stevens emphasized the necessity of the right: "Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty." "The *fourteenth amendment*, now so happily adopted, settles the whole question." Cong. Globe, 40th Cong., 2d Sess., 1967. And in debating the Civil Rights Act of 1871, Congress routinely [*3042] referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South. See Halbrook, Freedmen 120-131. Finally, legal commentators from the period emphasized the fundamental nature of the right. See, *e.g.*, T. Farrar, Manual of the Constitution of the United States of America § 118, p. 145 (1867) (reprint 1993); J. Pomeroy, An Introduction to the Constitutional [***62] Law of the United States § 239, pp. 152-153 (3d ed. 1875).

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

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

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

2

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

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

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

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

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

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

IV

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

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

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

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

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

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

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

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

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

The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution [***73] of crimes fall into the same category. See, *e.g.*, *Hudson v. Michigan, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006)* ("The exclusionary rule generates 'substantial social costs,' *United States v. Leon, 468 U.S. 897, 907, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*, which sometimes include setting the guilty free and the dangerous at large"); *Barker v. Wingo, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)* (reflecting on the serious consequences of dismissal for a speedy trial violation, which means "a defendant who may be guilty of a serious crime will go free"); *Miranda v. Arizona, 384 U.S. 436, 517, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)* (Harlan, J., dissenting); *id., at 542, 86 S. Ct. 1602, 16 L. Ed. 2d 694* (White, J., dissenting) (objecting that the Court's rule "[i]n some unknown number of cases . . . will return a killer, a rapist or other criminal to the streets . . . to repeat his crime"); *Mapp, 367 U.S., at 659, 81 S. Ct. 1684, 6 L. Ed. 2d 1081.* Municipal respondents cite no case in which we have refrained from holding that a provision of the *Bill of Rights* is binding on the States on the ground that the right at issue has disputed public safety implications.

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

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

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

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

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

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

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

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

As evidence that the *Fourteenth Amendment* has not historically been understood to restrict the authority of the States to regulate firearms, municipal respondents and supporting *amici* cite a variety of state and local firearms laws that courts have upheld. But what is most striking about their research is the paucity of precedent sustaining bans comparable to those at issue here and in *Heller*. Municipal respondents cite precisely one case (from the late 20th century) in which such a ban was sustained. See Brief for Municipal Respondents 26-27 (citing *Kalodimos v. Morton Grove, 103 Ill. 2d 483, 470 N.E.2d 266, 83 Ill. Dec. 308 (1984)*); see also Reply Brief for Respondents NRA et al. 23, n. 7 (asserting that no other court has ever upheld a complete ban on the possession of handguns). It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms [***79] is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 678*). We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id., at ___-___, 128 S. Ct. 2783, 171 L. Ed. 2d at 678*. We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

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

V

A

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

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

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

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

B

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

JUSTICE BREYER's conclusion that the *Fourteenth Amendment* does not incorporate [*3049] the right to keep and bear arms appears to rest primarily on four factors: First, "there is no popular consensus" that the right is fundamental, *post,* at 9; second, the right does not protect minorities or persons neglected by those holding political power, [***83] *post,* at 10; third, incorporation of the *Second Amendment* right would "amount to a significant incursion on a traditional and important area of state concern, altering [**928] the constitutional relationship between the States and the Federal Government" and preventing local variations, *post,* at 11; and fourth, determining the scope of the *Second Amendment* right in cases involving state and local laws will force judges to answer difficult empirical questions regarding matters that are outside their area of expertise, *post,* at 11-16. Even if we believed that these factors were relevant to the incorporation inquiry, none of these factors undermines the case for incorporation of the right to keep and bear arms for self-defense.

First, we have never held that a provision of the *Bill of Rights* applies to the States only if there is a "popular consensus" that the right is fundamental, and we see no basis for such a rule. But in this case, as it turns out, there is evidence of such a consensus. An *amicus* brief submitted by 58 Members of the Senate and 251 Members of the House of Representatives urges us to hold that the right to keep and bear arms is fundamental. See Brief for Senator Kay Bailey Hutchison [***84] et al. as *Amici Curiae* 4. Another brief submitted by 38 States takes the same position. Brief for State of Texas et al. as *Amici Curiae* 6.

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

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

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

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

[*3050] Third, JUSTICE BREYER is correct that incorporation of the *Second Amendment* right will to some extent limit the legislative freedom of the States, but this is always true when a *Bill of Rights* provision is incorporated. [***86] Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the *Bill of Rights*. "[T]he [**929] enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller, 554 U.S., at __, 128 S. Ct. 2783, 171 L. Ed. 2d at 684.* This conclusion is no more remarkable with respect to the *Second Amendment* than it is with respect to all the other limitations on state power found in the Constitution.

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

* * *

In *Heller*, we held that the *Second Amendment* protects the right to possess [***87] a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the *Bill of Rights* that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan, 391 U.S., at 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491,* and n. 14. We therefore hold that the *Due Process Clause of the Fourteenth Amendment* incorporates the *Second Amendment* right recognized in *Heller*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

CONCUR BY: SCALIA; THOMAS (In Part)

CONCUR

JUSTICE SCALIA, concurring.

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

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

I

A

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

II

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

5 JUSTICE STEVENS claims that I mischaracterize his argument by referring to the *Second Amendment* right to keep and bear arms, instead of "the interest in keeping a firearm of one's choosing in the home," the [***100] right he says petitioners assert. *Post*, at 38, n. 36. But it is precisely the "*Second Amendment* right to keep and bear arms" that petitioners argue is incorporated by the *Due Process Clause*. See, *e.g.*, Pet. [illegible] cate"). In any event, the demise of watered-down incorporation, see *ante*, at 17-19, means that we no longer subdivide *Bill of Rights* guarantees into their theoretical components, only some of which apply to the States. The *First Amendment* freedom of speech is incorporated -- not the freedom to speak on Fridays, or to speak about philosophy.

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

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

6 JUSTICE STEVENS goes a step farther still, suggesting that the right to keep and bear arms is

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

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

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

I

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

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

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

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

After the war, a series of constitutional amendments

Chief among those cases is *United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1876)*. There, the Court held that members of a white militia who had brutally [***118] murdered as many as 165 black Louisianians congregating outside a courthouse had not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms. *Ibid.*; see

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

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

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

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

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

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

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

II

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

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

A

1

At the time of Reconstruction, the terms "privileges" and "immunities" had an established meaning as synonyms for "rights." The two words, standing alone or paired together, were used interchangeably with the words "rights," "liberties," and "freedoms," and had been since the time of Blackstone. See 1 W. Blackstone, Commentaries *129 (describing the "rights and liberties" of Englishmen as "private immunities" and "civil privileges"). A number of antebellum judicial decisions used the terms in this manner. See, *e.g., Magill v.* [**944] *Brown, 16 F. Cas. 408, 428, F. Cas. No. 8952 (No. 8,952)* (CC ED Pa. 1833) (Baldwin, J.) ("The words 'privileges and immunities' relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places"). In addition, dictionary definitions confirm that the public shared this understanding. See, *e.g.*, N. Webster, An American Dictionary of the English Language 1039 (C. Goodrich & N. Porter rev. 1865) (defining "privilege" [***127] as "a right or immunity not enjoyed by others or by all" and listing among its synonyms the words "immunity," "franchise," "right," and "liberty"); *id.*, at 661 (defining "immunity" as "[f]reedom from an obligation" or "particular privilege"); *id.*, at 1140 (defining "right" as "[p]rivilege or immunity granted by authority"). [2]

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

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

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

2

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

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

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

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

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

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

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

common Rights of Mankind -- Therefore . . . .

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

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

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

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

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

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

3

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

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

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

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

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

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

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

* * *

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

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

B

I start with the nature of the rights that *§ 1*'s *Privileges or Immunities Clause* protects. *Section 1* overruled *Dred Scott*'s holding that blacks were not citizens of either the United States or their own State and, thus, did not enjoy "the privileges and immunities of citizens" embodied in the Constitution. *60 U.S. 393, 19 How. at 417, 15 L. Ed. 691*. The Court in *Dred Scott* did not distinguish between privileges and immunities of citizens of the United States and citizens in the several States, instead referring to the rights of citizens generally. It did, however, give examples of what the rights of citizens were -- the constitutionally enumerated rights of "the full liberty of speech" and the right "to keep and carry arms." *Ibid.*

Section 1 protects the rights of citizens "of the United States" specifically. The evidence overwhelmingly demonstrates that the privileges and immunities [***143] of such citizens included individual rights enumerated in the Constitution, including the right to keep and bear arms.

1

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

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

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

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

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

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

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

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

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

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

[*3071] 2

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

Records from the 39th Congress further support this understanding.

a

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

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

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

b

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

(1)

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

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

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

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

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

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

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

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

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

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

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

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. 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,

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 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 "[o]ur [w]e judges" can interpret the *Fourteenth*

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 *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,

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* [illegible]

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.

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.
>
> 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 lawmaking 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"

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.

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On December 6, 2010, I served the foregoing document(s) described as **NOTICE OF LODGING FEDERAL AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION / TRIAL**

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Edmund G. Brown, Jr.
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General (185098)
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

___ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on December 6, 2010, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on December 6, 2010, at Long Beach, California.

_X_ (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on December 6, 2010, at Long Beach, California.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

CLAUDIA AYALA

C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com

Attorneys for Plaintiffs/Petitioners

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	CASE NO. 10CECG02116 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION / TRIAL** Date: January 18, 2011 Time: 8:30 a.m. Location: Dept. 402 Judge: Hon. Jeff Hamilton Date Action Filed: June 17, 2010

PLEASE TAKE NOTICE THAT Plaintiffs Sheriff Clay Parker, et al., by and through their attorneys of record, request the Court take judicial notice pursuant to California Evidence Code section 452 and California Rules of Court, rules 3.1113(l) and 3.1306(c), of the following documents in support of their Motion for Summary Judgment or in the Alternative for Summary Adjudication / Trial:

Exhibit	Document Description
Exhibit "A"	Certified Copy of Amended Complaint for Injunctive and Declaratory Relief in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed July 6, 2009;
Exhibit "B"	Certified Copy of Defendant's Response in Opposition to Plaintiffs' Motions for Partial Summary Judgment in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed October 2, 2009;
Exhibit "C"	Certified Copy of Defendant's Cross-Motion for Judgment on the Pleadings and/or for Summary Judgment in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed October 5, 2009;
Exhibit "D"	Certified Copy of Order of Chancellor Claudia Bonnyman in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed November 25, 2009;
Exhibit "E"	California Department of Fish and Game, Certified Nonlead Ammunition Information, http://www.dfg.ca.gov/wildlife/hunting/condor/certifiedammo.html (last visited Nov. 29, 2010);
Exhibit "F"	California Assembly Bill 2358 (2010) as Amended in Senate on August 19, 2010;
Exhibit "G"	California Assembly Bill 2358 (2010) as Amended on in Senate August 30, 2010;
Exhibit "H"	California Senate Bill 1276 (1994) as Amended in Senate on May 26, 1994;
Exhibit "I"	Certified Copy of Consolidated Memorandum of Law of Defendant Attorney General Cooper in Opposition to Plaintiffs' Motions for Partial Summary Judgment and in Support of Defendant's Cross-Motion for Judgment on the Pleadings and/or for Summary Judgment in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed October 2, 2009.

The relevance of each court record requested to be noticed is set forth in Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment or in the Alternative for Summary Adjudication / Trial Brief.

Dated: December 6, 2010

Respectfully Submitted,
MICHEL & ASSOCIATES, PC

Clinton Monfort
Attorney for Plaintiffs

EXHIBIT A

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESEE *ex rel.* RANDY RAYBURN; JOHN (JANE) DOES NOS. 1-13;	)	
Petitioners,	)	
vs.	)	Civil Action No. 09-1284 -I CHANCELLOR CLAUDIA C. BONNYMAN
ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL	)	
Defendant.	)	

COPY

2009 JUL -6 PM 4:15

THIS 5TH DAY OF October 2010
CLERK & MASTER
BY Butler
DEPUTY

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I. NATURE OF THE ACTION

1. On July 14, 2009 an act of Tennessee Legislature, HB 0962/SB 1127, "An Act to amend Tennessee Code Annotated, Title 39, Chapter 17, relative to firearms" (*Exhibit A* hereto) is scheduled to become law (over a veto of Tennessee Governor Phil Bredesen). HB 0962/SB 1127, which became Public Law 339 on May 14, 2009 amends prior T.C.A. § 39-17-1305(c)[1] to make Tennessee the first state in the nation *expressly* to allow carrying a loaded concealed firearm into a bar[2].

[1] [Old] § 39-17-1305. Sale of alcoholic beverages; premises; possession of firearms

(a) It is an offense for a person to possess a firearm within the confines of a building open to the public where liquor, wine or other alcoholic beverages, as defined in § 57-3-101(a)(1)(A), or beer, as defined in § 57-6-102(1), are served for on premises consumption.
(b) A violation of this section is a Class A misdemeanor.
(c) The provisions of subsection (a) shall not apply to a person who is:
(1) In the actual discharge of official duties as a law enforcement officer, or is employed in the army, air force, navy, coast guard or marine service of the United States or any member of the Tennessee national guard in the line of duty and pursuant to military regulations, or is in the actual discharge of duties as a correctional officer employed by a penal institution; or

2. The challenged law, Public Chapter 339, as passed provides :

SECTION 1. Tennessee Code Annotated, Section 39-17-1305(c), is amended by adding the following language as a new, appropriately designated subdivision: [to section 1305 which makes it a Class A misdemeanor to carry a firearm where liquor, wine or other alcoholic beverages are served for on premises consumption, except for persons such as law enforcement and on one's own property and, now an exception for persons...]

(3)
(A) Authorized to carry a firearm under § 39-17-1351 who is not consuming beer, wine or any alcoholic beverage, and is within the confines of a restaurant that is open to the public and serves alcoholic beverages, wine or beer.
(B) As used in this subdivision (c)(3), "restaurant" means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, such place being provided with adequate and sanitary kitchen and dining room equipment, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations and periods of redecorating, and the serving of such meals shall be the principal business conducted.

3. Tennessee's liquor laws do not differentiate between bars and restaurants; *all* places that that are licensed to serve liquor by the drink are "restaurants." T.C.A. 57-

(2) On the person's own premises or premises under the person's control or who is the employee or agent of the owner of the premises with responsibility for protecting persons or property.

[2] A "bar" where firearms may not be carried by persons with firearms permits is variously defined under state liquor laws, as: an area or areas of a restaurant primarily devoted to drinking (the bar area of a restaurant); or a drinking establishment that derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption; or a drinking establishment that restricts entry to persons age 21 and above; or an establishment whose primary purpose is drinking. *See* footnote 3 *infra*. This Complaint's use of the term "bar" encompasses all of these definitions. As will be shown herein, however, in Tennessee *all* "bars" as defined above are considered "restaurants" as Tennessee law does not use any of these definitions, does not define a "bar" for liquor licensing purposes or for firearm restrictions and licenses *all* drinking establishments serving liquor by the drink for on premises consumption as "restaurants." *See infra* ¶ 3 & 4.

4-102 (27)(A).[3] Proponents of the new law misleadingly labeled the law a "restaurant carry" law or "restaurant bill." In Tennessee, however, *all* nightclubs, clubs, bars, and bar areas of restaurants that presently serve alcohol (until the wee hours of the morning : 3:00 a.m.; 24/7 Memphis) are licensed as "restaurants."

4. Because the new Tennessee law *expressly permits* bringing firearms into *all* drinking establishments (i.e. bars, nightclubs, or portions of restaurant premises that serve alcohol) Tennessee stands alone in expressly permitting bringing guns into all places in the state that serve liquor by the drink (including bars). Bringing firearms into drinking establishments (i.e. bars, nightclubs, or portions of restaurant premises that serve alcohol) is expressly prohibited by state statute, common law nuisance action or local laws.[4]

---

[3] "Proponents of the curfew [removed from the final bill and law] said they wanted handgun carry rights to extend to family restaurants that also happen to serve alcohol. The 11 p.m. curfew was meant to differentiate those restaurants from bars, since Tennessee law doesn't make an official distinction between the two." *CBS News website, "Guns In Bars? Tenn. House Says OK"* http://www.cbsnews.com/stories/2009/05/08/national/main5001150.shtml?tag=contentMain;contentBody

[4] **Nine states** expressly prohibit loaded guns in restaurants and bars (Arizona, Louisiana, Maine, Montana, North Carolina, North Dakota, New Mexico, Ohio and South Carolina).

Virginia prohibits *concealed* carrying of weapons in bars and restaurants.

Alaska prohibits carrying loaded firearms where alcohol is served; the law creates an affirmative defense for carrying a firearm in a "restaurant" (defined and limited by law to serve only beer or wine [not liquor]) if alcohol is not consumed.

Fourteen states expressly permit a concealed weapons permit holder to carry a gun into a *restaurant* that serves alcohol (Arkansas, Florida, Georgia, Kansas, Kentucky, Michigan, Missouri, Mississippi, Nebraska, Oklahoma, South Dakota, Texas, Washington, Wyoming). However in none of these states can a concealed loaded weapon be brought into a bar. **Five** of those 14 states expressly *preclude* carrying a loaded weapon into areas of the restaurant primarily devoted to drinking (i.e. the bar) (Arkansas, Florida, Kentucky, Mississippi and Wyoming). **Six** other states prohibit carrying guns in establishments that derive less than 50% of their total annual food and beverage sales from prepared meals (Georgia, Missouri, Nebraska, South Dakota Texas and Kansas (30%). **Washington** prohibits guns in 21 and up establishments. **Oklahoma and Michigan** prohibit carrying guns if the primary purpose of the establishment is drinking.

5. No state, by statute or regulation, *expressly* allows firearms in *bars*. Because bars, saloons, nightclubs and restaurants with bar areas are notorious for fights, assaults and breaches of the peace, carrying loaded guns is *expressly* prohibited in bars, nightclubs or bar areas serving alcohol in **24 states** (Alaska (AK ST s 11.61.220; AK § 04.11.100) , Arizona (AZ ST s 4-244), Arkansas (AR ST s 5-73-306); Florida (FL ST s 790.06) Georgia (GA ST s 16-11-127), Kansas (K.S.A. 75-7c10(12)), Kentucky (KY ST s 237.110), Louisiana (LA R.S. 40:1379.3), Maine (ME ST T. 17-A s 1057), Michigan (MI ST 28.425o), Mississippi (MS ST s 45-9-101), Missouri (MO ST 571.107), Montana (MT ST

Illinois and Wisconsin prohibit carrying concealed weapons in all places in the state.

22 other states (Alabama, California, Colorado Connecticut, Delaware, Hawaii, , Idaho, Iowa Indiana, Maryland, Massachusetts, Minnesota, New Jersey, New Hampshire, New York, Nevada, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia) have no express permission or express prohibition statutes related to carrying a gun where alcohol is served. However, these states take action under public nuisance laws when the state or city becomes aware that guns and/or shootings are occurring in bars.

Nuisance bars: Vermont, nuisance bars shut down; http://bit.ly/LiqSk (""The City of Burlington has a long history of dealing with issues revolving around bars and alcohol. And in the past, the city has shut down several places that were perceived to be a public nuisance." California nuisance bar shut down (shooting at bar; public nuisance): http://bit.ly/GI21t; Florida nuisance bar shut down (shootings at the bar): http://bit.ly/wlOrp; Kansas: nuisance bar shut down: http://bit.ly/GI21t; Maryland: nuisance bar shut down: http://bit.ly/gt5wZ; Minnesota: nuisance bar closed (gunshots at bar): http://bit.ly/2qwUus; Pennsylvania: nuisance bar shut down (shooting): http://bit.ly/gt0L1

States also do not issue or restrict permits to not allow carrying in bars or places that serve alcohol. *See e.g.* Connecticut ("The permit to carry handguns allows people to carry them openly or concealed, but mature judgment, says the Board of Firearm Permit Examiners, dictates that (1) "every effort should be made to ensure that no gun is exposed to view or carried in any manner that would tend to alarm people who see it. . . [and] (2) no handgun should be carried unless carrying the gun at the time and place involved is prudent and proper in the circumstances. "
For example, according to the board, handguns should not be carried: 1. *into a bar or other place where alcohol is being consumed"*www.cga.ct.gov/2007/rpt/2007-R-0369.htm; California (permit itself prohibits carrying in places where primary purpose is serving alcoholic beverages for on-site consumption)
http://rkba.org/ccw/ca_ccw_app.pdf

The point must simply be stressed: no state by act of positive law permits guns in bars and when guns are found in bars or bar shootings occur public nuisance laws are applied or state permits preclude carrying where alcohol is served.

45-8-328), Nebraska (NE LEGIS 430 (2009), New Mexico (NM ST s 30-7-3), North Carolina (NC ST s 14-269.3) , North Dakota (ND ST 62.1-02-04) , Ohio (OH ST s 2923.126), Oklahoma (OK ST T. 21 s 1272.1), South Carolina (SC Code 1976 § 16-23-465), South Dakota (SDCL § 23-7-8.1), Texas (V.T.C.A., Penal Code § 46.03), Washington (WA ST 9.41.300(1)(d), Wyoming (W.S.1977 § 6-8-104). Two states do not permit carrying weapons permits (Illinois, 720 ILCS 5/24-1 and Wisconsin, W.S.A. 167.31(2)(b)). Virginia expressly prohibits carrying concealed weapons where alcohol is served.[5].

6. Absent an injunction guns can be brought into any bar or restaurant or nightclub that serves alcohol on July 14, 2009 and the law will decriminalize carrying a permitted gun into a *posted* bar or restaurant (where the owner has posted "no firearms") making the act a fine of "no more than $500." Websites for Tennessee Firearms Association members and blogs of the Tennessee Firearms Association are already discussing the topics of what is the penalty for bringing a gun into a bar or restaurant and whether the law prohibits having consumed alcohol prior to entering the bar or restaurant (it does not). *See* Tennessee Firearms Association website blog.

7. Legislators who supported this law have claimed that "36" or more states have "similar laws" allowing permit holders to go armed in establishments serving alcohol. Legislative proponents stated 36 states have similar laws and later that "40 states allow citizens that have handguns to carry their handguns where alcohol is served." http://www.youtube.com/watch?v=s2pZclaNqi4.

8. The National Rifle Association released statistics that "38 states" had laws similar to the new Tennessee law:

> "According to Alexa Fritts, media relations associate for the National Rifle Association, the following states already allow similar forms of gun

[5] Virginia law *expressly* prohibits carrying *concealed* weapons where alcohol is served. Va. Code Ann. 18.2-308(J3) (2005). *See* http://www.youtube.com/watch?v=aeR9LKDtQws

carrying laws in restaurants which serve alcohol: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming."

9. In fact: *none* of these 38 states identified by the NRA and the law's proponents *expressly* permit guns in bars. Fourteen of these 38 states *expressly prohibit* loaded guns in bars or bar areas (Alaska, Arkansas, Florida, Georgia, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, Texas, Washington and Wyoming). In the remaining 24 states cited by the NRA these states have *no statutes that expressly permit* (or prohibit) guns where alcohol is served. However these states in fact take action to close nuisance bars where guns are present or shootings occur. *See supra* fn. 4.

10. Tennessee will also be the first state in the nation to *decriminalize* bringing a permitted firearm into a drinking establishment that posts a notice (forbidding guns on the premises). Under prior law, T.C.A. § 39-17-1305 carrying a concealed weapon into a drinking establishment was a criminal offense, Class A misdemeanor ("(b) A violation of this section is a Class A misdemeanor"—meaning the person carrying a gun into a drinking establishment, licensed to carry or not, could be arrested, detained, taken to jail, dispossessed of the gun by police officers, and faced a criminal penalty– Class A misdemeanor – "of not greater than eleven (11) months, twenty-nine (29) days or a fine not to exceed two thousand five hundred dollars ($2,500), or both." T. C. A. § 40-35-302.; T. C. A. § 40-35-111.

11. The newly passed law removes the specific Class A misdemeanor criminal penalty for carrying a firearm into a drinking establishment by permit holders, and over 220,000 permitted gun owners (and permit holders in 19 reciprocity states) can

carry a firearm *even on the premises of a posted drinking establishment that serves alcohol and* will face a mere fine (a ticket) of up to $500. T.C.A. § 39-17-1359. Carrying a gun into a drinking establishment is no longer a criminal offense or an incarcerative offense and there is no forfeiture of the firearm.[6] *Compare e.g.,* Kansas law, K.S.A. 75-7c11, (criminal Class B misdemeanor to bring a gun onto *posted* property). Imposing small fines or penalties for illegally carrying a gun into at or near drinking establishment causes more firearms at bars and presents a risk to public safety. *See "Mayor* [of Lawrence, Kansas] *seeks stricter gun law: Amyx wants jail time for carrying firearms near bars"* [local ordinance

[redacted]

KS but imposed no mandatory jail time; mayor called for stiffer law].[7]

12. A permit owner, under the new law, although not permitted to consume alcohol on the premises, can enter the premises of a drinking establishment, having

14. *Due Process/Taking.* Petitioners aver that the law violates due process and amounts to a taking of property that exposes bars and restaurants that serve alcohol to guns with no effective deterrent to carrying guns on posted premises and increases civil liability for shootings. *See "Patron injured in shooting sues bar"* (PA bar patron sued bar for inadequately screening for firearms, http://bit.ly/1arT1V.

15. *Due Process/Arbitrary and Capricious Exercise of Police Power.* Petitioners challenge the law and on the grounds that the law is an unconstitutional deprivation of due process because it is an unreasonable, arbitrary and capricious exercise of the police power.

16. *Tennessee Occupational Safety and Health Act of 1972.* Petitioners challenge the guns in bar law as in violation the general duty clause of the Tennessee Occupational Safety and Health Act of 1972, T.C.A. § 50-3-105(1).[9]

17. *Tennessee Constitution.* Petitioners aver the guns in bar law violates due process and the rights guaranteed by Art. I ,Secs. 1[10], 8[11], 17[12], 23[13] of the Tennessee Constintution. Petitioners further challenge the law as in violation of Art. XI, Sec. 8 of the Tennessee Constitution: "The Legislature shall have no power to suspend any

[9] T.C.A. § 50-3-105(1) provides that "[e]ach employer shall furnish to each of their employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to their employees."

[10] "That all power is inherent in the people, and all free governments are founded on their authority, and instituted *for their peace, safety,* and happiness;"

[11] "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

[12] "Suits may be brought against the state in such manner and in such courts as the Legislature may by law direct."

[13] "That the citizens have a right, in a peaceable manner, to assemble together for their common good"

general law for the benefit of any particular individual, *nor to pass any law for the benefit of individuals inconsistent with the general laws of the land."* (emphasis supplied).

18. *42 U.S.C. § 1983 State-Created Danger and State-Created Vigilantism.* Petitioners challenge the law as an unconstitutional deprivation of civil and constitutional rights under the "state-created danger" doctrine recognized under cases and law construing 42 U.S.C. 1983.[14]

19. *Due Process and the Fundamental Right to be Free from Gun Violence in "Sensitive Places".* Petitioners challenge the law on the ground that the law is an unconstitutional deprivation of due process because it violates a fundamental right to be free from gun violence in sensitive public places.

20. The Second Amendment right to keep and bear arms is not implicated in this case. Just as there is no First Amendment right falsely to cry "fire" in a crowded theater[15] : "There is nothing in the language of our state constitution or in the history of the right to 'bear arms', as protected by the federal and various state constitutions, which lends any credence whatsoever to the claim that there is a constitutional right to carry a firearm into a drinking establishment." *Second Amendment Foundation v. City of Renton*, 35 Wash.App. 583, 588, 668 P.2d 596, 599 (Wash. Ct. App. 1983). The U.S. Supreme Court has recently recognized in *District of Columbia v. Heller*, 128 S.Ct. 2783,

[14] *Henderson v. City of Chattanooga*, 133 S.W.3d 192, 211 (Tenn.Ct.App.,2003): "The next issue addressed in *Kallstrom I* [*Kallstrom v. City of Columbus*, 136 F.3d 1055 C.A.6 (Ohio),1998] was whether a state could be held liable for private acts of violence under 42 U.S.C. § 1983. Relying on the state-created-danger theory, the Sixth Circuit concluded that a state can be held liable for the actions of a private individual, such as a gang member, when the state's action places the individual victim "specifically at risk, as distinguished from a risk that affects the public at large." *Id.* at 1066. Owners and employees (wait staff, bartenders, servers, etc) are placed at direct and grave risk of guns in drinking establishments).

[15] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." *Schenck v. U.S.* 249 U.S. 47, 39 S.Ct. 247, 249 (U.S. 1919).

2817 (2008) that the right of an individual to bear arms is not unlimited and that firearms may not be carried "in sensitive places"[16]

21. Tennessee law has long recognized that guns in the presence of alcohol is a dangerous and volatile combination. "It has been stated in several opinions of this Court that alcohol and firearms are a volatile combination as someone will likely be hurt." *State v. Parker*, 932 S.W.2d 945, 957 (Tenn.Cr.App.,1996); *see also United States v. Prescott*, 599 F.2d 103 (5th Cir. 1979) (discussing the " volatile mixture" of alcohol and firearms."

22. Petitioners seek a temporary and permanent injunction to enjoin the guns in bars law from taking effect. Simply put, guns and alcohol don't mix. The combination of guns and alcohol on the premises of drinking establishments is a state-created danger and threat to public safety that violates common law, statutory and constitutional rights of the public and persons who own and work at drinking establishments. Courts have the power and duty to strike down state-created nuisances and laws that unreasonably or unconstitutionally threaten the health, safety and welfare of the public.

II. FACTUAL AND LEGAL BASIS FOR CLAIMS

23. Although a state legislature may pass laws in pursuit of its regulation and police powers, judicial review is necessary and appropriate "[i]f the means employed have no real, substantial relation to public objects which government may legally accomplish, [or] if they are arbitrary and unreasonable . . . the judiciary will . . .

[16] "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 128 S.Ct. 2783, 2817 (2008)

interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt." *Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 593 26 S.Ct. 341 U.S. (1906).

24. A legislative enactment will be deemed invalid if it bears no real or substantial relationship to the public's health, safety, morals or general welfare or if it is unreasonable or arbitrary. *See Nashville, C & L. Ry. v. Walters*, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949 (1935); *Estrin v. Moss*, 221 Tenn. 657, 430 S.W.2d 345, 348 (Tenn.1968), cert. dismissed, 393 U.S. 318, 89 S.Ct. 554 (1969); *First Tennessee Bank Nat. Ass'n v. Jones*, 732 S.W.2d 281 (Tenn.App.,1987) (statute is an invalid exercise of the police power burden if "the statute is arbitrary, capricious and unreasonable, and has no real tendency to effectuate the legislative purpose." *Templeton v. Metropolitan Government of Nashville and Davidson Co.*, 650 S.W.2d 743 (Tenn.App.1983).

25. The Attorney General of the State of Tennessee is the proper defendant in this action. T.C.A. § 8-6-109. *Peters v. O'Brien*, 152 Tenn. 466, 278 S.W. 660 (1925) (Attorney General is proper party in a declaratory judgment action to determine validity of a state statute). Petitioners aver that pursuant to T.C.A. § 8-6-109 the Attorney General should exercise his discretion and *not* defend the validity and constitutionality and give notice to the speakers of each house of the general assembly of his decision.

26. *Public Nuisance.* Petitioners bring this challenge to Tennessee's "guns in bar law" on the grounds that the law *creates* and abets an unlawful public nuisance: loaded weapons (concealed or carried openly) on premises where alcoholic beverages, wine or beer is served.

27. The "guns in bar law" is a public nuisance under RESTATEMENT OF TORTS (SECOND) § 834 in that it is an unreasonable interference with a right common to the

general public and creates a significant threat to the public health, public safety, and public peace.

28. The "guns in bar law" permits concealed (and openly carried) loaded firearms to be carried by gun permit holders into bars, nightclubs and restaurants serving alcohol. Petitioners aver the law itself creates a public nuisance (public nuisances) and threatens the health, safety, welfare and the very lives of the Petitioners.[17]

29. "In Tennessee, a public nuisance is defined as "an act or omission that unreasonably interferes with or obstructs rights common to the public." *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 283 (Tenn. Ct. App. 1988) (citing Restatement (Second) of Torts § 821B (1977)), cited in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 549 F.Supp.2d 725 , 735 (W.D.N.C.,2008).

30. A public nuisance may be enjoined "even though it has not yet resulted in any significant harm" if "harm is *threatened*" where "harm is threatened that would be significant." Restatement Second of Torts § 821F (comment b).

31. *Shootings* that occur in a bar or nightclub are evidence of a public nuisance which Tennessee courts may abate. *State ex rel. Gibbons v. Club Universe*, 2005 WL 175035 (Tenn.Ct.App.,2005) (Memphis nightclub declared a public nuisance and Court enjoined the nightclub from further operation based upon, inter alia, evidence of "shootings" "in the nightclub"). Id. at * 1. *See also People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 929 P.2d 596 (Cal.,1997) ("shootings" supported finding of public nuisance.").

---

[17] The Tennessee statute defines nuisance as: any place in or upon which lewdness, assignation, promotion of prostitution, patronizing prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, and sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver, or distribute matter or materials, ... quarreling, drunkenness, fighting or *breaches of the peace are carried on or permitted*, and personal property, contents, furniture, fixtures, equipment and stock used in or in connection with the conducting and maintaining any such place for any such purpose. Tenn.Code Ann. § 29-3-101(2) (2000) (emphasis supplied).

32. The Court should take judicial notice pursuant to Tenn. R. Evid. 201 that shootings in bars, nightclubs and restaurants that serve alcohol is a "recognized hazard" to life, public health and public safety--whether the shooter has a permit or not:

- shooting by a Tennessee permit holder outside restaurant that served alcohol in Memphis Tennessee[18],
- Violent crimes and gun offenses by permit holders[19]
- That Tennessee's "shall issue" gun permit law forces officials to give permits to "almost everyone," including persons with a violent criminal history.
- bar shooting in Nashville: 4/2009: http://www.wkrn.com/Global/story.asp?S=10124657
- bar shooting Knoxville: 6/2008 http://www.wbir.com/news/local/story.aspx?storyid=59690
- bar shooting Millington:12/2008 http://www.myeyewitnessnews.com/news/local/story/2-Charged-in-Millington-Bar-Shooting/arFbGrqg00GMqAr4gp7dmg.cspx
- bar shooting Jackson: 12/2008 http://www.wmctv.com/global/story.asp?s=9472549
- Numerous shootings in bars reported in Tennessee cases.[20]

---

[18] http://www.commercialappeal.com/news/2009/jun/04/grand-jury-indicts-man-second-degree-murder-cordov/

[19] "Sims is among dozens of Shelby Countians with violent histories who have received permits to carry handguns in Tennessee, according to an investigation by The Commercial Appeal. The newspaper identified as many as 70 county residents who were issued permits despite arrest histories, some with charges that include robbery, assault, domestic violence and other serious offenses." http://bit.ly/6TYnm

[20] *Chattanooga-Hamilton County Hosp. Authority v. Bradley County*, 249 S.W.3d 361 (Tenn., March 10, 2008)(" suspect injured in a shooting at a bar in Cleveland"; *State v. Snow*, 2002 WL 1256142 (Tenn.Crim.App., June 07, 2002) ("The shooting occurred in a bar in Nashville"; *State v. Baldwin*, 1998 WL 426199 (Tenn.Crim.App., July 29, 1998) ("Martin stated that the only other person in the bar when the shooting took place"); *State v. Bolden*, 1996 WL 417673, Tenn.Crim.App., July 26, 1996 (" Raymond Davis, and Charles Belk met in Tiptonville and proceeded to a "bar" where they practiced shooting a nine millimeter, semi-automatic pistol belonging to the appellant. The pistol was a "Tec-DC9," manufactured by Intratec, commonly referred to as a Tec-nine. The appellant testified that he had bought the gun earlier that month. After shooting at the "bar"); *State v. Sinclair*, 1996 WL 181432, (Tenn.Crim.App., April 17, 1996) (Mary Hall testified that she was sitting beside the victim at the bar immediately before the shooting and that the victim had no weapon in his hand when the Defendant approached."; *State v. Richardson*, 1993 WL 523630, (Tenn.Crim.App., December 16, 1993) ;("Mr. Jones, who knew the appellant, saw him return to the bar and start shooting"); *Kelton v. Park Place Center*, 1993 WL 415637, Tenn.Ct.App., October 12, 1993 ("...an increase in crime during the evening hours in the east Memphis area. In the six months prior to the shooting at bar"; *State v. Bates*, 1990 WL 39698, Tenn.Crim.App., March 30, 1990 (" The appellant was indicted for murder by use of a firearm after a shooting incident at a bar

- Cases of shootings at bars by persons licensed to carry permits.[21]

33. In supporting the new law, legislative proponents and the NRA cited examples to demonstrate the new law would expressly allow gun permit holders to carry their guns into bars and engage in vigilante *shooting* at drinking establishments:

- Nashville bar shooting fatality involving the death of Benjamin Goeser.
- http://blogs.nashvillescene.com/pitw/2009/05/lawmakers_vote_to_drop_curfew.php
- http://blogs.tennessean.com/politics/2009/nra-says-bredesen-broke-2006-pledge-to-support-guns-in-restaurants-bill/

34. "[O]therwise lawful actions may be the subject of nuisance lawsuits [under Tennessee law]," *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 549 F.Supp.2d 725 , 735 (W.D.N.C., 2008), citing *Sherrod v. Dutton*, 635 S.W.2d 117, 121 (Tenn. App. 1982).

---

in which an employee was shot in the head."); *State v. Wray*, 1987 WL 7990 (Tenn.Crim.App., March 17, 1987)("Tommy's After Hours Bar, where the shooting occurred").

[21] Bartlett, TN: permit holder shoots in parking lot of restaurant that served alcohol. http://www.commercialappeal.com/news/2009/jun/04/grand-jury-indicts-man-second-degree-murder-cordov/;
Memphis, TN: permit holder off duty police officer shoots at a bar. http://www.commercialappeal.com/news/2009/may/19/former-deputy-had-alcohol-and-demons-shooting/.
St. Louis, MO: permit holder off duty police officer shoots at a bar. http://www.ksdk.com/news/local/story.aspx?storyid=159746;
Sturgis, SD: permit holder off duty police officer shoots at a bar. http://www.seattlepi.com/local/376865_sturgis29.html
Minnesota: "Consider Zachary Ourada, who was proud of his newly obtained permit to carry a concealed handgun. A local bartender commented that the twenty-seven year old 'felt like somebody because he had a permit.' Ourada had met the requirements of Minnesota's Personal Protection Act, which, among other things, requires a background check, and completion of a gun safety course. On the night of May 13, 2005, however, Ourada had a little too much to drink. He does not clearly remember what happened that night, but does remember being asked to leave a popular supper-club and being escorted out by Billy Walsh, the doorman. A few moments later, Walsh was dead with four gunshot wounds in his back. "I'm sorry," Ourada told the court." *Comment A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce Controversy?*, 29 HAMLINE L. REV. 638-639 (2006).

35. "The definition of 'nuisance' is marked by flexibility and reasonable breadth, rather than meticulous specificity." *State ex rel. Woodall v. D&L. Co., Inc.*, 2001 WL 524279 (Tenn. Ct. App., 2001) *citing, Grayned City of Rockford*, 408 U.S. 104, 110 (1972). Liability for public nuisance "is based on interference with the public's use and enjoyment of a public place or with other common rights of the public." *Metro. Gov't of Nashville & Davidson County v. Counts*, 541 S.W.2d 133, 138 (Tenn. 1976) (An individual may maintain an action based on public nuisance if that individual has sustained some special injury as a result of the nuisance; and a public nuisance is the interference with the public's use and enjoyment of a public place); *66 C.J.S. Nuisances § 65* (1998); *Hale v. Ostrow*, 2004 WL 1563230 (Tenn.Ct.App.,2004), *rev'd on other grounds, Hale v. Ostrow*, 166 S.W.3d 713 (Tenn. 2005). A state or governmental entity that *creates* a public nuisance is not entitled to immunity and may be sued for creating a public nuisance. *Johnson v. Tennessean Newspaper,Inc.* 28 Beeler 287, 241 S.W.2d 399 (Tenn. 1951); *Jones v. Knox County*, 9 McCanless 561, 327 S.W.2d 473 (Tenn. 1959).

36. Where a governmental entity maintains or aids and abets a public nuisance, although it does so while in the discharge of a public duty, or in the performance of a governmental function, it cannot claim immunity. *Bobo v. City of Kenton*, 22 Beeler 515, 212 S.W.2d 363 (Tenn. 1948); Knoxville v. Lively, 1918, 141 Tenn. 22, 206 S.W. 180 (1918).

37. T.C.A. § 6-2-201(23) empowers municipalities in Tennessee to "prescribe limits within which business occupations and practices liable to be nuisances or detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained."

38. It is the law and public policy of the State of Tennessee for local governments to control and abate public nuisances. *See e.g.* T.C.A. § 6-54-127(g) (graffiti

as nuisance) "Nothing in this section shall be construed to impair or limit the power of the municipality to define and declare nuisances and to cause their removal or abatement under any procedure now provided by law for the abatement of any public nuisances." *To the same effect:* T.C.A. § 13-21-103(6)

39. It is the law and public policy of the State of Tennessee that governmental power may not be used to create, maintain or abet public nuisances. *See e.g.*, T.C.A. § 7-54-103(j),(k):

> "(j) Any municipality or county exercising, whether jointly or severally, any authority conferred upon it by this chapter, as amended, is hereby declared to be acting in furtherance of a public or governmental purpose. (k) Provided, that such separation and disposition neither creates a public nuisance nor is otherwise injurious to the public health, welfare, and safety."

40. It is the law and public policy of the State of Tennessee that the Courts have the power and jurisdiction to "abate nuisances." *See* T.C.A. § 16-10-110.

41. It is the law and public policy of the State of Tennessee that aiding and abetting a public nuisance is unlawful. *See* T.C.A. § 29-3-101(b): "Any person who uses, occupies, establishes or conducts a nuisance, or aids or abets therein, and the owner, agent or lessee of any interest in any such nuisance, together with the persons employed in or in control of any such nuisance by any such owner, agent or lessee, is guilty of maintaining a nuisance and such nuisance shall be abated as provided hereinafter."

42. It is the law and public policy of the State of Tennessee that the state may be sued for creating or maintaining nuisances." *See e.g.*, T.C.A. § 9-8-307(a)(1)(b) (State may be sued for monetary damages for "(B) Nuisances created or maintained.").

43. It is the law and public policy of the State of Tennessee that buildings that are dangerous to human life are declared "public nuisances." *See* T.C.A. § 13-6-102(8):

> "'Public nuisance' means any vacant building that is a menace to the public health, welfare, or safety; structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, dangerous to human life, or no longer fit and habitable; a nuisance as defined in § 29-3- 101(a); or is otherwise determined by the local municipal corporation or code enforcement entity to be as such."

44. It is the law and public policy of the State of Tennessee that citizens affected by nuisances may bring a civil action to abate a nuisance in their community. *See* T.C.A. § 13-6-106(a):

> "...[A]ny interested party or neighbor, may bring a civil action" to abate a public nuisance"; T.C.A. § 29-3-102: "The jurisdiction is hereby conferred upon the chancery, circuit, and criminal courts and any court designated as an environmental court pursuant to Chapter 426 of the Public Acts of 1991 to abate the public nuisances defined in § 29-3-101, upon petition in the name of the state, upon relation of the attorney general and reporter, or any district attorney general, or any city or county attorney, or without the concurrence of any such officers, upon the relation of ten (10) or more citizens and freeholders of the county wherein such nuisances may exist, in the manner herein provided."

45. It is the law and public policy of the State of Tennessee that citizens may sue "all aiders and abettors" of a public nuisance. T.C.A. § 29-3-103.

46. It is the law and public policy of the State of Tennessee that a temporary injunction to abate a public nuisance should issue upon presentation of a proper bill or petition for public nuisance. T.C.A. § 29-3-105. Temporary injunction (a) In such proceeding, the court, or a judge or chancellor in vacation, shall, upon the presentation of a bill or petition therefore, alleging that the nuisance complained of exists, award a temporary writ of injunction, enjoining and restraining the further continuance of such nuisance, and the closing of the building or place wherein the same is conducted until the further order of the court, judge, or chancellor. (b) The award of a temporary writ of injunction shall be accompanied by such bond as is required by law in such cases, in case the bill is filed by citizens and freeholders; but no bond shall be required when such is filed by the officers provided for, if it shall be made to appear to the satisfaction

of the court, judge or chancellor, by evidence in the form of a due and proper verification of the bill or petition under oath, or of affidavits, depositions, oral testimony, or otherwise, as the complaints or petitioners may elect, that the allegations of such bill or petition are true."

47. It is the law and public policy of the State of Tennessee that fighting, drunkenness, breaches of the peace and property used in breaches of the peace constitute public nuisances. *See* T.C.A. § 29-3-101(a)(2):

> "'Nuisance' means that which is declared to be such by other statutes, and, in addition thereto, means any place in or upon which lewdness, prostitution, promotion of prostitution, patronizing prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, any sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver or distribute matter or materials in violation of §§ 39-17-901 – 39-17-908, § 39-17-911, § 39-17-914, § 39-17-918, or §§ 39-17-1003 – 39-17-1005, quarreling, *drunkenness, fighting* or *breaches of the peace* are carried on or permitted, *and personal property*, contents, furniture, fixtures, equipment and stock *used* in or in connection with the conducting and maintaining any such place for any such purpose."

48. It is the law and public policy of the State of Tennessee that courts may abate nuisances and order that "all means, appliances, fixtures, appurtenances, materials, supplies, and instrumentalities used for the purpose of conducting, maintaining, or carrying on the unlawful business, occupation, game, practice or device constituting such nuisance" be removed. T.C.A. § 29-3-110.

49. It is the law and public policy of the State of Tennessee that the trial of public nuisance cases be "given precedence over all other causes." T.C.A. § 29-3-108.

50. It is the law and public policy of the State of Tennessee that "Any person who is visibly intoxicated and who is disorderly" creates a public nuisance. T.C.A. § 68-14-602; T.C.A. § 68-14-605.

51. "A nuisance has been defined as anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable." *Pate v. City of Martin*, 614 S.W.2d 46 at 47 (Tenn. 1981). "The key element of any nuisance is the reasonableness" of the "conduct under the circumstances." *Sadler v. State*, 56 S.W.3d 508 (Tenn.Ct.App.,2001), *citing*, 58 AM.JUR.2D NUISANCES § 76.

52. When the Petitioners' theory of liability is public nuisance, the pleading requirements are not exacting because the concept of common law public nuisance elude[s] precise definition The existence of a nuisance depends on the peculiar facts presented by each case. *Young v. Bryco Arms*, 213 Ill.2d 433, 821 N.E.2d 1078 (Ill.,2004).

53. Petitioners allege a cause of action for public nuisance: a right common to the general public for life and safety at public places including places that serve alcohol, the transgression of that right by the "guns in bars law" and resulting injury.

54. Petitioners aver the "guns in bar law" creates and abets a public nuisance because, under public nuisance law, even assuming *arguendo* the mere presence of permitted guns in bars is not *per se* harmful, the guns *may become harmful by the intervention and acts of other persons and patrons* and thus a public nuisance exists. *See* RESTATEMENT OF TORTS (SECOND) § 834[22], and *comment f*[23]. The mere presence of guns on the premises can establish proof and evidence of a public nuisance because by actions of

---

[22] "One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." RESTATEMENT OF TORTS (SECOND) § 834.

[23] f. *Causation*. In some cases the physical condition created is not of itself harmful, but becomes so upon the intervention of some other force, the act of another person or force of nature. In these cases the liability of the person whose activity created the physical condition depends upon the determination that his activity was a substantial factor in causing the harm, and that the intervening force was not a superseding cause. RESTATEMENT OF TORTS (SECOND) § 834, *comment f.*

patrons, shootings and fights with guns may occur, which would make the premises a nuisance.

55. Because bars, saloons and nightclubs are notorious for fights, assaults and breaches of the peace, carrying loaded guns is *expressly* prohibited in bars and nightclubs serving alcohol in 24 states. *See supra* ¶ 2. No state by statute or case law *expressly* permits a gun permit holder to take a concealed loaded gun into a bar or nightclub that serves alcohol for consumption.

56. In states where there is no express prohibition against bringing guns into bars or nightclubs, courts in such states (and historically Tennessee) treat guns and alcohol as a "volatile combination" and routinely declare bars or nightclubs where guns are found to be present as public nuisances, particularly when shootings occur. *See supra* footnote 4. *See e.g. Spitzer v. Sturm Ruger & Co., Inc.*, 309 A.D.2d 91, 98; 761 N.Y.S.2d 192 (N.Y. Sup. Ct. 2003) (unlike true public nuisance cases where "firearms" together with "the character of the premises as a nightclub serving alcoholic beverages" supports public nuisance; mere manufacture of guns did not cause/constitute public nuisance); *Suleiman v. City of Memphis Alcohol Com'n*, 2008 WL 2894679 (Tenn.Ct.App.,2008) (beer permit denied on public nuisance grounds because shootings had occurred at the market); *Kingsport v. Club 229*[24] (City of Kingsport filed public nuisance action to close bar where shooting and breaches of the peace had occurred); *Philadelphia v. Franchise Bar & Grille*[25]("A North Philadelphia bar that police say is at the center of a wild shootout for the second time in two years was shut down yesterday for being a "public nuisance."); *State of Tennessee v. Joseph Patrick Patton,*

[24] http://www.timesnews.net/article.php?id=3640427

[25] http://www.metro.us/us/article/2009/06/16/01/5110-85/index.xml

Tropicana Club (Davidson County Chancery Ct.),[26] *Gelletly v. Commonwealth of Virginia*, 16 Va. App. 457, 430 S.E. 2d 722 (1993) (evidence of patrons possessing guns in a bar on two different occasions was relevant to public nuisance; which the court found existed and was affirmed on appeal); *City of Rochester v. Premises Located at 10-12 South Washington Street*, 180 Misc.2d 17, 687 N.Y.S.2d 523 (N.Y.Sup.,1998) (frequent shooting of firearms and fighting in vicinity of night club, was public nuisance).

57. Prior Tennessee law, T.C.A. § 39-17-1305 expressly recognized that citizen health and safety was threatened by guns on premises where alcohol was served or sold.

58. The passage of the new law did not change the *facts* that guns and alcohol don't mix, that guns and alcohol are a volatile combination, and that carrying loaded and concealed weapons into bars, nightclubs and restaurants that serve alcohol presents an unreasonable threat to public safety and an increased risk of shootings. "Studies by Kwon et al. (1997), Jarrell and Howsen (1990) and Kellermann et al. (1993) all show that higher alcohol consumption or availability is associated with higher rates of gun-related fatalities." National Bureau of Economic Research, *Working Paper 7500* at p. 2 (Jan. 2000)[27].

II. PARTIES

59. Petitioner Randy Rayburn (John Randy Rayburn) is an individual of the full age of majority and is domiciled in Tennessee.

[26] "In 2006, a nightclub in Nashville Tennessee had more than three hundred calls for police service in a one year period. Most of those calls were for gunshots, fights and assaults. The owners, who tried beefing up security, could not control the type of people who flocked to their establishment and eventually the city used a civil nuisance law to padlock their door and force them to close down." http://bit.ly/19JWXk; *State of Tennessee v. Joseph Patrick Patton, Tropicana Club (Davidson County Chancery Ct.).*

[27] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=214614

60. Petitioners John (Jane) Does 1-9 are individuals of the full age of majority and who are domiciled in Tennessee. Each Doe plaintiff works in a bar or restaurant in Tennessee and faces the threat, risk and danger of guns being brought into drinking establishments. Does 1-9 ask that they be allowed to pursue this action anonymously, as they fear community reprisals and attacks, and ostracism from their stance to challenge the guns in bars law.

61. Petitioners John Does 10, 11, 12 and 13 are Tennessee residents who may lawfully carry concealed firearms by a Tennessee handgun carry permit pursuant T.C.A. § 39-17-1351. Petitioners John Does 10, 11, 12 and 13 fear actual or threatened prosecution (as a Class A misdemeanor) under T.C.A. § 39-17-1305 because the law makes it a crime to carry a firearm into an establishment that serves alcohol but is not a restaurant defined as "the serving of such meals shall be the principal business conducted."

62. Defendant Robert Cooper, Jr. is sued in his official capacity as Tennessee Attorney General, P.O. Box 20207, Nashville, TN 37202.; Tennessee, Tennessee State Capitol, Nashville, Tennessee 37243;

III. STANDING

63. Petitioner Rayburn has suffered a special injury vesting him with standing to bring this nuisance action because the use and enjoyment of his restaurants, bars and nightclubs has been impaired by the new law which will bring patrons carrying guns to his premises. His injury and damages are markedly different from members of the public generally.

64. Petitioners Does 1-9 have or will suffer a special injury vesting them with standing to bring this nuisance action because they work in bars and/or restaurants that serve alcohol and will face the dangers and risks from patrons carrying guns to

their workplaces (whether posted or not). Their injury and damages are markedly different from members of the public generally.

65. Petitioners John Does 10-13 are Tennessee residents who may lawfully carry concealed firearms by a Tennessee handgun carry permit pursuant T.C.A. § 39-17-1351. Petitioners John Does 10-13 fear actual or threatened prosecution (as a Class A misdemeanor) under T.C.A. § 39-17-1305.

66. Petitioners' injuries will be rectified by a favorable decision declaring and/or enjoining the enforcement as unconstitutional the guns in bars law.

67. Petitioners have a distinct and palpable injury (and are particularly aggrieved) by the guns-in-bars law.

V. First Count: Public Nuisance

68. Petitioners re-allege and re-aver all of the allegations contained in the previous paragraphs.

69. Permitting guns in bars threatens the security, life, safety and health of the public and Petitioners in a special manner and the law interferes with *community* interests and a collective ideal of civil life in a civil society. *People ex rel Gallo v. Acuna*, 14 Cal. 4th 1090, 1105, 60 Cal. Rptr. 2d 277, 929 P.2d 596 (1997).

70. Newly enacted T.C.A. § 39-17-1305(c) is an unlawful state-created public nuisance. The State of Tennessee is creating, aiding, and abetting an unlawful public nuisance. Just as, for example, the State of Tennessee may not create a public nuisance by pouring concrete into the Cumberland River[28], the State may not create, aid or abet placing guns in bars or restaurants with bar areas.

VI. Second Count: Due Process—Taking of Property

[28] *See e.g.*, North Carolina ex rel. Cooper v. Tennessee Valley Authority, 549 F.Supp.2d 725, 735 (W.D.N.C., 2008) (TVA, a governmental entity, could not pollute North Carolina's air).

71. Petitioners re-allege and re-aver all of the allegations contained in the previous paragraphs.

72. Petitioner Rayburn's right of private property is a sacred, natural and inherent right, which is protected by the United States and Tennessee Constitutions. The guns in bar law will impose added unreasonable burdens on Rayburn and other employers, property owners, tenants, or business entities who will be required to monitor the lawful and unlawful uses of firearms brought to the premises, especially since the new law decriminalizes bringing guns into bars and restaurants serving alcohol. The responsibility for monitoring who can legally enter and who cannot, who is armed and who is not, who can be served alcohol and who cannot, who needs police protection and who does not, rests entirely on the shoulders of the restaurant/bar owner.

73. The law will provide no effective deterrent or protection to carrying licensed guns into bars and will promote confrontations with patrons who seek to bring weapons into the bar and restaurant areas serving alcohol. Patrons will have to be monitored for guns and drinking and/or screened and identified for gun possession.[29] Signs will have to be posted which will deter patrons, tourism and the ambience of Petitioner's businesses. "Bar and restaurant owners are preparing for gun owners who want to pack heat everywhere they go."[30] The law will increase liability insurance rates and the legal risk and exposure for gun shootings as the law increases the probability of

[29] http://www.myeyewitnessnews.com/news/local/story/Guns-Not-Allowed-On-Beale-Street/PtxXy9GMJESnOuKirw4J3w.cspx ("Signs prohibiting guns will be posted inside every bar and restaurant on Beale Street. In addition to signs, metal detector wands will be used at every entrance. The move comes after state lawmakers passed the "Guns In Bars" bill, allowing gun permit holders to bring their weapons inside places that serve alcohol. It's a move Performa says will ensure the safety of patrons like Ray Rials.").

[30] http://www.wkrn.com/global/story.asp?s=10615468

the presence of guns at premises that serve alcohol and expressly contemplates gun shootings by Tennessee's 220,000 gun permit holders and permit holders in 19 reciprocity states. Bar owners who post notices will have no reasonable assurance thousands of permit holders will not brings guns to their premises as the law has decriminalized carrying guns into restaurants and bars that serve alcoholic beverages. Nor will bar owners who are operating at near or below 50% meal sales know whether their patrons are legally of illegally carrying firearms as the law only permits carrying firearms into restaurants who principal business is the service of meals.

VII. THIRD COUNT: SUBSTANTIVE DUE PROCESS VIOLATION

74. Petitioners re-allege and re-aver all of the allegations contained in the previous paragraphs.

75. Petitioners seek an injunction against the enforcement of the guns in bar law because it "is fundamentally arbitrary or irrational." *Lingle v. Chevron U.S.A. Inc.* 544 U.S. 528, 544 125 S.Ct. 2074 (U.S.,2005.). A government regulation "that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id.* at 542. The guns in bar law has no reasonable or rational basis (fails rationality review) and fails strict, mid-level or heightened scrutiny required by the fundamental right to a workplace safe from recognized hazards to health and safety and the fundamental right to be free from gun violence and vigilante shootings in sensitive public places.

VIII. FOURTH COUNT: TOSHA & OSHA PREEMPTION

76. Petitioners hereby incorporates by reference the preceding paragraphs above.

77. The guns in bars law is preempted by OSHA's rules and regulations, and is therefore unenforceable under the Supremacy Clause contained in the United States Constitution. Article VI of the United States Constitution.

78. Congress imposed upon employers a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1).

79. OSHA developed an enforcement policy with regard to workplace violence as early as 1992 in a letter of interpretation that stated: "In a workplace where the risk of violence and serious personal injury are significant enough to be "recognized hazards," the general duty clause [specified by Section 5(a)(1) of the Occupational Safety and Health Act (OSH Act)] would require the employer to take feasible steps to minimize those risks [from guns]. Failure of an employer to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation." *See Standards Interpretations Letter,* September 13, 2006, available at 2006 WL 4093048.

80. OSHA has stated that employers may be cited for a general duty clause violation "[i]n a workplace where the risk of violence and serious personal injury are significant enough to be 'recognized hazards.'" Standard Interpretations Letter, December 10, 1992, available at:

http://www.osha.gov/SLTC/workplaceviolence/standards.html

81. Guns in bars and restaurants that serve alcohol are a "recognized hazard" to health, life and safety. The law is preempted and/or rendered unconstitutional by its conflict with the general duty safe place to work law mandated by state and federal law.

82. Petitioners aver that guns in work places that serve alcohol is a distinct, recognized hazard to wait staff, bartenders, employees, security staff and owners that is distinguishable from the general hazards of guns in, for example a parking lot at a factory workplace. *Contrast:* *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 C.A.10 (Okla.,2009).

IX. Fifth Count: Tennessee Constitution

83. Petitioners hereby incorporate by reference the preceding paragraphs above.

84. Petitioners aver the guns in bar law violates due process and the rights guaranteed by Art. I, Secs. 1[31], 8[32], 17[33], 23[34] of the Tennessee Constintution. Petitioners further challenge the law as in violation of Art. XI, Sec. 8 of the Tennessee Constitution: "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, *nor to pass any law for the benefit of individuals inconsistent with the general laws of the land."*

IX. Sixth Count: 42 U.S.C. § 1983: State-Created Danger

85. Petitioners hereby incorporate by reference the preceding paragraphs above.

---

[31] "That all power is inherent in the people, and all free governments are founded on their authority, and instituted *for their peace, safety,* and happiness;"

[32] "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges"or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

[33] "Suits may be brought against the state in such manner and in such courts as the Legislature may by law direct."

[34] "That the citizens have a right, in a peaceable manner, to assemble together for their common good"

86. Petitioners challenge the law as an unconstitutional deprivation of civil and constitutional rights under the "state-created danger" doctrine recognized under cases and law construing 42 U.S.C. § 1983.[35]

87. Petitioners have and will suffer injury, fear, emotional distress and a lack of job mobility or employment prospects by laws that place guns in Tennessee bars and restaurants that serve alcohol.

X. SEVENTH COUNT: 42 U.S.C. § 1983: STATE-CREATED VIGILANTISM

88. Black's Law Dictionary defines vigilantism as: "The act of a citizen who takes the law into his or her own hands by apprehending and punishing suspected criminals."[36]

89. The Tennessee guns in bar law encourages breaches of the peace and unlawful vigilantism. The statute was actually intended by lawmakers to justify vigilante use of deadly force. This subjects Petitioners, employees, patrons and members of the public to the clear and present danger of vigilante shootings in contravention to law and the rights guaranteed by the U.S. and Tennessee Constitutions. "[When private citizens are encouraged to act as "police agents," official lawlessness thrives and the liberties of all are put in jeopardy. Surely we should not now repeat the mistakes of a discredited era of our frontier past." *People v. Superior Court (Meyers)* 25 Cal.3d 67, 88, 598 P.2d 877 (Cal., 1979)

---

[35] *Henderson v. City of Chattanooga*, 133 S.W.3d 192, 211 (Tenn.Ct.App.,2003): "The next issue addressed in *Kallstrom I* [*Kallstrom v. City of Columbus*, 136 F.3d 1055 C.A.6 (Ohio),1998] was whether a state could be held liable for private acts of violence under 42 U.S.C. § 1983. Relying on the state-created-danger theory, the Sixth Circuit concluded that a state can be held liable for the actions of a private individual, such as a gang member, when the state's action places the individual victim "specifically at risk, as distinguished from a risk that affects the public at large." *Id.* at 1066. Owners and employees (wait staff, bartenders, servers, etc) are placed at direct and grave risk of guns in drinking establishments).

[36] BLACK'S LAW DICTIONARY, 1599 (8th ed.2004).

X. EIGHTH COUNT: FUNDAMENTAL DUE PROCESS RIGHT TO BE FREE FROM STATE-CREATED GUN VIOLENCE IN PUBLIC PLACES AT HIGH RISK FOR VIOLENCE FROM GUNS—GUNS WHERE ALCOHOL IS SERVED

90. Courts possess the inherent power to recognize *new* fundamental rights of liberty, life, safety or property so as to subject legislative acts to strict scrutiny judicial review. *See e.g.* Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (U.S.,2003) (recognizing new fundamental right of sexual privacy). Now that the U. S. Supreme Court has given recognition to an individual right to bear arms *District of Columbia v. Heller*, 128 S.Ct. 2783, 2817 (2008) the legal question arises as to the rights of *other citizens* to be free from guns at least in "sensitive places" especially where the presence of guns creates a high risk to public safety. Guns in bars is such a "sensitive places" situation warranting strict scrutiny.

91. "The mixture of firearms and alcohol is volatile. The danger does not necessarily arise from any evil intent on the part of the person possessing the firearm. The state's interest in keeping firearms out of establishments dispensing liquor is independent of any designs by the possessor of the weapon. *Cf.* State v. Soto, 95 N.M. 81, 82, 619 P.2d 185, 186 (1980) (purpose of § 30-7-3 is to protect innocent patrons); *United States v. Margraf*, 483 F.2d 708, 710 (3d Cir.1973) ("[M]ere presence of a weapon on board a plane creates a hazard because it may be seized and used by a potential hijacker."), vacated, 414 U.S. 1106, 94 S.Ct. 833, 38 L.Ed.2d 734 (1973)." State v. Powell, 115 N.M. 188, 848 P.2d 1115, (N.M.App.,1993)

92. The Constitution of South Africa, for example, recently recognized in Article 12 that "everyone has the right to be free from all forms of violence, from either private, or public sources."[37]

[37] Adrien Katherine Wing, *The South African Transition to Democratic Rule: Lessons for International and Comparative Law*, 94 AM. SOC'Y INT'L L. PROC. 254,259 (2000)(" Could such a clause be added

XI. NINTH COUNT: UNCONSTITUTIONAL VAGUENESS

93. The new law is unconstitutionally vague because the statute's definition of a restaurant, "the serving of such meals shall be the principal business conducted" provides no notice or opportunity to know what establishments are, or are not, covered by the statute.

94. The Tennessee Attorney General has *already* opined that such a principal or principal purpose limitation is unconstitutionally vague as applied to firearms carry by handgun owners. Tenn. Atty. Gen Op. 00-020 (February 15, 2000) (attached as Exhibit B)[38].

95. Under the new law criminal penalties (Class A misdemeanor) apply unless the firearm is carried by a permit holder into a "restaurant." Legislative proponents of the bill, including the Speaker of the House, have repeatedly asserted the new law is a "restaurant carry" law and not a "guns in bar bill", stating that the law

---

to the U.S. Constitution in some future era? Could it ever be expanded to cover guns, to ban the violence that plagues American society?).

[38] "2. It is the opinion of this office that there is no basis for limiting the statute's purview to places where alcohol is the sole or primary product sold. The primary rule of statutory interpretation is to give effect to the plain language of the statute. See Metropolitan Government of Nashville & Davidson County v. Motel Systems, Inc., 525 S.W.2d 840 (Tenn. 1975). Here, the statute is not unclear or contradictory, and its plain language permits no such limitation. Further, such a limitation could create vagueness and open the statute to constitutional challenge.

Applying the statute to establishments in which alcohol is the predominate product creates vagueness and ambiguity. How would one know whether alcohol is the establishment's sole or primary product so that he or she may temper his or her conduct accordingly? Ordinary people would be unable to understand where certain conduct is prohibited. See Kolender, 461 U.S. at 358, 103 S.Ct. at 1858.

In addition, law enforcement would face the same problem. It would be difficult for an officer to distinguish between legal and illegal conduct. This would, in turn, encourage arbitrary and discriminatory enforcement. It is the opinion of this office that the statute survives constitutional muster as it is written, and that the limitation proposed in question 2 might render the statute vulnerable to attack on vagueness grounds." by permitted handgun owners. Tenn. Atty. Gen Op. 00-020 (February 15, 2000)

only applies to restaurants and *not* bars. *See "Williams Blasts Media for 'Guns in Bars' Portrayal"* available at: http://bit.ly/yyBWT*"Guns-in-restaurants bill a vote for safety"*, available at: http://bit.ly/T4LIY[39]

96. Senator Doug Jackson also stated on WAMB radio on July 2, 2009 that HCP (hand gun permit) holders should not take their weapons into establishments that do not serve meals as their principal purpose (51%) http://bit.ly/DFUCn; http://www.bobpopegunshows.com/

97. On July 14, 2009, however, HCP (handgun permit holders) holders will have no way of knowing whether the establishment they are entering serves meals as its "principal business." The new law is therefore unconstitutionally vague because it is a Class A misdemeanor for a permit holder to carry a gun into a place that serves alcohol that is not exempted as a restaurant. Permit holders will have no notice or way to determine if an establishment is a restaurant or a bar (whether its principal purpose is serving meals) as there is no distinction by licensing laws law or notice. *Compare* Tex. Govt. Code § 411.204.[40]

---

[39] "When this bill takes effect on July 14, law-abiding citizens who undergo a safety course and criminal background check to obtain a handgun carry permit will be allowed to carry in restaurants like Chili's that happen to serve alcohol. . . . Contrary to popular belief, the bill does not allow firearms into bars. The principal business conducted by the establishment must be to serve meals, not to serve alcohol." : http://bit.ly/T4LIY

[40] Tex. Govt. Code § 411.204. **Notice Required on Certain Premises**

(a) A business that has a permit or license issued under Chapter 25, 28, 32, 69, or 74, Alcoholic Beverage Code, and that derives 51 percent or more of its income from the sale of alcoholic beverages for on-premises consumption as determined by the Texas Alcoholic Beverage Commission under Section 104.06, Alcoholic Beverage Code, shall prominently display at each entrance to the business premises a sign that complies with the requirements of Subsection (c).

(c) The sign required under Subsections (a) and (b) must give notice in both English and Spanish that it is unlawful for a person licensed under this subchapter to carry a handgun on the premises. The sign must appear in contrasting colors with block

98. This is a criminal statute and the fear of enforcement in a vague manner is unconstitutional. The law is unconstitutional on its face *and* as it is likely to be applied.

99. As a penal statute it must be strictly construed against the state. The permit holder acts at his or her peril with the mere armed entry into an "alcohol-serving, non-restaurant." The permit holder simply cannot know if it is a restaurant or a non-restaurant and the risk of a sanction is high.

100. The law is vague and unconstitutional in three distinct ways: a) a permit holder's threat of criminal prosecution; b) a business owner's loss of business if prospective customers guess wrong, and 3) the public who enter establishments at their unknown peril.

101. Petitioners reiterate that by law in Tennessee in order to serve liquor for on premises consumption (including establishments such as Tootsies Orchid Lounge, Graham Central Station, bars on 2nd Ave, Broadway and Beale Street) they must be licensed as "restaurants" under T.C.A. 57-4-102 (27)(A) . The clear (in fact strident) statements by lawmakers that the new law does not permit permitted handgun owners to carry firearms in "bars" (a term undefined under the law or any Tennessee statute or regulation) creates unconstitutional vagueness.

102. The due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution additionally requires that a statute be sufficiently precise to provide both fair notice to citizens of prohibited activities and minimal guidelines for enforcement to police officers and the

---

letters at least one inch in height and must include on its face the number "51" printed in solid red at least five inches in height. The sign shall be displayed in a conspicuous manner clearly visible to the public.

courts. Due process of law requires, among other things, notice of what the law prohibits. 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, (1972). Criminal statutes "must 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited ....'" *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). A statute is unconstitutionally **vague**, therefore, if it does not serve sufficient notice of what is prohibited, forcing "'men of common intelligence [to] necessarily guess at its meaning.'" *Davis-Kidd*, 866 S.W.2d at 532 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973)); *see also Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 746 (Tenn. 1979). Here police officers may arrest permit holders who carry in "bars" (according to the legislators who passed and advocated the law) if the police believe the establishment's principal business is not to serve meals. How is the officer to know? This is unconstitutional vagueness. *See* Tenn. Atty. Gen. Op. No. 09-69 (May 04, 2009).[41]

XI. ATTORNEYS' FEES

103. Petitioners request and are entitled to an award of attorneys' fees and litigation-related costs pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920. 42 U.S.C. § 1983 prohibits the State of Tennessee from depriving Petitioners of "rights, privileges and immunities secured by the constitutional laws" in the United States.

XII. REQUEST FOR RELIEF

[41] "HB 1120 [prohibiting "loitering" "for a period of time" where minors congregate] if enacted, would be subject to challenge because it would leave the question of whether a violation has occurred to the subjective judgment of the officer on the scene and would thus allow or invite arbitrary conduct by police officers."

104. Based upon existing precedent and law, Petitioners have a substantial likelihood of success on the merits. Furthermore, there will be an immediate and irreparable harm, loss, injury and threat of injury and breaches of public safety should the guns in bar law take effect on July 14, 2009 with over 220,000 gun permit holders and permit holders in 19 reciprocity states bringing guns into drinking establishments. Petitioners seek, pursuant to Rule 65 of the Tennessee Rules of Civil Procedure, an immediate restraining order and in due course a temporary and permanent injunction to enjoin the enforcement or application of Public Law 339 and an order that the law be declared, pursuant to Rule 57 of the Tennessee Rules of Civil Procedure, a state-created public nuisance, unlawful, in violation of and preempted by the general duty safe-place-to work law, unconstitutional, void and unenforceable. Petitioners request after all the proceedings are completed that there be judgment rendered in their favor and against Robert Cooper, Jr., in his official capacity as Tennessee Attorney General ordering him to refrain from applying or enforcing Public Chapter 339. Petitioners further seek attorneys' fees and litigation costs pursuant to 42 U.S.C. § 1998 and 28 U.S.C § 1920 and the award of any other relief as this Court deems just and proper.

Respectfully Submitted,

LAW OFFICES OF DAVID RANDOLPH SMITH
& EDMUND J. SCHMIDT III

By: _____
David Randolph Smith, TN Bar #011905
1913 21st Avenue South
Nashville, Tennessee 37212
Phone: (615) 742-1775
Fax: (615) 742-1223
Web: http://www.drslawfirm.com
e-mail: drs@drslawfirm.com

OF COUNSEL:

By: _____

Adam Dread , TN Bar #023604
Durham & Dread, PLC
1709 19th Avenue South
Nashville, TN 37212
(615) 252-9937 phone
(615) 277-2277 fax

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been hand-delivered on _____ 2009:

Michael Meyer, Esq.
Assistant Attorney General
Tennessee Attorney General Office
425 5th Ave N # 2
Nashville, TN 37243-3400

_____
David Randolph Smith

STATE OF TENNESSEE

PUBLIC CHAPTER NO. 339

VETOED BY THE GOVERNOR

HOUSE BILL NO. 962

By Representatives Todd, McCord, Tindell, Evans, Fincher, Watson, Faulkner, Eldridge, Rowland, McCormick, Bass, Hackworth, Curt Cobb, Carr, Matheny, Mumpower, Floyd, Bell, Lollar, Casada, Rich, Lynn, Harrison, Shipley, Dean, Curtis Johnson, Phillip Johnson, Niceley, Tidwell, Shepard, Hill, Ramsey, Halford, Haynes, Swafford, Maggart, Hensley, West, Montgomery, Dennis, Harry Brooks, Matlock, Dunn, Hawk, Lundberg, Weaver, Roach, Ford, Moore, Fraley

Substituted for: Senate Bill No. 1127

By Senators Jackson, Norris, Gresham

AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 17, relative to firearms.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-17-1305(c), is amended by adding the following language as a new, appropriately designated subdivision:

(3)

(A) Authorized to carry a firearm under § 39-17-1351 who is not consuming beer, wine or any alcoholic beverage, and is within the confines of a restaurant that is open to the public and serves alcoholic beverages, wine or beer.

(B) As used in this subdivision (c)(3), "restaurant" means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, such place being provided with adequate and sanitary kitchen and dining room equipment, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations and periods of redecorating, and the serving of such meals shall be the principal business conducted.

SECTION 2. This act shall take effect on June 1, 2009, the public welfare requiring it.

PASSED: May 14, 2009

EXHIBIT

A

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

February 15, 2000

Opinion No. 00-020

Constitutionality of Tenn. Code Ann. § 39-17-1305.

QUESTIONS

1. Is Tenn. Code Ann. § 39-17-1305, which prohibits the possession of firearms where alcoholic beverages are served or sold, constitutional?

2. Should the statute's purview be limited to places where alcohol is the sole or primary product?

OPINIONS

1. Yes, Tenn. Code Ann. § 39-17-1305 is constitutional.

2. No, limiting the statute's purview to places where alcohol is the sole or primary product would likely create vagueness and thus open the statute to constitutional attack.

ANALYSIS

1. A fundamental component of both the Due Process Clause of the United States Constitution and the law of the land clause of the Tennessee Constitution is that a law is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294 (1972); *State v. Wilkins*, 655 S.W.2d 914, 915 (Tenn. 1983). The Supreme Court has explained that vague laws offend several important values:

> First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned, 408 U.S. at 108, 92 S.Ct. at 2294. The more important of these two factors is the presence of minimal guidelines to direct law enforcement. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858 (1983). Nevertheless, the Supreme Court has warned:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Colton v. Kentucky, 407 U.S. 104, 111, 93 S.Ct. 1953, 1957 (1972); *State v. Strickland*, S.W.2d 912, 921 (Tenn. 1975).

Tenn. Code Ann. § 39-17-1305 makes it "an offense to possess a firearm on the premises of a place open to the public where alcoholic beverages are served or in the confines of a building where alcoholic beverages are sold."[1] Further, the Sentencing Commission's comment on the statute provides that this section "prohibits possession of weapons in areas adjacent to where alcoholic beverages are served, such as parking lots." Tenn. Code Ann. § 39-17-1305 Sentencing Commission Cmts. (1997). The phrases "premises of a place" and "confines of a building" are not vague. The terms, "sold" and "served," are also self-explanatory. The premises of a place open to the public, including its parking lot, where alcohol is served, or in the confines of a building where alcoholic beverages are sold are off limits to those carrying firearms.

An ordinary citizen could understand that the above conduct constitutes an illegal offense. Anyone not conducting themselves accordingly, outside of the few exceptions enumerated in the statute, would be subject to the penalties prescribed in the statute.

Furthermore, if a law enforcement officer came upon one possessing a firearm at any premises open to the public, including a parking lot, where alcohol is served, or in the confines of a building where alcoholic beverages are sold, the statute would enable such officer to make an arrest. No discretion or arbitrary enforcement is involved in interpreting and administering the statute; all persons violating the statute would be treated the same. In addition, all establishments serving or selling alcohol would be treated the same. It is the opinion of this office that the statute is not void for vagueness and is, thus, constitutional.

---

[1]Tenn. Code Ann. § 39-17-1305 (1997) is entitled "Possession of firearm where alcoholic beverages are served or sold" and provides as follows:

> (a) It is an offense for a person to possess a firearm on the premises of a place open to the public where alcoholic beverages are served or in the confines of a building where alcoholic beverages are sold.
> (b) A violation of this section is a Class A misdemeanor.
> (c) The provisions of subsection (a) shall not apply to a person who is:
> (1) In the actual discharge of official duties as a law enforcement officer, or is employed in the army, air force, navy, coast guard, or marine service of the United States or any member of the Tennessee national guard in the line of duty and pursuant to military regulations, or is in the actual discharge of duties as a correctional officer employed by a penal institution; or
> (2) On the person's own premises or premises under the person's control or who is the employee or agent of the owner of the premises with responsibility for protecting persons or property.

Requested by:

Honorable Roy Herron
State Senator
P.O. Box 5
Dresden, TN 38225

EXHIBIT B

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE *ex rel* RANDY RAYBURN; JOHN (JANE) DOES NOS. 1-13,	)	
Plaintiffs,	)	
v.	)	**Civil No. 09-1284-I**
ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL,	)	
Defendant.	)	

RESPONSE OF ATTORNEY GENERAL AND REPORTER ROBERT E. COOPER, JR IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Attorney General and Reporter Robert E. Cooper, Jr., hereby opposes the Plaintiffs' motions for partial summary judgment and summary judgment respectively, in which the they seek a declaratory judgment that 2009 Public Chapter 339 is facially unconstitutional because it is vague, unlawfully delegates state police powers to private citizens and is preempted by federal law.

As more fully set forth in the memorandum of law that the Attorney General and Reporter has filed in opposition to Plaintiffs' motion, Plaintiffs have failed to establish that they are entitled to judgment as a matter of law and their motion ought to be denied.

Furthermore, as also more fully set forth in the Attorney General and Reporter's memorandum, this case ought to be dismissed because chancery courts do not have the authority to render declaratory rulings in criminal matters. Furthermore, Plaintiffs have failed to present a

justiciable issue and have failed to establish that they have standing to bring suit.

Finally, the Attorney General and Reporter submits that the case ought to be dismissed because Plaintiffs have failed to establish that Chapter 339 is facially invalid. They have not alleged, and cannot show, that Chapter 339 would be unconstitutional regardless of how it is applied.

The case that has been presented can be resolved solely as a matter of law; without the need to consider any facts. Accordingly, the Attorney General and Reporter relies upon the memorandum of law in opposition to Plaintiffs' Motion for Partial Summary Judgment, and the Response and Memorandum that were filed in opposition to Plaintiffs' Motion for a Temporary Injunction.

Respectfully submitted,

ROBERT E. COOPER, JR.
ATTORNEY GENERAL and REPORTER

STEVEN A. HART (BPR# 007050)
Special Counsel
Office of the Tennessee Attorney General
(615)741-3505

MICHAEL A. MEYER (BPR# 009230)
Deputy Attorney General
Law Enforcement & Special Prosecutions Division
(615)741-4082

LYNDSAY FULLER SANDERS (BPR#022849)
Assistant Attorney General
Law Enforcement & Special Prosecutions Division
(615)741-4087
Post Office Box 20207

29th Nov 10
Bweich

Nashville, TN 37202-0207
Fax (615)532-4892

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Response has been delivered by hand, united states mail, postage prepaid, and/or e-mail, to:

David Randolph Smith, Esq. (Hand Delivery)
Attorney at Law
1913 21st Avenue South
Nashville, TN 37212

Allen N. Woods, Esq. (Hand Delivery)
Attorney at Law
P.O. Box 128498
Nashville, TN 37212

William Cheek, Esq.
Attorney at Law
511 Union Street
Suite 1600
Nashville, TN 37219

Patricia Head Moskal, Esq.
Attorney at law
1600 Division Street
Suite 700
Nashville, TN 37203

Jonathan C. Stewart, Esq.
1812 Broadway
Nashville, TN 37203

this 2nd day of October, 2009.

Lyndsay F. Sanders
LYNDSAY FULLER SANDERS
Assistant Attorney General

EXHIBIT C

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE ex rel.

DAVI

2009 0

(1) This case ought to be dismissed because chancery courts do not have the authority to render declaratory rulings in criminal matters such as this law.

(2) Plaintiffs have failed to present a justiciable issue, therefore this case must be dismissed.

(3) Plaintiffs have failed to establish standing, therefore this case must be dismissed.

(4) Plaintiffs have failed to name and include necessary parties, the appropriate District Attorneys General.

(5) Plaintiffs have failed to establish tha,t as a matter of law, Chapter 339 is facially invalid due to unconstitutional vagueness. Plaintiffs have not alleged, and cannot show, that Chapter 339 would be unconstitutional regardless of how it is applied. This Court should declare that Chapter 339 is facially valid.

(6) Plaintiffs have failed to establish that, as a matter of law, Chapter 339 is fundamentally arbitrary or irrational in violation of substantive due process. This Court should declare that Chapter 339 complies with substantive due process.

(7) Plaintiffs have failed to establish that, as a matter of law, Chapter 339 is an unconstitutional delegation of police power by the legislature. This Court should declare that Chapter 339 is facially valid and does not constitute an invalid delegation of police power.

(8) This Court should declare that, as a matter of law, Chapter 339 is not preempted by the OSHA laws.

(9) Should this Court find that any particular phrase or portion of Chapter 339 is constitutionally invalid, elision should be applied to preserve the remainder of the law.

The case that has been presented can be resolved solely as a matter of law; without the need to consider any facts. Accordingly, the Attorney General and Reporter relies upon the

memorandum of law in opposition to Plaintiffs' Motion for Partial Summary Judgment, and the Response and Memorandum that were filed in opposition to Plaintiffs' Motion for a Temporary Injunction, in support of its pending motions. The Attorney General submits that even if this Court considers the affidavits presented by both parties, as a matter of law, this case should be dismissed and/or Chapter 339 be declared constitutionally valid.

THE ATTORNEY GENERAL'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT IS HEREBY AMENDED TO SPECIFICALLY INCLUDE ALL OF THE GROUNDS ASSERTED IN THESE MOTIONS (WHICH WERE INCLUDED IN HIS MEMORANDUM OF LAW).

NOTICE OF HEARING

THE ATTORNEY GENERAL'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR FOR SUMMARY JUDGEMNT WILL BE HEAR AT THE SAME TIME AS THE PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT, ON FRIDAY, NOVEMBER 6, 2009, AT 9:00 A.M., AT THE DAVIDSON COUNTY HISTORIC COURTHOUSE, CHANCERY COURT, PART I.

Respectfully submitted,

ROBERT E. COOPER, JR.
ATTORNEY GENERAL and REPORTER

Steven A. Hart

STEVEN A. HART (BPR# 007050)
Special Counsel
Office of the Tennessee Attorney General
(615)741-3505

MICHAEL A. MEYER (BPR# 009230)
Deputy Attorney General
Law Enforcement & Special Prosecutions Division
(615)741-4082

LYNDSAY FULLER SANDERS (BPR#022849)
Assistant Attorney General
Law Enforcement & Special Prosecutions Division
(615)741-4087
Post Office Box 20207
Nashville, TN 37202-0207
Fax (615)532-4892

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been delivered by hand, united states mail, postage prepaid, and/or e-mail, to:

David Randolph Smith, Esq. Attorney at Law
1913 21st Avenue South
Nashville, TN 37212

Allen N. Woods, Esq.
Attorney at Law
P.O. Box 128498
Nashville, TN 37212

William Cheek, Esq.
Attorney at Law
511 Union Street
Suite 1600
Nashville, TN 37219

Patricia Head Moskal, Esq.
Attorney at law
1600 Division Street
Suite 700
Nashville, TN 37203

Jonathan C. Stewart, Esq.
1812 Broadway
Nashville, TN 37203

this 5th day of October, 2009.

Lyndsay F. Sanders
LYNDSAY FULLER SANDERS
Assistant Attorney General

EXHIBIT D

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESEE *ex rel.* RANDY RAYBURN; JOHN (JANE) DOES NOS. 1-13; *et al.*,

Petitioners,

vs.

ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL and THE STATE OF TENNESSEE

Defendants.

Civil Action No. 09-1284-I

CHANCELLOR CLAUDIA BONNYMAN

ORDER

This cause came to be heard on November 20, 2009 on *Petitioners' Motion for Partial Summary Judgment* and on *Defendant's Cross- Motion for Judgment on the Pleadings and/or for Summary Judgment.*

The Court heard oral argument on the motions and considered the briefs, affidavits and other filings submitted to the Court by the parties.

After oral arguments the parties agreed that The State of Tennessee should be added as a party-defendant to this action.

Accordingly it is **ORDERED** that the State of Tennessee is added as a party-defendant in this case.

For the reasons set forth in the Excerpt of the Proceedings, attached hereto and fully incorporated herein, the Court **GRANTS** *Petitioners' Motion for Partial Summary Judgment* as to the Ninth Count in *Petitioners' Second Amended Complaint* and finds T.C.A. § 39-17-1305(c)(3) unconstitutional because the language in T.C.A. § 39-17-

1305(c)(3)(B) "and the serving of such meals shall be the principal business conducted" is void for vagueness.

For the reasons set forth in the Excerpt of the Proceedings, attached hereto and fully incorporated herein, the Court **DENIES** *Petitioners' Motion for Partial Summary Judgment* on the two other grounds sought by Plaintiffs: TOSHA and OSHA preemption (Fourth Count) and unconstitutional delegation of police and legislative power (Tenth Count) and correspondingly **GRANTS** *Defendant's Cross- Motion for Judgment on the Pleadings and/or for Summary Judgment* as to grounds seven (unconstitutional delegation of police and legislative power) and eight (TOSHA and OSHA preemption). The Court **DENIES** *Defendant's Cross- Motion for Judgment on the Pleadings and/or for Summary Judgment* as to all other grounds.

Pursuant to Tenn. R. Civ. P. 54.02 the Court **ORDERS**, determines and finds that there is no just reason for delay and directs that this judgment is a final judgment.

SEPT NOV 15

CHANCELLOR CLAUDIA C. BONNYMAN

On page 12 of the bench ruling, the Court announced four issues, not five. A third issue (numbered as 3) was intentionally omitted. CB
The Court has made corrections on the bench ruling transcript.
The issue of which parties have standing is not of paramount concern today since the Justice is one of law. Further, this order does not dispose of all issues - the Case and certain parties have standing for some causes and not for others. CB
* See p. 3.

APPROVED FOR ENTRY:

LAW OFFICES OF DAVID RANDOLPH SMITH & EDMUND J. SCHMIDT III

By: David R. Smith

David Randolph Smith
TN Bar #011905
1913 21st Avenue South
Nashville, Tennessee 37212
Phone: (615) 742-1775
Fax: (615) 742-1223

TENNESSEE ATTORNEY GENERAL

By: Michael Meyer (w/ agreement by DRL)

Michael Meyer, TN Bar #
Steven A. Hart, TN Bar #
Assistant Attorney General
425 5th Avenue North # 2
Nashville, TN 37243-3400
Phone: (615) 741-3505
Fax: (615) 741-2009

Attorneys for Robert E. Cooper, Jr., Tennessee Attorney General, and State of Tennessee

Adam Dread , Esq.
DURHAM & DREAD, PLC
1709 19th Avenue South
Nashville, TN 37212

William T. Cheek, III, Esq.
BONE MCALLESTER NORTON PLLC
511 Union Street, Suite 1600
Nashville, TN 37219

David L. Raybin, TN Bar #03385
HOLLINS, WAGSTER, WEATHERLY & RAYBIN, P.C.
Suite 2200 . Fifth Third Center
424 Church Street
Nashville, Tennessee 37219

Attorneys for Petitioners

* The Court sees no way to remove a portion of the Amendment and at the same time, effectuate the intent of the legislature. C. Bourgeois

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been mailed by first-class mail on this 24th day of November, 2009:

Michael Meyer, Esq.
Steven A. Hart, Esq.
Assistant Attorney General
Tennessee Attorney General Office
425 5th Ave N # 2
Nashville, TN 37243-3400

Larry D. Woods, Esq.
WOODS & WOODS
P.O. Box 128498
Nashville, TN 37212

Patricia Head Moskal, Esq.
Bradley Arant Boult Cummings
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, TN 37203

Jonathan C. Stewart, Esq.
1812 Broadway
Nashville, TN 37203

David Randolph Smith

In The Matter Of:

State of Tennessee, ex rel., Randy Rayburn, et al v. Robert E. Cooper, Jr., Tennessee Attorney General

---

Bench Ruling of Chancellor Claudia Bonnyman
November 20, 2009

Vowell & Jennings, Inc.
214 Second Avenue North
Suite 207
Nashville, Tennessee 37201
615-256-1935

VJ VOWELL AND JENNINGS

Original File MELROSE.TXT

[illegible] with Word Index

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE, ex rel., RANDY RAYBURN, JOHN (JANE) DOES NOS. 1-13, AUSTIN RAY, and FLANEUR LLC d/b/a MELROSE, Plaintiffs,	)	
vs.	)	CIVIL NO. 09-1284-I
ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL, Defendant.	)	

BENCH RULING OF:

CHANCELLOR CLAUDIA BONNYMAN

November 20, 2009

VOWELL & JENNINGS, INC.
Court Reporting Services
214 Second Avenue North
207 Washington Square Building
Nashville, Tennessee 37201
(615) 256-1935

APPEARANCES:

For the Plaintiffs:

DAVID RANDOLPH SMITH, ESQ.
Smith & Schmidt
193 21st Avenue South
Nashville, Tennessee 37212
Phone: 615-742-1775
Fax: 615-742-1223
drs@drslawfirm.com

and

DAVID L. RAYBIN, ESQ.
Hollins, Wagster, Weatherly & Raybin, PC
Suite 2200, Fifth Third Center
424 Church Street
Nashville, Tennessee 37219
Phone: 615-256-6666
Fax: 615-254-4254
draybin@hwylaw.com

and

ADAM DREAD, ESQ.
Durham & Dread, PLC
1709 19th Avenue South
Nashville, Tennessee 37212
Phone: 615-252-9937
Fax: 615-277-2277
durhamandddread.com

and

WILLIAM T. CHEEK, III, Esq.
BONE, McALLESTER, NORTON, PLLC
Nashville City Center, Suite 1600
511 Union Street
Nashville, Tennessee 37219
Telephone: 615-238-6300
Fax: 615-238-6301
www.bonelaw.com

and

ALLEN N. WOODS, ESQ.
Law Office of Allen N. Woods
1600 Division Street
Nashville, Tennessee 37203
Telephone: 615-252-2315

For the Defendant:

MICHAEL A. MEYER, ESQ.
Assistant Attorney General
Law Enforcement & Special Prosecution Division
2nd Floor, CHB
425 5th Avenue North
Nashville, Tennessee
Telephone: 615-741-4082
Fax: 615-532-4892
michael.meyer@ag.tn.gov

and

LYNDSAY FULLER SANDERS, ESQ.
Assistant Attorney General
Law Enforcement & Special Prosecution Division
2nd Floor, CHB
425 5th Avenue North
Nashville, Tennessee
Telephone: 615-741-4087
Fax: 615-532-4892

For the Amicus Curiae:

PATRICIA HEAD MOSKAL, ESQ.
Bradley, Arant, Boult, Cummings
Rounabout Plaza
1600 Division Street, Suite 700
Nashville, Tennessee 37203
Telephone: 615-244-2582
Fax: 615-252-6369
pmoskal@babc.com

and

JONATHAN C. STEWART, ESQ.
1812 Broadway
Nashville, Tennessee 37202

INDEX OF EXHIBITS

P R O C E E D I N G S

THE COURT: Lawyers and parties, this is a bench ruling, and it will include all my definitions and judgment of the law. But when cases were clear as that, in case that it's probably going to go to the Court of Appeals, then we make every effort we can to render a bench ruling rather than taking things under guidelines.

This lawsuit was brought by the plaintiffs ~~in part of~~ seeking a declaratory judgment that legislation passed in 2009, and codified at TCA Section 39-17-1305(c), ~~this~~ is unconstitutional or otherwise illegal. The plaintiffs -- some of the plaintiffs are citizens who are gun permit holders. Other plaintiffs are restaurant owners and wait staff at restaurants. All the plaintiffs moved for a a partial summary judgment that the statute or the section of the statute was unconstitutional because it's void for vagueness. And the Attorney General filed a ~~the~~ cross motion to dismiss the void ~~of~~ for vagueness claims brought by these plaintiffs. The plaintiffs and the State agree there are no material facts in dispute, and the question is one of law. There are other

issues in the overall case, but these other issues are not the subject of summary judgment.

Because the question is one of law, the Attorney General by intent did not file a statement of undisputed facts to support his cross judgment, and also the State, who's been added as a defendant in this general comment or statement of the case.

I don't want the Court of Appeals to be looking for -- to do what I did, which was to look for statements of undisputed facts from all the parties because they're just not there. There is a reason why they're not there. The Attorney General responded to the plaintiffs' statement of undisputed facts that the statements were either opinions, and not fact; or were an interpretation of the law, and not fact; or were a legal argument policy statement, and not fact.

The first plaintiffs and the intervening plaintiffs advanced an identical statement; that is, they advanced a statement of undisputed fact that were the same statements. So the time spent by the Court in understanding the facts in the case are limited to facts which

set the context or the background for the lawsuit.

Now the Rayburn plaintiffs, which included Mr. Randy Rayburn and John Doe plaintiffs, also moved for summary judgment based on their theory that there's been an unconstitutional delegation of police power; that is, that the statute creates an unconstitutional delegation of police power in that the restaurants can opt out by -- in part opt out by placing signs in their -- on their private properties. And the Rayburn plaintiffs and intervening plaintiffs -- I'm sorry -- the Rayburn plaintiffs and the John Doe plaintiffs also take the position that there is a preemption, that OSHA preempts this statute under its general duty clause.

The issues in the case: The plaintiffs, that is the John Doe plaintiffs 10 and 11, state that the statute is so vague, that it offends due process guarantees in the federal and statute constitutions.

First, the plaintiff gun permit holders contend because they cannot know which place is serving alcohol, wine, or beer, meet

the definition of restaurant under the act, there's no fair warning about what is prohibited, so people carrying guns lawfully may act accordingly.

Second, say the plaintiffs, the State's failure to provide a definition of "restaurant," which can be known, invites the arbitrary and discriminatory enforcement of a criminal law. In other words, the police cannot know what place is a restaurant under the act.

The Melrose plaintiffs contend that they meet the definition of restaurant under TCA 39-17-1305; and they face the possibility that police may charge them with aiding and abetting if they serve alcohol to a permit holder who carries a gun. The Melrose plaintiffs contend the option of posting a sign, which is found at TCA 39-17-1359, may not protect them from prosecution. The Melrose plaintiffs adopt the John Doe plaintiffs' arguments of vagueness.

The remaining plaintiffs, Mr. Rayburn and the other John Does, first raise the void for vagueness issues from the perspective of wait staff and restaurant owners. They move for a partial summary judgment based upon the

unconstitutional delegation of police powers and preemption by virtue of Tennessee's OSHA's general duty clause.

The Rayburn plaintiffs contend there's no fair warning to their customers, to them, or to customers; and they're exposed to arbitrary prosecution by law enforcement.

The Rayburn plaintiffs advance ~~that~~ the idea that no-gun postings option leaves it to restaurant owners whether to ban guns where alcohol is served, even though in general, firearms are not allowed where alcohol is served.

Last, the Rayburn plaintiffs contend that, as I've stated before, that OSHA requires a safe work environment, and it trumps TCA 39-17-1305.

The Attorney General seeks dismissal of the plaintiffs' claims on summary judgment because Chancery Court does not have subject matter jurisdiction over declaratory judgment cases which challenge validity of a criminal law. Only the -- according to the State, only the Criminal Courts or Circuit Courts with the criminal jurisdiction have

subject matter jurisdiction, and that these courts of equity do not.

The Attorney General also asserts that the plaintiffs' lawsuit is not justiciable because the entire controversy depends upon hypothetical situations in theory rather than actual legal issues. The restaurant owners, according to the State, may avoid any possible problem by opting for a no-weapons policy on their private properties. The owners' fear of prosecution, according to the State and the Attorney General, is not a real fear because if the owners he does not reasonably know a gun permit holder has a gun, a charge of aiding and abetting is not proper or appropriate.

The plaintiffs who wish to carry weapons into restaurants selling alcohol will invalidate a law and therefore, be unable to carry at all times where alcohol is served. And the State makes the argument that this is an illogical conclusion if you believe that the plaintiffs have a true motivation.

The Attorney General seeks dismissal for another reason. The district attorney generals are not parties; and the

declaratory judgment statute
declaration ~~of statement~~ provides that all persons who have an interest must be made parties.

The Attorney General and the State have no authority to enforce TCA 37-17-1305; nor to interfere with the district attorney generals' prosecutorial discretion. The Attorney General and the State also take the position that 39-17-1305 is not vague. All the criteria for a restaurant in the definition as the statute are knowable by the ordinary citizen. If a permit holder has a doubt, he should not carry his weapon. As a practical matter, a mistake by a permit holder is not criminal intent; and the gun carrier would not be prosecuted.

Now the Attorney General also -- and the State also assert that TCA 39-17-1305 is not preempted by OSHA. There's no authority otherwise. The Attorney General and the State contend the option to post "no weapons" at TCA 39-17-1305(9) is proper because it only addresses private property, and not ~~a~~ public thoroughfares.

And last, the State contends that

if any part of the restaurant definition is unconstitutionally vague, and it violates due process; and here the Attorney General and the State were looking specifically at the last criteria for a restaurant; that is that the restaurant be primarily in the business of serving food, or getting its income from food — then the Court can remove that offending provision without altering the intent of the state legislature.

Now, of all of those issues that the Court has summarized that the parties are advancing, the issues that the Court will decide today are: (1) Is there subject matter jurisdiction? (2) Is TCA 39-17-1305(c) unconstitutional because it's void for vagueness and therefore, it violates the due process clauses of the constitution? Or four: does OSHA preempt the state statute? Five: Does the statute allow the unconstitutional delegation of state police powers?

And the Court summarizes its decision here that the Court finds it does have subject matter jurisdiction in the case. The Court finds that TCA 39-17-1305(c) does violate

the due process rights of the plaintiffs, generally, the plaintiffs gun permit holders because the language, "the serving of such meals shall be the principal business conducted," cannot be known to the ordinary citizen. Inquiry would not be satisfactory or helpful.

The Court finds the plaintiffs' other theories are not supported by authority such that the theories have merit; and the motion for summary judgment or a partial summary judgment is denied as to the other plaintiffs' theories.

As to the findings of fact, there are no material facts in dispute. The facts available to the Court which bear upon the legal issues are whether the definition of "restaurant" in TCA-39-17-1305 can be easily known or can be known at all. In addition, certain of the plaintiffs have shown -- and these are the ~~general~~ permit holders -- have shown that they intend to carry a gun into restaurants which serve alcohol. And the officials charged with the regulations' enforcement, that is a police chief or sheriff, has threatened to use sanctions against persons

who violate TCA 39-17-1305.

As to the principles of law in the case, rather than read legislation into the record, the Court will attach to a bench ruling a copy of TCA 39-17-1305 and TCA 39-17-1359 as Collective Exhibit 1; and I'll make those available to the court reporter.

And then as to the principles of law, as a fundamental component of both the due process clause of the United State Constitution and the Law of the Land clause of the Tennessee Constitution is that a law is void for vagueness if its prohibitions are not clearly defined. Gray Med vs. City of Rockford, 408 US 104, a 1972 U.S. Supreme Court case. And the Court also cites State vs. Wilkins, 655 SW 2nd, 914, a Tennessee Supreme Court case, 1983.

The Supreme Court has explained that vague laws offend several important values. First, because we assume when a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may ~~attract~~ trap the

innocent by not providing fair warning.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. And this is the citation from Gray Med at page 108.

The more important of these two factors is the presence of minimal guidelines to direct law enforcement. And here the Court is citing Collinder vs. Lawson, 461 US 352, a 1983 U.S. Supreme Court case. Nevertheless, the Supreme Court has warned the root of the vagueness doctrine is a rough idea of fairness. It's not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes, both general enough to take into account a variety of human conduct, and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. This is from Colton vs. Kentucky, 407, US 104, a U.S. Supreme Court case decided in 1972. And the language is also stated or quoted in State vs. Stricklin, a southwest -- a Tennessee Supreme Court case in 1975.

As to the subject matter jurisdiction, which I really should have evaluated first because if the Court doesn't have subject matter jurisdiction, the void for vagueness analysis doesn't matter. But going slightly backwards, I did do some work, like all the parties did, to find enough cases -- reported cases in Tennessee that set a pattern, which we would like to have a case that just sets out like a law that says that a Chancery Court sitting as a ~~board~~ Court of equity, which it does, has subject matter jurisdiction over declaratory ~~action~~ judgment actions which evaluate criminal laws. There are plenty of cases in Tennessee which say that the Chancery Court must not enjoin the enforcement of criminal statutes; and I think all the lawyers in the room realize that that's the case, but looking for and finding a case which just says, "Yes, Chancery Court does have jurisdiction on declaratory judgment actions to evaluate criminal laws," the way this Court came to its conclusion that it has subject matter jurisdiction is by looking at four cases and the ALR. And those cases are Parlor vs. Buckner, in

which the Chancery Court entertained a lawsuit which looked at whether it can determine the constitutionality of laws declaring the operation of poolrooms as unlawful under the declaratory judgment act. And although there's some language in this case, which discusses whether there were property rights involved, which would be a special case; the general language in the case seems to indicate that the property rights are not the real issue; that the real issue is whether the plaintiffs have a special interest in the question of the constitutionality of a penal statute distinct from the interest of the public generally. And the Court stated in that case: "We are of the opinion that a person so situated is entitled to bring and maintain an action for the determination of the proper construction or constitutionality of such statutes under the provisions of a declaratory judgment act." And the bill in the present case, which this Court must resolve in Chancery Court, was properly filed against the sheriff in view of the development of the bill, that the sheriff had given notice of his intent to proceed against

the complainant. And then this Court goes on to say that the Chancery Court cannot issue an injunction, but it does appear that the Supreme Court in this case held that the lawsuit was properly brought in the Chancery Court; and that was a 1927 case.

And then the next case is -- that this Court is relying on to find subject matter jurisdiction is Clinton Books vs. City of Memphis, in which Justice Janice Holder held that the Circuit Court acting as a court of equity, lacked jurisdiction to enjoin enforcement of the criminal statute, but she sent the case back for the Circuit Court to rule on the merits of the business' constitutional claims. And I don't know why she would have sent it back to Circuit Court, or that the Supreme Court would have sent it back to Circuit Court, if the Circuit Court had not had jurisdiction over the question. And what the record needs to show is that in Clinton Books vs. City of Memphis, which is a 2006 Supreme Court case -- a state Supreme Court case, the Circuit Court was -- did not have original jurisdiction over criminal cases. And the

Circuit Court in many ways exercised in Clinton Books the same jurisdiction that this Chancery Court is exercising today. It has to be noted that the city of Memphis and Shelby County has a separate criminal court. So now we see that a civil court of record has subject matter jurisdiction for purposes of getting the case sent back to them to ~~the~~ CB rule on the merits of a declaratory judgment addressing a criminal statute.

The next case the Court looked at to determine subject matter jurisdiction is Campbell vs. Sundquist. And in that case, the Circuit Court in Davidson County addressed a criminal ~~case~~ statute CB; did not issue an injunction. And I think he was -- I don't believe Judge ~~Kirtz~~ Kurtz CB was asked to issue an injunction, but in that case, the Court of Appeals said that -- addressed the merits of a declaratory judgment action. And Appeals Court Judge ~~Hensel~~ Cantrell CB did not believe -- did not necessarily say that the Circuit Court had subject matter jurisdiction, but the other judges did; and that's the law of the land.

And then the last case is Grubb

vs. Mayor and Alderman of Morrison. This is a 1947 case. And you'll see if I didn't have it in here. Well, this says Chancery Court had jurisdiction of a suit by the holders of their permit for a declaratory judgment as to the ~~validity~~ equitable of a city ordinance prohibiting the sale of beer, and which did not involve a property right in 1947, because the property right was not recognized at that time. It's been recognized since. But at that time, the chancellor was found to have jurisdiction over that particular declaratory judgment. And those are the cases on which the Court is relying.

In ~~re~~, 10 ALR 3rd, 727, throws some light on why it is that Tennessee doesn't have maybe a bright-line case addressing this subject. And that ALR article analysis is: "It now seems reasonably well settled that in an otherwise proper case, declaratory relief may be granted notwithstanding the fact that the declaration is as to validity of a statute having criminal ~~and~~ or penal provisions. And it seems ~~later~~ clear under the modern practice in most courts that declaratory relief will not denied merely because the petitioner, by

violating the statute or ordinance in question, to have the issue of guilt tried out in a criminal prosecution. In the earlier cases following general attitudes through the equity courts, the view seemed to be that a declaration would be readily given where property rights were threatened than where purely personal rights were involved. But modern trend seems to be toward the protection of the personal, as well as property rights. Accordingly, where the petitioner is threatened with an unconstitutional deprivation of either property or personal rights and to remit him to the ordinary processes of criminal law would, under the circumstances, deprive him of a speedy and an effective remedy. And it seems that the courts will now readily entertain an action for declaratory relief. However, the petition must present actual and justiable controversy, the case must be one in which the declaration will be effective to settle the question, and terminate the controversy, and all the parties whose rights are substantially and directly affected by the declaration must be before the court." So it's not that it is free-for-all, but

it does appear that Chancery has subject matter jurisdiction of this case.

As to the arguments and applying the law to the case, under current law, firearms are prohibited where alcohol is served. And this is at 39-17-1305(a). As currently written, the law is clear and unambiguous as "currently" meaning before the exception was presented. It's easily understood and easily applied by business owners and authorized owners of firearms. This statute in its section (a) makes it a criminal offense for a patron to carry a firearm into any establishment that serves alcohol. While it remains unlawful in Tennessee to carry firearms into establishments that serve alcohol, the new provisions of section (c) of this same statute creates a new exception that allows persons who are authorized to carry firearms into restaurants so long as that person is not consuming alcohol, beer, or wine. The exception, which is section (c) of the statute, replaces what historically has been a bright-line rule with the new exception fraught with ambiguity. The new exception of the prohibition against firearms where alcohol is served creates

ambiguity where none existed before, and is vague on its face in that it fails to satisfy the constitutional standards of fair warning and fair enforcement.

Law enforcement officials are no better suited to make the difficult judgment call as to whether the serving of meals constitutes the principal business of an establishment, such that the presence of a handgun on the premises would be legal or illegal. The lack of clarity, an explicit standard, specifically directed to whether the restaurant is in the business of primarily serving of meals -- the principal business of serving meals, fails to discuss either fair enforcement standards as well.

And as further analysis, the Court finds that the other criteria in the statute, which have to do with determining whether the restaurant is open for serving meals five days a week, or serving one meal a day, it's not difficult for the ordinary person or patron to discern because most restaurants, which serve food, want the public to know that they serve food; and advertise the service of food in

writing on the walls, in writing on the menus, in writing in ads. And the Court finds and believes that the ordinary citizen can make inquiry of restaurant workers -- or excuse me -- restaurant worker -- entity workers as to the service of meals, and the frequency of the service of meals; and that this information can be fairly, easily known to the patron. However, the language that the Court has pointed out as being unfairly vague cannot be easily known, and may never be known by a patron as a matter of fact.

And going back now to the issues in this case: Does the Chancery Court have subject matter jurisdiction over this declaratory judgment act which addresses a criminal statute? And the Court has found that, yes, the Chancery Court does have subject matter jurisdiction.

Is TCA 39-17-1305 unconstitutional because it's void for vagueness? And the Court finds here that the specific language that the Court has focused upon; that is that the business is in "the principal business of the serving of meals or food" is void for vagueness.

The next issue, does OSHA preempt this state statute? And the Court finds here that there is a failure of authority for such a theory.

Number five: Does the statute allow the unconstutitonal delegation of the state police power? And here the Court agrees with the State and the Attorney General that there is a distinction between the facts in this case, which allow the private property owner to regulate its own private -- exclusively private space; and that the cases cited by the plaintiffs raise the issue of private owners regulating and managing public space when, in fact, the law at issue in those cases was that -- was there to enhance the public welfare, and to protect the public.

And lawyers, I'm just asking the plaintiffs to order just the bench ruling; to file that bench ruling; and then please submit a judgment. And I think this should be a -- I think probably all of you will agree, it would be a Rule 54. Do you think? I sort of got the impression because you filed a partial summary judgment motion, and the State responded; that

you would want this issue to be examined ~~for~~ the rest of the case.

MR. SMITH: Yes, your Honor. We can respond in the final order.

THE COURT: Okay. I think maybe one of you mentioned that to me at the injunction hearing, but I don't want to make that decision for you.

MR. SMITH: Thank you.

THE COURT: Okay. So if you include that in the order, and then incorporate the bench ruling, I think that will get it.

MR. SMITH: And we will add the State as parties also because that's by agreement.

THE COURT: Okay. Because that's by agreement.

MR. SMITH: Thank you.

THE COURT: Okay. I think that's it. We're in adjournment.

COURT OFFICER: All rise.

(The proceedings were adjourned at 12:45 p.m.)

REPORTER'S CERTIFICATE

I, VICKI S. GANNO, Registered Professional Reporter, Certified Court Reporter, and Notary Public for the State of Tennessee, hereby certify that I reported foregoing proceedings; that the proceedings were stenographically reported by me; and that the foregoing proceedings constitute a true and correct transcript of said proceedings to the best of my ability.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in events of this action.

Signed this 24th day of November, 2009.

_____

VICKI S. GANNO, RPR, CCR, Notary Public
State of Tennessee at Large
My Commission expires January 7, 2013

West's Tennessee Code Annotated Currentness
Title 39. Criminal Offenses
Chapter 17. Offenses Against Public Health, Safety and Welfare
Part 13. Weapons (Refs & Annos)

§ 39-17-1359. Authorization by individual, corporation, business entity to government entity to prohibit possession of weapons; posted notice; exceptions

(a) An individual, corporation, business entity or local, state or federal government entity or agent thereof is authorized to prohibit the possession of weapons by any person otherwise authorized by §§ 39-17-1351--39-17-1360, at meetings conducted by, or on property owned, operated, or managed or under the control of the individual, corporation, business entity or government entity. Notice of the prohibition shall be posted. Posted notices shall be displayed in prominent locations, including all entrances primarily used by persons entering the building, portion of the building or buildings where weapon possession is prohibited. If the possession of weapons is also prohibited on the premises of the property as well as within the confines of a building located on the property, the notice shall be posted at all entrances to the premises that are primarily used by persons entering the property. The notice shall be in English but a notice may also be posted in any language used by patrons, customers or persons who frequent the place where weapon possession is prohibited. In addition to the sign, notice may also include the international circle and slash symbolizing the prohibition of the item within the circle. The sign shall be of a size that is plainly visible to the average person entering the building, premises or property and shall contain language substantially similar to the following:

PURSUANT TO § 39-17-1359, THE OWNER/OPERATOR OF THIS PROPERTY HAS BANNED WEAPONS ON THIS PROPERTY, OR WITHIN THIS BUILDING OR THIS PORTION OF THIS BUILDING. FAILURE TO COMPLY WITH THIS PROHIBITION IS PUNISHABLE AS A CRIMINAL ACT UNDER STATE LAW AND MAY SUBJECT THE VIOLATOR TO A FINE OF NOT MORE THAN FIVE HUNDRED DOLLARS ($500).

(b) Nothing in this section shall be construed to alter, reduce or eliminate any civil or criminal liability that a property owner or manager may have for injuries arising on their property.

(c) Any posted notice being used by a local, state or federal governmental entity on July 1, 2000, that is in substantial compliance with the provisions of subsection (a) of this section may continue to be used by the governmental entity.

(d) The provisions of this section shall not apply to title 70 regarding wildlife laws, rules and regulations.

(e) The provisions of this section shall not apply to the grounds of any public park, natural area, historic park, nature trail, campground, forest, greenway, waterway or other similar public place that is owned or operated by

the state, a county, a municipality or instrumentality thereof. The carrying of firearms in such areas shall be governed by § 39-17-1311.

CREDIT(S)

1996 Pub.Acts, c. 905, § 11, eff. Oct. 1, 1996; 2000 Pub.Acts, c. 929, § 1, eff. July 1, 2000; 2009 Pub.Acts, c. 428, § 4.

HISTORICAL AND STATUTORY NOTES

For effective date provisions of 1996 Pub.Acts, c. 905, see the Historical and Statutory Notes following § 39-17-1351.

2000 Pub.Acts, c. 929, § 1 rewrote the section, which formerly provided:

"An individual, corporation, business entity or local, state or federal government entity or agent thereof is authorized to prohibit possession of weapons by any person otherwise authorized by §§ 39-17-1351--39-17-1360, at meetings conducted by, or on premises owned, operated, managed or under control of such individual, corporation, business entity or government entity. Notice of such prohibition shall be posted or announced."

2009 Pub.Acts, c. 428, § 4, added subsec. (e), relating to provisions of section not applicable to public parks, etc. owned or operated by the state, county, municipality or instrument thereof.

2009 Pub.Acts, c. 428, § 5, provides:

"(a) For purposes of permitting municipalities or counties to elect to prohibit the carrying of handguns in parks pursuant to § 39-17-1311(d), this act shall take effect upon becoming a law [June 12, 2009], the public welfare requiring it.

"(b) For purposes of it being lawful for persons authorized to carry a handgun pursuant to § 39-17-1351, to carry in places owned or operated by the state or federal government that are designated in Section 1 of this act, this act shall take effect upon becoming a law, the public welfare requiring it.

"(c) For purposes of it being lawful for persons authorized to carry a handgun pursuant to § 39-17-1351, to carry in places owned or operated by municipalities or counties that are designated in Section 1 of this act, this act shall take effect on September 1, 2009."

LIBRARY REFERENCES

Key Numbers

Weapons ⚿ 4.

Westlaw Key Number Search: 406k4.

Corpus Juris Secundum

C.J.S. Weapons § 3.

NOTES OF DECISIONS

Local regulation 1
Posting of notice 2

1. Local regulation

A county can prohibit everyone, except a certified law enforcement officer, from carrying a gun into a county building, including those who have a permit to carry a handgun, if the appropriate notices are provided. Op.Atty.Gen. No. 00-161, Oct. 17, 2000.

2. Posting of notice

Section 39-17-1359(a) requires the posting of a notice which uses language that is "substantially similar" to the language provided in the statute; the international circle and slash symbol may not be used in lieu of such language. Op.Atty.Gen. No. 07-043, April 9, 2007.

Section 39-17-1359 requires the posting of notices at the entrances of each individual business that prohibits weapons on its property if possession of handguns has not been prohibited on the entire property. Op.Atty.Gen. No. 07-043, April 9, 2007.

T. C. A. § 39-17-1359, TN ST § 39-17-1359
Current through end of 2009 First Reg. Sess.

END OF DOCUMENT

West's Tennessee Code Annotated Currentness
Title 39. Criminal Offenses
Chapter 17. Offenses Against Public Health, Safety and Welfare
Part 13. Weapons (Refs & Annos)

§ 39-17-1305. Sale of alcoholic beverages; premises; possession of firearms; discrimination

(a) It is an offense for a person to possess a firearm within the confines of a building open to the public where liquor, wine or other alcoholic beverages, as defined in § 57-3-101(a)(1)(A), or beer, as defined in § 57-6-102(1), are served for on premises consumption.

(b) A violation of this section is a Class A misdemeanor.

(c) The provisions of subsection (a) shall not apply to a person who is:

(1) In the actual discharge of official duties as a law enforcement officer, or is employed in the army, air force, navy, coast guard or marine service of the United States or any member of the Tennessee national guard in the line of duty and pursuant to military regulations, or is in the actual discharge of duties as a correctional officer employed by a penal institution; or

(2) On the person's own premises or premises under the person's control or who is the employee or agent of the owner of the premises with responsibility for protecting persons or property.

(3)(A) Authorized to carry a firearm under § 39-17-1351 who is not consuming beer, wine or any alcoholic beverage, and is within the confines of a restaurant that is open to the public and serves alcoholic beverages, wine or beer.

(B) As used in this subdivision (c)(3), "restaurant" means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, such place being provided with adequate and sanitary kitchen and dining room equipment, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations and periods of redecorating, and the serving of such meals shall be the principal business conducted.

(d)(1) Notwithstanding any provision of title 57 or any other law to the contrary, no entity of state or local government is authorized to:

(A) Refuse the issuance or renewal of any permit or license to sell beer, wine, or alcoholic beverages;

(B) Suspend or revoke any such permit or license; or

(C) Otherwise discriminate against the holder of, or applicant for, any such permit or license;

based solely upon conduct or activity that is lawful under this section or § 39-17-1359.

(2) As used in this subsection "discriminate against" includes, but is not limited to, requiring additional information in the permit or license application, charging a higher fee, requiring additional inspections, or restricting otherwise available locations.

CREDIT(S)

1989 Pub.Acts, c. 591, § 1; 1990 Pub.Acts, c. 1029, § 4; 2001 Pub.Acts, c. 345, § 1, eff. July 1, 2001; 2009 Pub.Acts, c. 339, § 1, eff. July 14, 2009; 2009 Pub.Acts, c. 605, § 2.

COMMENTS OF THE TENNESSEE SENTENCING COMMISSION

This section prohibits possession of weapons in areas adjacent to where alcoholic beverages are served, such as parking lots.

HISTORICAL AND STATUTORY NOTES

2001 Pub.Acts, c. 345, § 2, provides:

"This act shall take effect July 1, 2001, the public welfare requiring it."

Article 3, § 18, of the Tennessee Constitution provides, in part:

"If the Governor shall fail to return any Bill with his objections in writing within ten calendar days (Sundays excepted) after it shall have been presented to him, the same shall become a law without his signature."

2001 Pub.Acts, c. 345, became law without the governor's signature.

2009 Pub.Acts, c. 339, § 1, added subsec. (c)(3), relating to authorization to carry firearm in a restaurant.

2009 Pub.Acts, c. 339, was vetoed by the governor on May 28, 2009. The House repassed the bill on June 3,

2009, and the Senate repassed the bill on June 4, 2009. Article 3, § 18 of the Tennessee Constitution provides, in part:

"If after such reconsideration, a majority of all the members elected to that House shall agree to pass the Bill, notwithstanding the objections of the Executive, it shall be sent with said objections, to the other House, by which it shall likewise be reconsidered. If approved by a majority of the whole number elected to that House, it shall become a law."

2009 Pub.Acts, c. 605, § 2, added subsec. (d), relating to refusal to issue or renew any permit or license to sell alcoholic beverages based upon conduct or activity that is lawful.

CROSS REFERENCES

Accessories before the fact, principals, and aiders and abettors, see §§ 39-11-401 and 39-11-402.
Alternative sentencing for misdemeanor convictions, see § 40-35-104.
Attempt, solicitation and conspiracy offenses, classification and penalties, see § 39-12-107.
Classification of misdemeanors, see § 40-35-110.
Penalties for designated classes of misdemeanors, see § 40-35-111.
Sentencing for misdemeanors, see § 40-35-302.

LAW REVIEW AND JOURNAL COMMENTARIES

Alcohol, Firearms, and Constitutions. Glenn Harlan Reynolds, Mike Roberts and Larry D. Soderquist, 28 U. Mem. L. Rev. 335 (1998).

LIBRARY REFERENCES

Key Numbers

Weapons ⚿ 4.

Westlaw Key Number Search: 406k4.

Corpus Juris Secundum

C.J.S. Weapons § 3.

RESEARCH REFERENCES

Treatises and Practice Aids

Tenn. Prac., Pattern Jury Instr. - Criminal 36.09, T.P.I.--Crim. 36.09. Unlawful Possession of Firearm Where Alcoholic Beverages Are Served.

NOTES OF DECISIONS

In general 2
Validity 1

1. Validity

Section 39-17-1305 is constitutional; however, limiting the statute's purview to places where alcohol is the sole or primary product would likely create vagueness and thus open the statute to constitutional attack. Op.Atty.Gen. No. 00-020, Feb. 15, 2000.

Section 39-17-1307(a), making it an offense to carry a firearm with the intent to go armed; § 39-17-1309, making it an offense to carry a firearm on school property; § 39-17-1311, making it an offense to possess or carry a firearm with the intent to go armed in a public park or recreational facility; and § 39-17-1305, making it an offense to possess a firearm on any premises where alcoholic beverages are sold; are all a valid exercise of the state's regulatory authority under Article I, Section 26 of the Tennessee Constitution and are therefore constitutional. Op.Atty.Gen. No. 96-080 April 25, 1996.

2. In general

Sale of beer from establishment wherein guns are sold and repaired would interfere with public health, safety and morals within meaning of statute prohibiting carrying dangerous weapons into establishment licensed to sell alcoholic beverages. T.C.A. § 39-6-1717. Gibbs v. Blount County Beer Bd., 1984, 664 S.W.2d 68. Intoxicating Liquors ⟹ 71

A court would most likely interpret the term "alcoholic beverages" in § 39-17-1305(a) to exclude beer, thereby permitting the carrying of a weapon into an establishment that sells beer with an alcohol content of 5% by weight or less. Op.Atty.Gen. No. 00-031, Feb. 22, 2000.

An off duty law enforcement officer not actually discharging his or her official duties is not permitted to carry a weapon on premises that sell or serve alcohol, on school property, nor on recreational grounds. An off duty law enforcement officer not actually discharging his or her official duties during a judicial proceeding or who has not been subpoenaed to be a witness in the judicial proceeding is not permitted to carry a weapon during that judicial proceeding. Op.Atty.Gen. No. 99-024, Feb. 16, 1999.

T. C. A. § 39-17-1305, TN ST § 39-17-1305
Current through end of 2009 First Reg. Sess.

END OF DOCUMENT

EXHIBIT E

DEPARTMENT OF FISH AND GAME

Certified Nonlead Ammunition Information

1. Certified list (choose a link to go to the manufacturer's specific information):

Name	Date Application Received	Date Application Approved
Ammo Brothers	September 22, 2008	September 25, 2008
Barnes Bullets, Inc.	April 16, 2008	April 28, 2008
Black Hills Ammunition	June 10, 2008	July 2, 2008
CCI	April 15, 2008	April 28, 2008
Cutting Edge Bullets	February 26, 2010	April 12, 2010
Custom Cartridge, Inc.	March 14, 2008	April 28, 2008
Dakota Ammo (COR-BON/Glaser)	April 16, 2008	April 28, 2008
D Dupleks Ltd.	March 2, 2010	March 16, 2010
Dynamic Research Technologies (DRT)	July 29, 2009	September 8, 2009
Federal Cartridge Company	April 15, 2008	April 28, 2008
Hornady Mfg. Co	December 8, 2008	December 29, 2008
International Cartridge Company	August 12, 2008	September 4, 2008
Magtech Ammunition Company	September 11, 2008	October 20, 2008
Miwall Corporation	September 23, 2008	October 20, 2008
North Fork Bullets	January, 27 2009	February 23, 2009
Nosler, Inc.	March 25, 2008	April 28, 2008
P-Bar Co., LLC	November 30, 2009	January 4, 2010
Remington Arms Co., Inc.	March 25, 2008	April 28, 2008
Sinterfire, Inc	May 29, 2008	July 2, 2008
Snake River Ammunition	August 31, 2009	September 14, 2009
Stars & Stripes Ammunition	August 15, 2008	September 11, 2008
TomBob Outdoors, LLC	March 15, 2010	April 21, 2010
Weatherby, Inc.	May 29, 2008	July 2, 2008
Winchester Ammunition	April 7, 2008	April 28, 2008

2. Non-toxic shot approved by the U.S. Fish and Wildlife Service for use in waterfowl hunting (Section 507.1,

Title 14, California Code of Regulations) is certified to take appropriate nongame species within the nonlead zone. **NOTE: The U.S. Fish and Wildlife Service reviews and may approve applications for other types of non-toxic shot throughout the year. A full list of approved shot types can be found at** http://migratorybirds.fws.gov/issues/nontoxic_shot/nontoxic.htm.

3. Frangible bullets are **not** certified for use to take any big-game species (as defined in Section 350, T14, CCR) and/or fallow deer, sambar deer, axis deer, sika deer, aoudad, mouflon, tahr, and feral goats (Section 475(c), T14, CCR) in any area of the state, including the nonlead zone.

4. This certified list will be updated as new applications are received and approved.

EXHIBIT F

AMENDED IN SENATE AUGUST 19, 2010

AMENDED IN SENATE JUNE 22, 2010

AMENDED IN SENATE JUNE 3, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL No. 2358

Introduced by Assembly Member De León

February 19, 2010

An act to amend Sections 12061 ~~and 12318~~, *12318, and 12323* of the Penal Code, relating to ammunition.

LEGISLATIVE COUNSEL'S DIGEST

AB 2358, as amended, De León. Ammunition.

Existing law provides that commencing February 1, 2011, a vendor shall not sell or otherwise transfer ownership of any handgun ammunition without, at the time of delivery, legibly recording specified information regarding the purchaser or transferee, and maintaining the record for a period of not less than 5 years, as specified. Existing law provides that violation of these provisions is a misdemeanor. Existing law also provides that the records shall be subject to inspection by any peace officer and certain others, as specified, for purposes of an investigation where access to those records is or may be relevant to that investigation, when seeking information about persons prohibited from owning a firearm or ammunition, or when engaged in ensuring compliance with laws pertaining to firearms or ammunition, as specified.

This bill would require the information described above in connection with the transfer of handgun ammunition be legibly or electronically recorded. The bill would provide that commencing February 1, 2011, except for investigatory and enforcement purposes described above, no

ammunition vendor shall provide the required information to any 3rd party without the written consent of the purchaser or transferee. The bill would also provide that records may be copied for investigatory or enforcement purposes by any person authorized to inspect those records, as specified, and that copies shall be transmitted to local law enforcement if required by local law. The bill would also provide that any required ammunition records that are no longer required to be maintained shall be destroyed in a manner that protects the privacy of the purchaser or transferee who is the subject of the record. The bill would provide that violation of these provisions is a misdemeanor.

By expanding the scope of an existing crime, this bill would impose a state-mandated local program.

The bill would require ammunition vendors, commencing February 1, 2011, to provide written notice to the local police chief, or if the vendor is in an unincorporated area, to the county sheriff, of the vendor's intent to conduct business in the jurisdiction, and to obtain any regulatory or business license required by the jurisdiction for ammunition sellers.

Existing law provides that commencing February 1, 2011, the delivery or transfer of ownership of handgun ammunition may only occur in a face-to-face transaction with the deliverer or transferor being provided bona fide evidence of identity from the purchaser or other transferee.

This bill would also provide that handgun ammunition may be purchased over the Internet or through other means of remote ordering if a handgun ammunition vendor in California initially receives the ammunition and processes the transfer, as specified.

Existing law defines "handgun ammunition" for most purposes as ammunition principally for use in handguns, notwithstanding that the ammunition may also be used in some rifles.

This bill would instead define "handgun ammunition" for those purposes as any variety of ammunition of a caliber specified in a list added by this bill, notwithstanding that the ammunition may also be used in some rifles, and would provide that "handgun ammunition" does not include blanks or ammunition designed and intended to be used in an "antique firearm," as defined.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 12061 of the Penal Code is amended to read:

12061. (a) A vendor shall comply with all of the following conditions, requirements and prohibitions:

(1) A vendor shall not permit any employee who the vendor knows or reasonably should know is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code to handle, sell, or deliver handgun ammunition in the course and scope of his or her employment.

(2) A vendor shall not sell or otherwise transfer ownership of, offer for sale or otherwise offer to transfer ownership of, or display for sale or display for transfer of ownership of any handgun ammunition in a manner that allows that ammunition to be accessible to a purchaser or transferee without the assistance of the vendor or employee thereof.

(3) Commencing February 1, 2011, a vendor shall not sell or otherwise transfer ownership of any handgun ammunition without, at the time of delivery, legibly or electronically recording the following information:

(A) The date of the sale or other transaction.

(B) The purchaser's or transferee's driver's license or other identification number and the state in which it was issued.

(C) The brand, type, and amount of ammunition sold or otherwise transferred.

(D) The purchaser's or transferee's signature.

(E) The name of the salesperson who processed the sale or other transaction.

(F) The right thumbprint of the purchaser or transferee on the above form.

(G) The purchaser's or transferee's full residential address and telephone number.

(H) The purchaser's or transferee's date of birth.

(4) Commencing February 1, 2011, the records required by this section shall be maintained on the premises of the vendor for a period of not less than five years from the date of the recorded

transfer. Commencing February 1, 2011, except for the purposes set forth in paragraph (5), no vendor shall provide the information specified in paragraph (3) to any third party without the written consent of the purchaser or transferee. Any records required by this section that are no longer required to be maintained shall be destroyed in a manner that protects the privacy of the purchaser or transferee who is the subject of the record.

(5) Commencing February 1, 2011, the records referred to in paragraph (3) shall be subject to inspection at any time during normal business hours by any peace officer employed by a sheriff, city police department, or district attorney as provided in subdivision (a) of Section 830.1, or employed by the department as provided in subdivision (b) of Section 830.1, provided the officer is conducting an investigation where access to those records is or may be relevant to that investigation, is seeking information about persons prohibited from owning a firearm or ammunition, or is engaged in ensuring compliance with the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4), or any other laws pertaining to firearms or ammunition. The records shall also be subject to inspection at any time during normal business hours by any other employee of the department, provided that employee is conducting an investigation where access to those records is or may be relevant to that investigation, is seeking information about persons prohibited from owning a firearm or ammunition, or is engaged in ensuring compliance with the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4), or any other laws pertaining to firearms or ammunition. Records may be copied for investigatory or enforcement purposes by any person authorized to inspect those records pursuant to this subdivision.

(6) Commencing February 1, 2011, the vendor shall not knowingly make a false entry in, fail to make a required entry in, fail to obtain the required thumbprint, or otherwise fail to maintain in the required manner records prepared in accordance with paragraph (2). If the right thumbprint is not available, then the vendor shall have the purchaser or transferee use his or her left thumb, or any available finger, and shall so indicate on the form. If the purchaser or transferee is physically unable to provide a thumbprint or fingerprint, the vendor shall so indicate on the form.

(7) Commencing February 1, 2011, no vendor shall refuse to permit a person authorized under paragraph (5) to examine any record prepared in accordance with this section during any inspection conducted pursuant to this section, or refuse to permit the use of any record or information by those persons.

(8) Commencing February 1, 2011, a vendor shall provide written notice to the local police chief, or if the vendor is in an unincorporated area, to the county sheriff, of the vendor's intent to conduct business in the jurisdiction, and shall obtain any regulatory or business license required by the jurisdiction for

ammunition sellers. Copies of the ammunition sales records required by this section shall be transmitted to the county sheriff or chief of police if required by local law.

(b) Paragraph (3) of subdivision (a) shall not apply to or affect sales or other transfers of ownership of handgun ammunition by handgun ammunition vendors to any of the following, if properly identified:

(1) A person licensed pursuant to Section 12071.

(2) A handgun ammunition vendor.

(3) A person who is on the centralized list maintained by the department pursuant to Section 12083.

(4) A target facility which holds a business or regulatory license.

(5) Gunsmiths.

(6) Wholesalers.

(7) Manufacturers or importers of firearms licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code, and the regulations issued pursuant thereto.

(8) Sales or other transfers of ownership made to authorized law enforcement representatives of cities, counties, cities and counties, or state or federal governments for exclusive use by those government agencies if, prior to the delivery, transfer, or sale of handgun ammunition, written authorization from the head of the agency authorizing the transaction is presented to the person from whom the purchase, delivery, or transfer is being made. Proper written authorization is defined as verifiable written certification from the head of the agency by which the purchaser, transferee, or person otherwise acquiring ownership is employed, identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency by which he or she is employed.

(c) (1) A violation of paragraph (3), (4), (6), or (7) of subdivision (a) is a misdemeanor.

(2) The provisions of this subdivision are cumulative, and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

SEC. 2. Section 12318 of the Penal Code is amended to read:

12318. (a) Commencing February 1, 2011, the delivery or transfer of ownership of handgun ammunition *in this state* may only occur in a face-to-face transaction with the deliverer or transferor being provided bona fide evidence of identity from the purchaser or other transferee, provided, however, that handgun ammunition may be purchased over the Internet or through other means of remote ordering if a handgun ammunition vendor in California initially receives the ammunition and processes the transfer in compliance with this section and Section 12061. A violation of this section is a misdemeanor.

(b) For purposes of this section:

(1) "Bona fide evidence of identity" means a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, state identification card, identification card issued to a member of the Armed Forces, or other form of identification that bears the name, date of birth, description, and picture of the person.

(2) "Handgun ammunition" means handgun ammunition as defined in subdivision (a) of Section ~~12323, but excluding ammunition designed and intended to be used in an "antique firearm" as defined in Section 921(a)(16) of Title 18 of the United States Code. Handgun ammunition does not include blanks.~~ *12323.*

(3) "Handgun ammunition vendor" has the same meaning as set forth in Section 12060.

(c) Subdivision (a) shall not apply to or affect the deliveries, transfers, or sales of, handgun ammunition to any of the following:

(1) Authorized law enforcement representatives of cities, counties, cities and counties, or state and federal governments for exclusive use by those government agencies if, prior to the delivery, transfer, or sale of the handgun ammunition, written authorization from the head of the agency employing the purchaser or transferee,

is obtained identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency employing the individual.

(2) Sworn peace officers, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 who are authorized to carry a firearm in the course and scope of their duties.

(3) Importers and manufacturers of handgun ammunition or firearms licensed to engage in business pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(4) Persons who are on the centralized list maintained by the Department of Justice pursuant to Section 12083.

~~(5) Persons whose licensed premises are outside this state who are licensed as dealers or collectors of firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.~~

~~(6)~~

(5) Persons licensed as *dealers or* collectors of firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto ~~whose licensed premises are within this state who has a~~ *who have* current ~~certificate~~ *certificates* of eligibility issued to ~~him or her~~ *them* by the Department of Justice pursuant to Section 12071.

~~(7)~~

(6) A handgun ammunition vendor.

~~(8)~~

(7) A consultant-evaluator, as defined in subdivision (s) of Section 12001.

SEC. 3. Section 12323 of the Penal Code is amended to read:

12323. As used in this chapter, the following definitions shall apply:

(a) "Handgun ~~ammunition"~~ *ammunition," which does not include blanks and ammunition designed and intended to be used in an "antique firearm" as defined in Section 921(a)(16) of Title 18 of the United States Code,* means ~~ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, as defined in subdivision (a) of Section 12001, notwithstanding that the ammunition may also be used in some rifles.~~ *any variety of ammunition in the following calibers,*

notwithstanding that the ammunition may also be used in some rifles:

(1) .22.
(2) .25.
(3) .32.
(4) .38.
(5) .9mm.
(6) .10mm.
(7) .40.
(8) .41.
(9) .44.
(10) .45.
(11) 5.7x28mm.
(12) .223.
(13) .357.
(14) .454.
(15) 5.56x45mm.
(16) 7.62x39.
(17) 7.63mm.
(18) 7.65mm.
(19) .50.

(b) "Handgun ammunition designed primarily to penetrate metal or armor" means any ammunition, except a shotgun shell or ammunition primarily designed for use in rifles, that is designed primarily to penetrate a body vest or body shield, and has either of the following characteristics:

(1) Has projectile or projectile core constructed entirely, excluding the presence of traces of other substances, from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness.

(2) Is primarily manufactured or designed, by virtue of its shape, cross-sectional density, or any coating applied thereto, including, but not limited to, ammunition commonly known as "KTW ammunition," to breach or penetrate a body vest or body shield when fired from a pistol, revolver, or other firearm capable of being concealed upon the person.

(c) "Body vest or shield" means any bullet-resistant material intended to provide ballistic and trauma protection for the wearer or holder.

(d) "Rifle" shall have the same meaning as defined in paragraph (20) of subdivision (c) of Section 12020.

~~SEC. 3.~~

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

EXHIBIT G

AMENDED IN SENATE AUGUST 30, 2010

AMENDED IN SENATE AUGUST 19, 2010

AMENDED IN SENATE JUNE 22, 2010

AMENDED IN SENATE JUNE 3, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL No. 2358

Introduced by Assembly Member De León

February 19, 2010

An act to amend Sections 12061, *12077*, 12318, and 12323 of the Penal Code, relating to ammunition.

LEGISLATIVE COUNSEL'S DIGEST

AB 2358, as amended, De León. Ammunition.

Existing law provides that commencing February 1, 2011, a vendor shall not sell or otherwise transfer ownership of any handgun ammunition without, at the time of delivery, legibly recording specified information regarding the purchaser or transferee, and maintaining the record for a period of not less than 5 years, as specified. Existing law provides that violation of these provisions is a misdemeanor. Existing law also provides that the records shall be subject to inspection by any peace officer and certain others, as specified, for purposes of an investigation where access to those records is or may be relevant to that investigation, when seeking information about persons prohibited from owning a firearm or ammunition, or when engaged in ensuring compliance with laws pertaining to firearms or ammunition, as specified.

This bill would require the information described above in connection with the transfer of handgun ammunition be legibly or electronically

recorded. The bill would provide that commencing February 1, 2011, except for investigatory and enforcement purposes described above, no ammunition vendor shall provide the required information to any 3rd party without the written consent of the purchaser or transferee. The bill would also provide that records may be copied for investigatory or enforcement purposes by any person authorized to inspect those records, as specified, and that copies shall be transmitted to local law enforcement if required by local law. The bill would also provide that any required ammunition records that are no longer required to be maintained shall be destroyed in a manner that protects the privacy of the purchaser or transferee who is the subject of the record. The bill would provide that violation of these provisions is a misdemeanor. *This bill would provide that commencing February 1, 2011, except for investigatory and enforcement purposes described above, no ammunition vendor shall provide the required information to any 3rd party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee. The bill would also provide that any required ammunition records that are no longer required to be maintained shall be destroyed in a specified manner. The bill would provide that violation of these provisions is a misdemeanor.*

By expanding the scope of an existing crime, this bill would impose a state-mandated local program.

The bill would require ammunition vendors, commencing February 1, 2011, to provide written notice to the local police chief, or if the vendor is in an unincorporated area, to the county sheriff, of the vendor's intent to conduct business in the jurisdiction, and to obtain any regulatory or business license required by the jurisdiction for ammunition sellers. *A violation of this provision would be a misdemeanor. The bill would also provide that no public agency may make public the information obtained from the record of the ammunition transaction.*

Existing law requires certain information to be collected by firearms dealers in connection with the transfer of firearms and submitted to the Department of Justice, as specified.

This bill would provide that no firearms dealer shall provide the information required by those provisions to any 3rd party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee, except for purposes of 3rd-party electronic submission to

the department. The bill would also provide that any of these records that are no longer required to be maintained, if destroyed, shall be destroyed in a specified manner.

Existing law provides that commencing February 1, 2011, the delivery or transfer of ownership of handgun ammunition may only occur in a face-to-face transaction with the deliverer or transferor being provided bona fide evidence of identity from the purchaser or other transferee.

This bill would also provide that handgun ammunition may be purchased over the Internet or through other means of remote ordering if a handgun ammunition vendor in California initially receives the ammunition and processes the transfer, as specified.

Existing law defines "handgun ammunition" for most purposes as ammunition principally for use in handguns, notwithstanding that the ammunition may also be used in some rifles.

This bill would instead define "handgun ammunition" for those purposes as any variety of ammunition of a caliber specified in a list added by this bill, notwithstanding that the ammunition may also be used in some rifles, and would provide that "handgun ammunition" does not include blanks or ammunition designed and intended to be used in an "antique firearm," as defined.

This bill would incorporate additional amendments to Section 12077 of the Penal Code proposed by AB 1810, contingent on the prior enactment of that bill.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 12061 of the Penal Code is amended to read:

12061. (a) A vendor shall comply with all of the following conditions, requirements, and prohibitions:

(1) A vendor shall not permit any employee who the vendor knows or reasonably should know is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the

Welfare and Institutions Code to handle, sell, or deliver handgun ammunition in the course and scope of his or her employment.

(2) A vendor shall not sell or otherwise transfer ownership of, offer for sale or otherwise offer to transfer ownership of, or display for sale or display for transfer of ownership of any handgun ammunition in a manner that allows that ammunition to be accessible to a purchaser or transferee without the assistance of the vendor or employee thereof.

(3) Commencing February 1, 2011, a vendor shall not sell or otherwise transfer ownership of any handgun ammunition without, at the time of delivery, legibly or electronically recording the following information:

(A) The date of the sale or other transaction.

(B) The purchaser's or transferee's driver's license or other identification number and the state in which it was issued.

(C) The brand, type, and amount of ammunition sold or otherwise transferred.

(D) The purchaser's or transferee's signature.

(E) The name of the salesperson who processed the sale or other transaction.

(F) The right thumbprint of the purchaser or transferee on the above form.

(G) The purchaser's or transferee's full residential address and telephone number.

(H) The purchaser's or transferee's date of birth.

(4) *(A)* Commencing February 1, 2011, the records required by this section shall be maintained on the premises of the vendor for a period of not less than five years from the date of the recorded transfer. Commencing February 1, 2011, except for the purposes set forth in paragraph (5), no vendor shall provide the information ~~specified in paragraph (3) to any third party without the written consent of the purchaser or transferee. Any records required by this section that are no longer required to be maintained shall be destroyed in a manner that protects the privacy of the purchaser or transferee who is the subject of the record.~~ *specified in paragraph (3) to any third party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee of the handgun ammunition who is the subject of the record.*

(B) Any records generated pursuant to this section that are no longer required to be maintained shall be destroyed pursuant to Section 1798.81 of the Civil Code.

(5) Commencing February 1, 2011, the records referred to in paragraph (3) shall be subject to inspection at any time during normal business hours by any peace officer employed by a sheriff, city police department, or district attorney as provided in subdivision (a) of Section 830.1, or employed by the department as provided in subdivision (b) of Section 830.1, provided the officer is conducting an investigation where access to those records is or may be relevant to that investigation, is seeking information about persons prohibited from owning a firearm or ammunition, or is engaged in ensuring compliance with the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4), or any other laws pertaining to firearms or ammunition. The records shall also be subject to inspection at any time during normal business hours by any other employee of the department, provided that employee is conducting an investigation where access to those records is or may be relevant to that investigation, is seeking information about persons prohibited from owning a firearm or ammunition, or is engaged in ensuring compliance with the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4), or any other laws pertaining to firearms or ammunition. Records may be copied for investigatory or enforcement purposes by any person authorized to inspect those records pursuant to this subdivision.

(6) Commencing February 1, 2011, the vendor shall not knowingly make a false entry in, fail to make a required entry in, fail to obtain the required thumbprint, or otherwise fail to maintain in the required manner records prepared in accordance with paragraph (2). If the right thumbprint is not available, then the vendor shall have the purchaser or transferee use his or her left thumb, or any available finger, and shall so indicate on the form. If the purchaser or transferee is physically unable to provide a thumbprint or fingerprint, the vendor shall so indicate on the form.

(7) Commencing February 1, 2011, no vendor shall refuse to permit a person authorized under paragraph (5) to examine any record prepared in accordance with this section during any inspection conducted pursuant to this section, or refuse to permit the use of any record or information by those persons.

(8) Commencing February 1, 2011, a vendor shall provide written notice to the local police chief, or if the vendor is in an unincorporated area, to the county sheriff, of the vendor's intent to conduct business in the jurisdiction, and shall obtain any regulatory or business license required by the jurisdiction for ammunition sellers. Copies of the ammunition sales records required by this section shall be transmitted to the county sheriff or chief of police if required by local law.

(b) Paragraph (3) of subdivision (a) shall not apply to or affect sales or other transfers of ownership of handgun ammunition by handgun ammunition vendors to any of the following, if properly identified:

(1) A person licensed pursuant to Section 12071.

(2) A handgun ammunition vendor.

(3) A person who is on the centralized list maintained by the department pursuant to Section 12083.

(4) A target facility which holds a business or regulatory license.

(5) Gunsmiths.

(6) Wholesalers.

(7) Manufacturers or importers of firearms licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code, and the regulations issued pursuant thereto.

(8) Sales or other transfers of ownership made to authorized law enforcement representatives of cities, counties, cities and counties, or state or federal governments for exclusive use by those government agencies if, prior to the delivery, transfer, or sale of handgun ammunition, written authorization from the head of the agency authorizing the transaction is presented to the person from whom the purchase, delivery, or transfer is being made. Proper written authorization is defined as verifiable written certification from the head of the agency by which the purchaser, transferee, or person otherwise acquiring ownership is employed, identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency by which he or she is employed.

(c) No public agency may make public the information obtained from the record made pursuant to paragraph (3) of subdivision (a).

~~(c)~~

(d) (1) A violation of paragraph (3), (4), (6), ~~or (7)~~ *(7), or (8)* of subdivision (a) is a misdemeanor.

(2) The provisions of this subdivision are cumulative, and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

SEC. 2. Section 12077 of the Penal Code is amended to read:

12077. (a) The Department of Justice shall prescribe the form of the register and the record of electronic transfer pursuant to Section 12074.

(b) (1) For handguns, information contained in the register or record of electronic transfer shall be the date and time of sale, make of firearm, peace officer exemption status pursuant to subdivision (a) of Section 12078 and the agency name, dealer waiting period exemption pursuant to subdivision (n) of Section 12078, dangerous weapons permitholder waiting period exemption pursuant to subdivision (r) of Section 12078, curio and relic waiting period exemption pursuant to subdivision (t) of Section 12078, California Firearms Dealer number issued pursuant to Section 12071, for transactions occurring prior to January 1, 2003, the purchaser's basic firearms safety certificate number issued pursuant to Sections 12805 and 12809, for transactions occurring on or after January 1, 2003, the purchaser's handgun safety certificate number issued pursuant to Article 8 (commencing with Section 12800), manufacturer's name if stamped on the firearm, model name or number, if stamped on the firearm, if applicable, serial number, other number (if more than one serial number is stamped on the firearm), any identification number or mark assigned to the firearm pursuant to Section 12092, caliber, type of firearm, if the firearm is new or used, barrel length, color of the firearm, full name of purchaser, purchaser's complete date of birth, purchaser's local address, if current address is temporary, complete permanent address of purchaser, identification of purchaser, purchaser's place of birth (state or country), purchaser's complete telephone number, purchaser's occupation, purchaser's sex, purchaser's physical description, all legal names and aliases ever used by the purchaser, yes or no answer to questions that prohibit purchase including, but not limited to, conviction of a felony as described in Section 12021 or an offense described in Section 12021.1, the purchaser's status

as a person described in Section 8100 of the Welfare and Institutions Code, whether the purchaser is a person who has been adjudicated by a court to be a danger to others or found not guilty by reason of insanity, whether the purchaser is a person who has been found incompetent to stand trial or placed under conservatorship by a court pursuant to Section 8103 of the Welfare and Institutions Code, signature of purchaser, signature of salesperson (as a witness to the purchaser's signature), salesperson's certificate of eligibility number if he or she has obtained a certificate of eligibility, name and complete address of the dealer or firm selling the firearm as shown on the dealer's license, the establishment number, if assigned, the dealer's complete business telephone number, any information required by Section 12082, any information required to determine whether or not paragraph (6) of subdivision (c) of Section 12072 applies, and a statement of the penalties for any person signing a fictitious name or address or for knowingly furnishing any incorrect information or for knowingly omitting any information required to be provided for the register.

(2) Effective January 1, 2003, the purchaser shall provide his or her right thumbprint on the register in a manner prescribed by the department. No exception to this requirement shall be permitted except by regulations adopted by the department.

(3) The firearms dealer shall record on the register or record of electronic transfer the date that the handgun is delivered.

(c) (1) For firearms other than handguns, information contained in the register or record of electronic transfer shall be the date and time of sale, peace officer exemption status pursuant to subdivision (a) of Section 12078 and the agency name, auction or event waiting period exemption pursuant to subdivision (g) of Section 12078, California Firearms Dealer number issued pursuant to Section 12071, dangerous weapons permitholder waiting period exemption pursuant to subdivision (r) of Section 12078, curio and relic waiting period exemption pursuant to paragraph (1) of subdivision (t) of Section 12078, full name of purchaser, purchaser's complete date of birth, purchaser's local address, if current address is temporary, complete permanent address of purchaser, identification of purchaser, purchaser's place of birth (state or country), purchaser's complete telephone number, purchaser's occupation, purchaser's sex, purchaser's physical description, all legal names and aliases

ever used by the purchaser, yes or no answer to questions that prohibit purchase, including, but not limited to, conviction of a felony as described in Section 12021 or an offense described in Section 12021.1, the purchaser's status as a person described in Section 8100 of the Welfare and Institutions Code, whether the purchaser is a person who has been adjudicated by a court to be a danger to others or found not guilty by reason of insanity, whether the purchaser is a person who has been found incompetent to stand trial or placed under conservatorship by a court pursuant to Section 8103 of the Welfare and Institutions Code, signature of purchaser, signature of salesperson (as a witness to the purchaser's signature), salesperson's certificate of eligibility number if he or she has obtained a certificate of eligibility, name and complete address of the dealer or firm selling the firearm as shown on the dealer's license, the establishment number, if assigned, the dealer's complete business telephone number, any information required by Section 12082, and a statement of the penalties for any person signing a fictitious name or address or for knowingly furnishing any incorrect information or for knowingly omitting any information required to be provided for the register.

(2) Effective January 1, 2003, the purchaser shall provide his or her right thumbprint on the register in a manner prescribed by the department. No exception to this requirement shall be permitted except by regulations adopted by the department.

(3) The firearms dealer shall record on the register or record of electronic transfer the date that the firearm is delivered.

(d) Where the register is used, the following shall apply:

(1) Dealers shall use ink to complete each document.

(2) The dealer or salesperson making a sale shall ensure that all information is provided legibly. The dealer and salespersons shall be informed that incomplete or illegible information will delay sales.

(3) Each dealer shall be provided instructions regarding the procedure for completion of the form and routing of the form. Dealers shall comply with these instructions which shall include the information set forth in this subdivision.

(4) One firearm transaction shall be reported on each record of sale document. For purposes of this subdivision, a "transaction" means a single sale, loan, or transfer of any number of firearms that are not handguns.

(e) The dealer or salesperson making a sale shall ensure that all required information has been obtained from the purchaser. The dealer and all salespersons shall be informed that incomplete information will delay sales.

(f) Effective January 1, 2003, the purchaser's name, date of birth, and driver's license or identification number shall be obtained electronically from the magnetic strip on the purchaser's driver's license or identification and shall not be supplied by any other means except as authorized by the department. This requirement shall not apply in either of the following cases:

(1) The purchaser's identification consists of a military identification card.

(2) Due to technical limitations, the magnetic ~~stripe~~ *strip* reader is unable to obtain the required information from the purchaser's identification. In those circumstances, the firearms dealer shall obtain a photocopy of the identification as proof of compliance.

(3) In the event that the dealer has reported to the department that the dealer's equipment has failed, information pursuant to this subdivision shall be obtained by an alternative method to be determined by the department.

(g) No dealer shall provide the information required by this section to any third party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee. This subdivision shall not apply to the electronic submission to the department, through a third party authorized by the department, of information required by this section and Section 12076.

(h) Any records generated pursuant to this section by a person licensed pursuant to Section 12071 that are no longer required to be maintained by that licensee, if destroyed, shall be destroyed pursuant to Section 1798.81 of the Civil Code.

~~(g)~~

(i) As used in this section, the following definitions shall control:

(1) "Purchaser" means the purchaser or transferee of a firearm or the person being loaned a firearm.

(2) "Purchase" means the purchase, loan, or transfer of a firearm.

(3) "Sale" means the sale, loan, or transfer of a firearm.

SEC. 2.5. Section 12077 of the Penal Code is amended to read:

12077. (a) The Department of Justice shall prescribe the form of the register and the record of electronic transfer pursuant to Section 12074.

(b) (1) ~~For handguns,~~ *Until July 1, 2012, for handguns, and thereafter for all firearms,* information contained in the register or record of electronic transfer shall be the date and time of sale, make of firearm, peace officer exemption status pursuant to subdivision (a) of Section 12078 and the agency name, *auction or event waiting period exemption pursuant to subdivision (g) of Section 12078,* dealer waiting period exemption pursuant to subdivision (n) of Section 12078, dangerous weapons permitholder waiting period exemption pursuant to subdivision (r) of Section 12078, curio and relic waiting period exemption pursuant to subdivision (t) of Section 12078, California Firearms Dealer number issued pursuant to Section 12071, for transactions occurring prior to January 1, 2003, the purchaser's basic firearms safety certificate number issued pursuant to Sections 12805 and 12809, for transactions occurring on or after January 1, 2003, the purchaser's handgun safety certificate number issued pursuant to Article 8 (commencing with Section 12800), manufacturer's name if stamped on the firearm, model name or number, if stamped on the firearm, if applicable, serial number, other number (if more than one serial number is stamped on the firearm), any identification number or mark assigned to the firearm pursuant to Section 12092, *provided, however, that if the firearm is not a handgun and does not have a serial number, identification number, or mark assigned to it, a notation as to that fact, the* caliber, type of firearm, if the firearm is new or used, barrel length, color of the firearm, full name of purchaser, purchaser's complete date of birth, purchaser's local address, if current address is temporary, complete permanent address of purchaser, identification of purchaser, purchaser's place of birth (state or country), purchaser's complete telephone number, purchaser's occupation, purchaser's sex, purchaser's physical description, all legal names and aliases ever used by the purchaser, yes or no answer to questions that prohibit purchase including, but not limited to, conviction of a felony as described in Section 12021 or an offense described in Section 12021.1, the purchaser's status as a person described in Section 8100 of the Welfare and Institutions Code, whether the purchaser is a person who has been adjudicated by a court to be a danger to

others or found not guilty by reason of insanity, whether the purchaser is a person who has been found incompetent to stand trial or placed under conservatorship by a court pursuant to Section 8103 of the Welfare and Institutions Code, signature of purchaser, signature of salesperson (as a witness to the purchaser's signature), salesperson's certificate of eligibility number if he or she has obtained a certificate of eligibility, name and complete address of the dealer or firm selling the firearm as shown on the dealer's license, the establishment number, if assigned, the dealer's complete business telephone number, any information required by Section 12082, any information required to determine whether or not paragraph (6) of subdivision (c) of Section 12072 applies, and a statement of the penalties for any person signing a fictitious name or address or for knowingly furnishing any incorrect information or for knowingly omitting any information required to be provided for the register.

(2) ~~Effective January 1, 2003, the~~ *The* purchaser shall provide his or her right thumbprint on the register in a manner prescribed by the department. No exception to this requirement shall be permitted except by regulations adopted by the department.

(3) The firearms dealer shall record on the register or record of electronic transfer the date that the ~~handgun~~ *firearm* is delivered.

(c) (1) For firearms other than handguns, information contained in the register or record of electronic transfer shall be the date and time of sale, peace officer exemption status pursuant to subdivision (a) of Section 12078 and the agency name, auction or event waiting period exemption pursuant to subdivision (g) of Section 12078, California Firearms Dealer number issued pursuant to Section 12071, dangerous weapons permitholder waiting period exemption pursuant to subdivision (r) of Section 12078, curio and relic waiting period exemption pursuant to paragraph (1) of subdivision (t) of Section 12078, full name of purchaser, purchaser's complete date of birth, purchaser's local address, if current address is temporary, complete permanent address of purchaser, identification of purchaser, purchaser's place of birth (state or country), purchaser's complete telephone number, purchaser's occupation, purchaser's sex, purchaser's physical description, all legal names and aliases ever used by the purchaser, yes or no answer to questions that prohibit purchase, including, but not limited to, conviction of a felony as described in Section 12021 or an offense described in

Section 12021.1, the purchaser's status as a person described in Section 8100 of the Welfare and Institutions Code, whether the purchaser is a person who has been adjudicated by a court to be a danger to others or found not guilty by reason of insanity, whether the purchaser is a person who has been found incompetent to stand trial or placed under conservatorship by a court pursuant to Section 8103 of the Welfare and Institutions Code, signature of purchaser, signature of salesperson (as a witness to the purchaser's signature), salesperson's certificate of eligibility number if he or she has obtained a certificate of eligibility, name and complete address of the dealer or firm selling the firearm as shown on the dealer's license, the establishment number, if assigned, the dealer's complete business telephone number, any information required by Section 12082, and a statement of the penalties for any person signing a fictitious name or address or for knowingly furnishing any incorrect information or for knowingly omitting any information required to be provided for the register.

(2) ~~Effective January 1, 2003, the~~ *The* purchaser shall provide his or her right thumbprint on the register in a manner prescribed by the department. No exception to this requirement shall be permitted except by regulations adopted by the department.

(3) The firearms dealer shall record on the register or record of electronic transfer the date that the firearm is delivered.

(4) This subdivision shall become inoperative on July 1, 2012.

(d) Where the register is used, the following shall apply:

(1) Dealers shall use ink to complete each document.

(2) The dealer or salesperson making a sale shall ensure that all information is provided legibly. The dealer and salespersons shall be informed that incomplete or illegible information will delay sales.

(3) Each dealer shall be provided instructions regarding the procedure for completion of the form and routing of the form. Dealers shall comply with these instructions which shall include the information set forth in this subdivision.

(4) One firearm transaction shall be reported on each record of sale document. ~~For purposes of this subdivision, a "transaction" means a single sale, loan, or transfer of any number of firearms that are not handguns.~~

(e) The dealer or salesperson making a sale shall ensure that all required information has been obtained from the purchaser. The

dealer and all salespersons shall be informed that incomplete information will delay sales.

(f) ~~Effective January 1, 2003, the~~ *The* purchaser's name, date of birth, and driver's license or identification number shall be obtained electronically from the magnetic strip on the purchaser's driver's license or identification and shall not be supplied by any other means except as authorized by the department. This requirement shall not apply in either of the following cases:

(1) The purchaser's identification consists of a military identification card.

(2) Due to technical limitations, the magnetic ~~stripe~~ *strip* reader is unable to obtain the required information from the purchaser's identification. In those circumstances, the firearms dealer shall obtain a photocopy of the identification as proof of compliance.

(3) In the event that the dealer has reported to the department that the dealer's equipment has failed, information pursuant to this subdivision shall be obtained by an alternative method to be determined by the department.

(g) No dealer shall provide the information required by this section to any third party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee. This subdivision shall not apply to the electronic submission to the department, through a third party authorized by the department, of information required by this section and Section 12076.

(h) Any records generated pursuant to this section by a person licensed pursuant to Section 12071 that are no longer required to be maintained by that licensee, if destroyed, shall be destroyed pursuant to Section 1798.81 of the Civil Code.

~~(g)~~

(i) As used in this section, the following definitions shall control:

(1) "Purchaser" means the purchaser or transferee of a firearm or the person being loaned a firearm.

(2) "Purchase" means the purchase, loan, or transfer of a firearm.

(3) "Sale" means the sale, loan, or transfer of a firearm.

~~SEC. 2.~~

SEC. 3. Section 12318 of the Penal Code is amended to read:

12318. (a) Commencing February 1, 2011, the delivery or transfer of ownership of handgun ammunition in this state may only occur in a face-to-face transaction with the deliverer or

transferor being provided bona fide evidence of identity from the purchaser or other transferee, provided, however, that handgun ammunition may be purchased over the Internet or through other means of remote ordering if a handgun ammunition vendor in California initially receives the ammunition and processes the transfer in compliance with this section and Section 12061. A violation of this section is a misdemeanor.

(b) For purposes of this section:

(1) "Bona fide evidence of identity" means a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, state identification card, identification card issued to a member of the Armed Forces, or other form of identification that bears the name, date of birth, description, and picture of the person.

(2) "Handgun ammunition" means handgun ammunition as defined in subdivision (a) of Section 12323.

(3) "Handgun ammunition vendor" has the same meaning as set forth in Section 12060.

(c) Subdivision (a) shall not apply to or affect the deliveries, transfers, or sales of, handgun ammunition to any of the following:

(1) Authorized law enforcement representatives of cities, counties, cities and counties, or state and federal governments for exclusive use by those government agencies if, prior to the delivery, transfer, or sale of the handgun ammunition, written authorization from the head of the agency employing the purchaser or transferee, is obtained identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency employing the individual.

(2) Sworn peace officers, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 who are authorized to carry a firearm in the course and scope of their duties.

(3) Importers and manufacturers of handgun ammunition or firearms licensed to engage in business pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(4) Persons who are on the centralized list maintained by the Department of Justice pursuant to Section 12083.

(5) Persons licensed as dealers or collectors of firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the

United States Code and the regulations issued pursuant thereto who have current certificates of eligibility issued to them by the Department of Justice pursuant to Section 12071.

(6) A handgun ammunition vendor.

(7) A consultant-evaluator, as defined in subdivision (s) of Section 12001.

~~SEC. 3.~~

SEC. 4. Section 12323 of the Penal Code is amended to read:

12323. As used in this chapter, the following definitions shall apply:

(a) "Handgun ammunition," which does not include blanks and ammunition designed and intended to be used in an "antique firearm" as defined in Section 921(a)(16) of Title 18 of the United States Code, meansany variety of ammunition in the following calibers, notwithstanding that the ammunition may also be used in some rifles:

(1) .22 *rimfire*.

(2) .25.

(3) .32.

(4) .38.

(5) .9mm.

(6) .10mm.

(7) .40.

(8) .41.

(9) .44.

(10) .45.

(11) 5.7x28mm.

~~(12) .223.~~

~~(13)~~

(12) .357.

~~(14)~~

(13) .454.

~~(15)~~

(14) 5.56x45mm.

~~(16) 7.62x39.~~

~~(17)~~

(15) 7.63mm.

~~(18)~~

(16) 7.65mm.

~~(19) .50.~~

(b) "Handgun ammunition designed primarily to penetrate metal or armor" means any ammunition, except a shotgun shell or ammunition primarily designed for use in rifles, that is designed primarily to penetrate a body vest or body shield, and has either of the following characteristics:

(1) Has projectile or projectile core constructed entirely, excluding the presence of traces of other substances, from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness.

(2) Is primarily manufactured or designed, by virtue of its shape, cross-sectional density, or any coating applied thereto, including, but not limited to, ammunition commonly known as "KTW ammunition," to breach or penetrate a body vest or body shield when fired from a pistol, revolver, or other firearm capable of being concealed upon the person.

(c) "Body vest or shield" means any bullet-resistant material intended to provide ballistic and trauma protection for the wearer or holder.

(d) "Rifle" shall have the same meaning as defined in paragraph (20) of subdivision (c) of Section 12020.

SEC. 5. Section 2.5 of this bill incorporates amendments to Section 12077 of the Penal Code proposed by both this bill and AB 1810. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2011, (2) each bill amends Section 12077 of the Penal Code, and (3) this bill is enacted after AB 1810, in which case Section 2 of this bill shall not become operative.

~~SEC. 4.~~

SEC. 6. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

EXHIBIT H

BILL NUMBER: SB 1276 AMENDED 05/26/94
BILL TEXT

AMENDED IN SENATE MAY 26, 1994
AMENDED IN SENATE MARCH 24, 1994
AMENDED IN SENATE MARCH 15, 1994

INTRODUCED BY Senator Hart

JANUARY 4, 1994

An act to amend Sections 12001, 12020, 12021, {- 12022.4, -} 12070, 12076, 12101, and 12551 of, to amend the heading of Article 4 (commencing with Section 12070) of Chapter 1 of Title 2 of Part 4 of, and to add Sections 12070.5, 12072.3, {- 12326, and 12327 -} {+ and 12326 +} to, the Penal Code, relating to ammunition.

LEGISLATIVE COUNSEL'S DIGEST

SB 1276, as amended, Hart. Ammunition.

(1) Under existing law, any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any of a series of specified weapons, including any ammunition that contains or consists of any flechette dart, shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison.

This bill would, in addition, make the above provision applicable to any firearm ammunition that contains exothermic pyrophoric misch metal as the projectile and that is designed for the sole purpose of throwing or spewing a flame or fireball to simulate a flamethrower, or any firearm ammunition that can be fired in a firearm capable of expelling as projectiles 2 or more metal balls connected by metal wire.

(2) Existing law prohibits specified persons from owning or having possession or control, as specified, of any firearm.

This bill would extend this prohibition to apply to firearm ammunition and to include persons who purchase or receive or attempt to purchase or receive any firearm or firearm ammunition.

(3) {- Existing law provides for an additional term of imprisonment in the state prison of 1, 2, or 3 years for a person convicted of the commission or attempted commission of a felony during which the person furnished or offered to furnish a firearm to another for the purpose of aiding, abetting, or enabling that person or any other person to commit a felony.

This bill would extend this enhancement to apply to furnishing or offering to furnish firearm ammunition under these circumstances.

(4) -} Existing law requires that a person be licensed to sell, lease, or transfer firearms. These provisions define "infrequent" for the purposes of exempting from the licensing requirements the infrequent sale, lease, or transfer of firearms. A violation of the licensing requirements is a misdemeanor.

This bill would extend the licensing provisions to apply to

firearm ammunition, as specified, and would define "infrequent" for the purposes of firearm ammunition. {-

(5) -} {+

(4) +} Existing law makes a person who purchases, sells, manufactures, ships, transports, distributes, or receives, by mail order or in any other manner, an imitation firearm, liable for a civil fine of not more than $10,000 for each violation.

This bill would make it a misdemeanor for a person to knowingly sell handgun ammunition by mail to anyone other than a licensed firearms dealer, punishable as specified. The bill would also make it a misdemeanor for a person who is not a licensed firearm dealer to knowingly receive any handgun ammunition directly through the mail, punishable as specified. The bill would authorize a person to order handgun ammunition through a local firearms dealer and to take possession of the ammunition only after furnishing the dealer with clear evidence of his or her identity and firearm or arsenal license, issued as specified. The bill would provide that these provisions shall become operative on July 1, 1996. {-

(6) -} {+

(5) +} Under existing law, the licensure procedures require a purchaser or transferee of a firearm to present clear evidence of his or her identity and age, including certain documents.

This bill would exempt duly authorized agencies performing law enforcement duties in California or peace officers, as defined, from the foregoing provisions. {-

(7) -} {+

(6) +} Existing law also prohibits a person licensed under (3) above from selling, delivering, or transferring any pistol, revolver, or firearm capable of being concealed upon the person to any person under the age of 21 years or any other firearm to a person under the age of 18 years, punishable as a misdemeanor.

This bill would prohibit any person or dealer licensed to sell firearms from employing any person under the age of 18 years unless the licensee does not sell pistols, revolvers, or other firearms capable of being concealed upon the person. If the licensee sells pistols, revolvers, or other firearms capable of being concealed upon the person, this bill would prohibit him or her from employing any person under the age of 21 years. The bill would require the Department of Justice to perform a background check on any employee of a person or dealer licensed as specified. The bill would provide punishment, as prescribed, for violation of these and other specified hiring provisions. {-

(8) -} {+

(7) +} Existing law provides that a minor may not possess live ammunition, except as specified. A violation of this provision is a misdemeanor.

This bill, instead, would provide that a minor may not possess firearm ammunition, except as specified.

The bill, in addition, would prohibit a person under the age of 21 years from purchasing any handgun ammunition, as defined, and a person under the age of 18 years from purchasing any firearm ammunition, including, but not limited to, handgun ammunition. {-

(9) -} {+

(8) +} Existing law prohibits, except as specified, the possession, manufacture, importation, sale, offer of sale, or knowing transportation of handgun ammunition designed primarily

to penetrate metal or armor, punishable as a felony.
This bill would authorize the Attorney General to ban the sale and manufacture of any type of handgun bullet that tests show is capable of piercing a body vest, as defined. The bill also would require the Attorney General to annually compile a list of these bullets. {-
(10) Existing law provides a definition of handgun ammunition and generally imposes restrictions on the sale, purchase, possession, or use of ammunition.
This bill would provide that every person who possesses or purchases in excess of 1,000 rounds of handgun ammunition without a valid California Arsenal License is guilty of a misdemeanor.
(11) -} {+
(9) +} Existing law provides that it is a misdemeanor for every person to sell to a minor any firearm.
This bill, instead, would provide that this provision shall apply to every person, except those licensed under (4) above, who would be subject to certain other provisions. The bill also would extend these provisions to apply to any firearm ammunition. {-
(12) -} {+
(10) +} Because this bill would create new crimes, it would impose a state-mandated local program. {-
(13) -} {+
(11) +} The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.
This bill would provide that no reimbursement is required by this act for a specified reason.
Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 12001 of the Penal Code is amended to read:

12001. (a) As used in this title, the terms "pistol," "revolver," and "firearm capable of being concealed upon the person" shall apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and which has a barrel less than 16 inches in length. These terms also include any device which has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length.
(b) As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.
(c) As used in Sections 12021, 12021.1, 12070, 12071, 12072, 12073, and 12078 of this code, and Sections 8100 and 8103 of the Welfare and Institutions Code, the term "firearm" includes the frame or receiver of that weapon.
(d) For the purpose of Sections 12025 and 12031, the term "firearm" also shall include any rocket, rocket propelled projectile launcher, or similar device containing any explosive

or incendiary material whether or not the device is designed for emergency or distress signaling purposes.

(e) (1) For purposes of Sections 12070, 12071, and subdivisions (b), (c), and (d) of Section 12072, the term "firearm" does not include an unloaded firearm which is defined as an "antique firearm" in Section 921(a)(16) of Title 18 of the United States Code.

(2) For purposes of Sections 12070, 12071, and subdivisions (b), (c), and (d) of Section 12072, the term "firearm" does not include an unloaded firearm that meets both of the following:

(A) It is not a pistol, revolver, or other firearm capable of being concealed upon the person.

(B) It is a curio or relic, as defined in Section 178.11 of Title 27 of the Code of Federal Regulations.

(f) Nothing shall prevent a device defined as a "pistol," "revolver," or "firearm capable of being concealed upon the person" from also being found to be a short-barreled shotgun or a short-barreled rifle, as defined in Section 12020.

(g) For purposes of Section 12551, the term "firearm" also shall include any instrument which expels a metallic projectile, such as a BB or a pellet, through the force of air pressure, CO2 pressure, or spring action, or any spot marker gun.

(h) As used in this title, "wholesaler" means any person who is licensed as a dealer pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto who sells or transfers or assigns firearms, or parts of firearms, to persons who are licensed as manufacturers, importers, or gunsmiths pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code, or persons licensed pursuant to Section 12071 and includes persons who receive finished parts of firearms and assemble them into completed or partially completed firearms, in furtherance of that purpose.

"Wholesaler" shall not include a manufacturer or importer or a gunsmith who is licensed to engage in those activities pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code or a person licensed pursuant to Section 12071 and the regulations issued pursuant thereto. A wholesaler also does not include those persons dealing exclusively in grips, stocks, and other parts of firearms that are not frames or receivers thereof.

(i) As used in Section 12071, 12072, or 12084, "application to purchase" means either of the following:

(1) The initial completion of the register by the purchaser or transferee as required by subdivision (a) of Section 12076.

(2) The initial completion of the LEFT by the purchaser or transferee as required by subdivision (d) of Section 12084.

(j) For the purpose of this chapter, "firearm ammunition" means any ammunition, including, but not limited to, handgun ammunition, as defined in Section 12323, except "firearm ammunition" shall not include ammunition, as described in Section 12322.

SEC. 2. Section 12020 of the Penal Code is amended to read:

12020. (a) Any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any cane gun or wallet gun, any undetectable firearm, any firearm which is not immediately recognizable as a firearm, any camouflaging firearm container, any firearm ammunition which contains or consists of any flechette dart, any firearm

ammunition that contains exothermic pyrophoric misch metal as the projectile and that is designed for the sole purpose of throwing or spewing a flame or fireball to simulate a flamethrower, any firearm ammunition that can be fired in a firearm capable of expelling as projectiles two or more metal balls connected by solid metal wire, any bullet containing or carrying an explosive agent, any ballistic knife, any multiburst trigger activator, any nunchaku, any short-barreled shotgun, any short-barreled rifle, any metal knuckles, any belt buckle knife, any leaded cane, any zip gun, any shuriken, any unconventional pistol, any lipstick case knife, any cane sword, any shobi-zue, any air gauge knife, any writing pen knife, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag, or who carries concealed upon his or her person any explosive substance, other than fixed ammunition or who carries concealed upon his or her person any dirk or dagger shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison. A bullet containing or carrying an explosive agent is not a destructive device as that term is used in Section 12301.

(b) Subdivision (a) does not apply to any of the following:

(1) The sale to, purchase by, or possession of short-barreled shotguns or short-barreled rifles by police departments, sheriffs' offices, marshals' offices, the California Highway Patrol, the Department of Justice, or the military or naval forces of this state or of the United States for use in the discharge of their official duties or the possession of short-barreled shotguns and short-barreled rifles by regular, salaried, full-time members of a police department, sheriff's office, marshal's office, the California Highway Patrol, or the Department of Justice when on duty and the use is authorized by the agency and is within the course and scope of their duties.

(2) The manufacture, possession, transportation or sale of short-barreled shotguns or short-barreled rifles when authorized by the Department of Justice pursuant to Article 6 (commencing with Section 12095) of this chapter and not in violation of federal law.

(3) The possession of a nunchaku on the premises of a school which holds a regulatory or business license and teaches the arts of self-defense.

(4) The manufacture of a nunchaku for sale to, or the sale of a nunchaku to, a school which holds a regulatory or business license and teaches the arts of self-defense.

(5) Any antique firearm. For purposes of this section, "antique firearm" means any firearm not designed or redesigned for using rimfire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(6) Tracer ammunition manufactured for use in shotguns.

(7) Any firearm or ammunition which is a curio or relic as defined in Section 178.11 of Title 27 of the Code of Federal Regulations and which is in the possession of a person permitted to possess the items pursuant to Chapter 44 (commencing with

Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto. Any person prohibited by Section 12021, 12021.1, or 12101 of this code or Section 8100 or 8103 of the Welfare and Institutions Code from possessing firearms or ammunition who obtains title to these items by bequest or intestate succession may retain title for not more than one year, but actual possession of these items at any time is punishable pursuant to Section 12021, 12021.1, or 12101 of this code or Section 8100 or 8103 of the Welfare and Institutions Code. Within the year the person shall transfer title to the firearms or ammunition by sale, gift, or other disposition. Any person who violates this paragraph is in violation of subdivision (a).

(8) Any other weapon as defined in subsection (e) of Section 5845 of Title 26 of the United States Code and which is in the possession of a person permitted to possess the weapons pursuant to the federal Gun Control Act of 1968 (Public Law 90-618), as amended, and the regulations issued pursuant thereto. Any person prohibited by Section 12021, 12021.1, or 12101 of this code or Section 8100 or 8103 of the Welfare and Institutions Code from possessing these weapons who obtains title to these weapons by bequest or intestate succession may retain title for not more than one year, but actual possession of these weapons at any time is punishable pursuant to Section 12021, 12021.1, or 12101 of this code or Section 8100 or 8103 of the Welfare and Institutions Code. Within the year, the person shall transfer title to the weapons by sale, gift, or other disposition. Any person who violates this paragraph is in violation of subdivision (a). The exemption provided in this subdivision does not apply to pen guns.

(9) Instruments or devices that are possessed by federal, state, and local historical societies, museums, and institutional collections which are open to the public, provided that these instruments or devices are properly housed, secured from unauthorized handling, and, if the instrument or device is a firearm, unloaded.

(10) Instruments or devices, other than short-barreled shotguns or short-barreled rifles, that are possessed or utilized during the course of a motion picture, television, or video production or entertainment event by an authorized participant therein in the course of making that production or event or by an authorized employee or agent of the entity producing that production or event.

(11) Instruments or devices, other than short-barreled shotguns or short-barreled rifles, that are sold by, manufactured by, exposed or kept for sale by, possessed by, imported by, or lent by persons who are in the business of selling instruments or devices listed in subdivision (a) solely to the entities referred in paragraphs (9) and (10) when engaging in transactions with those entities.

(12) The sale to, possession of, or purchase of any weapon, device, or ammunition, other than a short-barreled rifle or short-barreled shotgun, by any federal, state, county, city and county, or city agency that is charged with the enforcement of any law for use in the discharge of their official duties, or the possession of any weapon, device, or ammunition, other than a short-barreled rifle or short-barreled shotgun, by peace officers thereof when on duty and the use is authorized by the agency and is within the course and scope of their duties.

(13) Weapons, devices, and ammunition, other than a

short-barreled short-barreled shotgun, that are sold by, manufactured by, exposed, or kept for sale by, possessed by, imported by, or lent by, persons who are in the business of selling weapons, devices, and ammunition listed in subdivision (a) solely to the entities referred to in paragraph (12) when engaging in transactions with those entities.

(14) The manufacture for, sale to, exposing or keeping for sale to, importation of, or lending of wooden clubs or batons to special police officers or uniformed security guards authorized to carry any wooden club or baton pursuant to Section 12002 by entities that are in the business of selling wooden batons or clubs to special police officers and uniformed security guards when engaging in transactions with those persons.

(c) (1) As used in this section, a "short-barreled shotgun" means any of the following:

(A) A firearm which is designed or redesigned to fire a fixed shotgun shell and having a barrel or barrels of less than 18 inches in length.

(B) A firearm which has an overall length of less than 26 inches and which is designed or redesigned to fire a fixed shotgun shell.

(C) Any weapon made from a shotgun (whether by alteration, modification, or otherwise) if that weapon, as modified, has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length.

(D) Any device which may be readily restored to fire a fixed shotgun shell which, when so restored, is a device defined in subparagraphs (A) to (C), inclusive.

(E) Any part, or combination of parts, designed and intended to convert a device into a device defined in subparagraphs (A) to (C), inclusive, or any combination of parts from which a device defined in subparagraphs (A) to (C), inclusive, can be readily assembled if those parts are in the possession or under the control of the same person.

(2) As used in this section, a "short-barreled rifle" means any of the following:

(A) A rifle having a barrel or barrels of less than 16 inches in length.

(B) A rifle with an overall length of less than 26 inches.

(C) Any weapon made from a rifle (whether by alteration, modification, or otherwise) if that weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length.

(D) Any device which may be readily restored to fire a fixed cartridge which, when so restored, is a device defined in subparagraphs (A) to (C), inclusive.

(E) Any part, or combination of parts, designed and intended to convert a device into a device defined in subparagraphs (A) to (C), inclusive, or any combination of parts from which a device defined in subparagraphs (A) to (C), inclusive, may be readily assembled if those parts are in the possession or under the control of the same person.

(3) As used in this section, a "nunchaku" means an instrument consisting of two or more sticks, clubs, bars or rods to be used as handles, connected by a rope, cord, wire, or chain, in the design of a weapon used in connection with the practice of a system of self-defense such as karate.

(4) As used in this section, a "wallet gun" means any firearm mounted or enclosed in a case, resembling a wallet, designed to be or capable of being carried in a pocket or purse, if the

firearm may be fired while mounted or enclosed in the case.

(5) As used in this section, a "cane gun" means any firearm mounted or enclosed in a stick, staff, rod, crutch, or similar device, designed to be, or capable of being used as, an aid in walking, if the firearm may be fired while mounted or enclosed therein.

(6) As used in this section, a "flechette dart" means a dart, capable of being fired from a firearm, which measures approximately one inch in length, with tail fins which take up five-sixteenths of an inch of the body.

(7) As used in this section, "metal knuckles" means any device or instrument made wholly or partially of metal which is worn for purposes of offense or defense in or on the hand and which either protects the wearer's hand while striking a blow or increases the force of impact from the blow or injury to the individual receiving the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs which would contact the individual receiving a blow.

(8) As used in this section, a "ballistic knife" means a device that propels a knifelike blade as a projectile by means of a coil spring, elastic material, or compressed gas. Ballistic knife does not include any device which propels an arrow or a bolt by means of any common bow, compound bow, crossbow, or underwater spear gun.

(9) As used in this section, a "camouflaging firearm container" means a container which meets all of the following criteria:

(A) It is designed and intended to enclose a firearm.

(B) It is designed and intended to allow the firing of the enclosed firearm by external controls while the firearm is in the container.

(C) It is not readily recognizable as containing a firearm.

"Camouflaging firearm container" does not include any camouflaging covering used while engaged in lawful hunting or while going to or returning from a lawful hunting expedition.

(10) As used in this section, a "zip gun" means any weapon or device which meets all of the following criteria:

(A) It was not imported as a firearm by an importer licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(B) It was not originally designed to be a firearm by a manufacturer licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(C) No tax was paid on the weapon or device nor was an exemption from paying tax on that weapon or device granted under Section 4181 and subchapters F (commencing with Section 4216) and G (commencing with Section 4221) of Chapter 32 of Title 26 of the United States Code, as amended, and the regulations issued pursuant thereto.

(D) It is made or altered to expel a projectile by the force of an explosion or other form of combustion.

(11) As used in this section, a "shuriken" means any instrument, without handles, consisting of a metal plate having three or more radiating points with one or more sharp edges and designed in the shape of a polygon, trefoil, cross, star, diamond, or other geometric shape for use as a weapon for throwing.

(12) As used in this section, an "unconventional pistol" means a firearm that does not have a rifled bore and has a barrel or barrels of less than 18 inches in length or has an overall length of less than 26 inches.

(13) As used in this section, a "belt buckle knife" is a knife which is made an integral part of a belt buckle and consists of a blade with a length of at least 21/2 inches.

(14) As used in this section, a "lipstick case knife" means a knife enclosed within and made an integral part of a lipstick case.

(15) As used in this section, a "cane sword" means a cane, swagger stick, stick, staff, rod, pole, umbrella, or similar device, having concealed within it a blade that may be used as a sword or stiletto.

(16) As used in this section, a "shobi-zue" means a staff, crutch, stick, rod, or pole concealing a knife or blade within it which may be exposed by a flip of the wrist or by a mechanical action.

(17) As used in this section, a "leaded cane" means a staff, crutch, stick, rod, pole, or similar device, unnaturally weighted with lead.

(18) As used in this section, an "air gauge knife" means a device that appears to be an air gauge but has concealed within it a pointed, metallic shaft that is designed to be a stabbing instrument which is exposed by mechanical action or gravity which locks into place when extended.

(19) As used in this section, a "writing pen knife" means a device that appears to be a writing pen but has concealed within it a pointed, metallic shaft that is designed to be a stabbing instrument which is exposed by mechanical action or gravity which locks into place when extended or the pointed, metallic shaft is exposed by the removal of the cap or cover on the device.

(20) As used in this section, a "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

(21) As used in this section, a "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger.

(22) As used in this section, an "undetectable firearm" means any weapon which meets one of the following requirements:

(A) When, after removal of grips, stocks, and magazines, it is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar.

(B) When any major component of which, when subjected to inspection by the types of X-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(C) For purposes of this paragraph, the terms "firearm," "major component," and "Security Exemplar" have the same meanings as those terms are defined in Section 922 of Title 18 of the United States Code.

All firearm detection equipment newly installed in nonfederal public buildings in this state shall be of a type identified by either the United States Attorney General, the Secretary of Transportation, or the Secretary of the Treasury, as appropriate, as available state-of-the-art equipment capable of detecting an undetectable firearm, as defined, while distinguishing innocuous metal objects likely to be carried on one's person sufficient for reasonable passage of the public.

(23) As used in this section, a "multiburst trigger activator" means one of the following devices:

(A) A device designed or redesigned to be attached to a semiautomatic firearm which allows the firearm to discharge two or more shots in a burst by activating the device.

(B) A manual or power-driven trigger activating device constructed and designed so that when attached to a semiautomatic firearm it increases the rate of fire of that firearm.

(24) As used in this section, a "dirk" or "dagger" means a knife or other instrument with or without a handguard that is primarily designed, constructed, or altered to be a stabbing instrument designed to inflict great bodily injury or death.

(d) Knives carried in sheaths which are worn openly suspended from the waist of the wearer are not concealed within the meaning of this section.

SEC. 3. Section 12021 of the Penal Code is amended to read:

12021. (a) (1) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, or who is addicted to the use of any narcotic drug, who purchases or receives or attempts to purchase or receive or owns or has in his or her possession or under his or her custody or control any firearm or firearm ammunition is guilty of a felony.

(2) Any person who has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417 and who owns or has in his or her possession or under his or her custody or control any firearm or firearm ammunition is guilty of a felony.

(b) Notwithstanding subdivision (a), any person who has been convicted of a felony or of an offense enumerated in Section 12001.6, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, who purchases or receives or attempts to purchase or receive or owns or has in his or her possession or under his or her custody or control any firearm or firearm ammunition is guilty of a felony.

(c) (1) Except as provided in subdivision (a) or paragraph (2) of this subdivision, any person who has been convicted of a misdemeanor violation of Section 136.5, 140, 171b, 171c, 171d, 240, 241, 242, 243, 244.5, 245, 245.5, 246.3, 247, 273.5, 273.6, 417, 417.2, 626.9, 646.9, subdivision (b) or (d) of Section 12034, subdivision (a) of Section 12100, 12320, or 12590 and who, within 10 years of the conviction, owns, or has in his or her possession or under his or her custody or control, any firearm or firearm ammunition is guilty of a public offense, which shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($1,000), or by both that

imprisonment and fine. The court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this subdivision. However, the prohibition in this paragraph may be reduced, eliminated, or conditioned as provided in paragraph (2) or (3).

(2) Any person employed as a peace officer described in Section 830.1, 830.2, 830.31, 830.32, 830.33, or 830.5 whose employment or livelihood is dependent on the ability to legally possess a firearm or firearm ammunition, who is subject to the prohibition imposed by this subdivision because of a conviction under Section 273.5, 273.6, or 646.9, may petition the court only once for relief from this prohibition. The petition shall be filed with the court in which the petitioner was sentenced. If possible, the matter shall be heard before the same judge that sentenced the petitioner. Upon filing the petition, the clerk of the court shall set the hearing date and shall notify the petitioner and the prosecuting attorney of the date of the hearing. Upon making each of the following findings, the court may reduce or eliminate the prohibition, impose conditions on reduction or elimination of the prohibition, or otherwise grant relief from the prohibition as the court deems appropriate:

(A) Finds by a preponderance of the evidence that the petitioner is likely to use a firearm in a safe and lawful manner.

(B) Finds that the petitioner is not within a prohibited class as specified in subdivision (a), (b), (d), (e), or (g) or Section 12021.1, and the court is not presented with any credible evidence that the petitioner is a person described in Section 8100 or 8103 of the Welfare and Institutions Code.

(C) Finds that the petitioner does not have a previous conviction under subdivision (c) no matter when the prior conviction occurred.

In making its decision, the court shall consider the petitioner's continued employment, the interest of justice, any relevant evidence, and the totality of the circumstances. The court shall require, as a condition of granting relief from the prohibition under this section, that the petitioner agree to participate in counseling as deemed appropriate by the court. Relief from the prohibition shall not relieve any other person or entity from any liability that might otherwise be imposed. It is the intent of the Legislature that courts exercise broad discretion in fashioning appropriate relief under this paragraph in cases in which relief is warranted. However, nothing in this paragraph shall be construed to require courts to grant relief to any particular petitioner. It is the intent of the Legislature to permit persons who were convicted of an offense specified in Section 273.5, 273.6, or 646.9 to seek relief from the prohibition imposed by this subdivision.

(3) Any person who is subject to the prohibition imposed by this subdivision because of a conviction prior to January 1, 1991, may petition the court only once for relief from this prohibition. The petition shall be filed with the court in which the petitioner was sentenced. If possible, the matter shall be heard before the same judge that sentenced the petitioner. Upon filing the petition, the clerk of the court shall set the hearing date and notify the petitioner and the prosecuting attorney of the date of the hearing. Upon making each of the following findings, the court may reduce or eliminate the prohibition, impose conditions on reduction or

elimination of the prohibition, or otherwise grant relief from the prohibition as the court deems appropriate:

(A) Finds by a preponderance of the evidence that the petitioner is likely to use a firearm in a safe and lawful manner.

(B) Finds that the petitioner is not within a prohibited class as specified in subdivision (a), (b), (d), (e), or (g) or Section 12021.1, and the court is not presented with any credible evidence that the petitioner is a person described in Section 8100 or 8103 of the Welfare and Institutions Code.

(C) Finds that the petitioner does not have a previous conviction under this subdivision, no matter when the prior conviction occurred.

In making its decision, the court may consider the interest of justice, any relevant evidence, and the totality of the circumstances. It is the intent of the Legislature that courts exercise broad discretion in fashioning appropriate relief under this paragraph in cases in which relief is warranted. However, nothing in this paragraph shall be construed to require courts to grant relief to any particular petitioner.

(4) Law enforcement officials who enforce the prohibition specified in this subdivision against a person who has been granted relief pursuant to paragraph (2) or (3), shall be immune from any liability for false arrest arising from the enforcement of this subdivision unless the person has in his or her possession a certified copy of the court order that granted the person relief from the prohibition. This immunity from liability shall not relieve any person or entity from any other liability that might otherwise be imposed.

(d) Any person who, as an express condition of probation, is prohibited or restricted from owning, possessing, controlling, receiving, or purchasing a firearm or firearm ammunition and who owns, or has in his or her possession or under his or her custody or control, any firearm or firearm ammunition but who is not subject to subdivision (a) or (c) is guilty of a public offense, which shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine. The court, on forms provided by the Department of Justice, shall notify the department of persons subject to this subdivision. The notice shall include a copy of the order of probation and a copy of any minute order or abstract reflecting the order and conditions of probation.

(e) Any person who (1) is alleged to have committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or an offense described in subdivision (b) of Section 1203.073, (2) is found to be a fit and proper subject to be dealt with under the juvenile court law, and (3) is subsequently adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or an offense described in subdivision (b) of Section 1203.073 shall not purchase or receive or attempt to purchase or receive or own, or have in his or her possession or under his or her custody or control, any firearm or firearm ammunition until the age of 30 years. A violation of this subdivision shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and

fine. The juvenile court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this subdivision. Notwithstanding any other law, the forms required to be submitted to the department pursuant to this subdivision may be used to determine eligibility to acquire a firearm or firearm ammunition.

(f) Subdivision (a) shall not apply to a person who has been convicted of a felony under the laws of the United States unless either of the following criteria is satisfied:

(1) Conviction of a like offense under California law can only result in imposition of felony punishment.

(2) The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than one thousand dollars ($1,000), or received both punishments.

(g) Every person who purchases or receives, or attempts to purchase or receive, a firearm or firearm ammunition knowing that he or she is subject to a protective order as defined in Section 6218 of the Family Code, is guilty of a public offense, which shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($1,000), or both that imprisonment and fine. This subdivision does not apply unless the copy of the restraining order personally served on the person against whom the restraining order is issued contains a notice in bold print stating (1) that the person is prohibited from purchasing or receiving or attempting to purchase or receive a firearm or firearm ammunition and (2) specifying the penalties for violating this subdivision, or a court has provided actual verbal notice of the firearm prohibition and penalty as provided in Section 6304 of the Family Code. However, this subdivision does not apply if the firearm or firearm ammunition is received as part of the disposition of community property pursuant to Division 7 (commencing with Section 2500) of the Family Code. {-

SEC. 4. Section 12022.4 of the Penal Code is amended to read:

12022.4. Any person who, during the commission or attempted commission of a felony, furnishes or offers to furnish a firearm or firearm ammunition to another for the purpose of aiding, abetting, or enabling that person or any other person to commit a felony shall, in addition and consecutive to the punishment prescribed by the felony or attempted felony of which the person has been convicted, be punished by an additional term of one, two, or three years in the state prison. The court shall order the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of the sentence. The additional term provided in this section shall not be imposed unless the fact of the furnishing is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

SEC. 5. -} {+

SEC. 4. +} The heading of Article 4 (commencing with Section 12070) of Chapter 1 of Title 2 of Part 4 of the Penal Code is amended to read:

Article 4. Licenses to Sell Firearms and Firearm Ammunition

{-

SEC. 6. -} {+

SEC. 5. +} Section 12070 of the Penal Code is amended to read:

12070. (a) No person shall sell, lease, or transfer firearms or firearm ammunition unless he or she has been issued a license pursuant to Section 12071. Any person violating this section is guilty of a misdemeanor.

(b) Subdivision (a) does not include any of the following:

(1) The sale, lease, or transfer of any firearm or firearm ammunition by a person acting pursuant to operation of law, a court order, or pursuant to the Enforcement of Judgments Law (Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure), or by a person who liquidates a personal firearm collection to satisfy a court judgment.

(2) A person acting pursuant to subdivision (e) of Section 186.22a or subdivision (c) of Section 12028.

(3) The sale, lease, or transfer of a firearm by a person who obtains title to the firearm by intestate succession or by bequest or as a surviving spouse pursuant to Chapter 1 (commencing with Section 13500) of Part 2 of Division 8 of the Probate Code, provided the person disposes of the firearm within 60 days of receipt of the firearm.

(4) The infrequent sale, lease, or transfer of firearms.

(5) The sale, lease, or transfer of used firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person, at gun shows or events, as specified in subparagraph (B) of paragraph (1) of subdivision (b) of Section 12071, by a person other than a licensee or dealer, provided the person has a valid federal firearms license and a certificate of eligibility issued by the Department of Justice, as specified in Section 12071, and provided all the sales, leases, or transfers fully comply with subdivision (d) of Section 12072. However, the person shall not engage in the sale, lease, or transfer of used firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person at more than 12 gun shows or events in any calendar year and shall not sell, lease, or transfer more than 15 used firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person at any single gun show or event. In no event shall the person sell more than 75 used firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person in any calendar year.

A person described in this paragraph shall be known as a "Gun Show Trader."

The Department of Justice shall adopt regulations to administer this program and shall recover the full costs of administration from fees assessed applicants.

As used in this paragraph, the term "used firearm" means a firearm that has been sold previously at retail and is more than three years old.

(6) The activities of a law enforcement agency pursuant to Section 12084.

(7) Deliveries, sales, or transfers of firearms or firearm ammunition between or to importers and manufacturers of firearms or firearm ammunition licensed to engage in business pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(8) The sale, delivery, or transfer of firearms or firearm ammunition by manufacturers or importers licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the

United States Code and the regulations issued pursuant thereto to dealers or wholesalers.

(9) Deliveries and transfers of firearms or firearm ammunition made pursuant to Section 12028, 12028.5, or 12030.

(10) The loan of a firearm for the purposes of shooting at targets, if the loan occurs on the premises of a target facility which holds a business or regulatory license or on the premises of any club or organization organized for the purposes of practicing shooting at targets upon established ranges, whether public or private, if the firearm is at all times kept within the premises of the target range or on the premises of the club or organization.

(11) Sales, deliveries, or transfers of firearms or firearm ammunition by manufacturers, importers, or wholesalers licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto to persons who reside outside this state who are licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto, if the sale, delivery, or transfer is in accordance with Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(12) Sales, deliveries, or transfers of firearms or firearm ammunition by persons who reside outside this state and are licensed outside this state pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto to wholesalers, manufacturers, or importers, if the sale, delivery, or transfer is in accordance with Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(13) Sales, deliveries, or transfers of firearms or firearm ammunition by wholesalers to dealers.

(14) Sales, deliveries, or transfers of firearms or firearm ammunition by persons who reside outside this state to persons licensed pursuant to Section 12071, if the sale, delivery, or transfer is in accordance with Chapter 44 (commencing with Section 921) of Title 18 of the United States Code, and the regulations issued pursuant thereto.

(15) Sales, deliveries, or transfers of firearms or firearm ammunition by persons who reside outside this state and are licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto to dealers, if the sale, delivery, or transfer is in accordance with Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(16) The delivery, sale, or transfer of an unloaded firearm by one wholesaler to another wholesaler if that firearm is intended as merchandise in the receiving wholesaler's business.

(c) (1) As used in this section, "infrequent" means:

(A) (i) For pistols, revolvers, and other firearms capable of being concealed upon the person, less than six transactions per calendar year. For this purpose, "transaction" means a single sale, lease, or transfer of any number of pistols, revolvers, or other firearms capable of being concealed upon the person.

(ii) For firearm ammunition, less than six transactions per calendar year. For this purpose, "transaction" shall mean a

single sale or transfer of 25 or more bullets or shells.
(B) For firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person, occasional and without regularity.
(2) As used in this section, "operation of law" includes, but is not limited to, any of the following:
(A) The executor or administrator of an estate, if the estate includes firearms.
(B) A secured creditor or an agent or employee thereof when the firearms are possessed as collateral for, or as a result of, a default under a security agreement under the Commercial Code.

(C) A levying officer, as defined in Section 481.140, 511.060, or 680.260 of the Code of Civil Procedure.
(D) A receiver performing his or her functions as a receiver, if the receivership estate includes firearms.
(E) A trustee in bankruptcy performing his or her duties, if the bankruptcy estate includes firearms.
(F) An assignee for the benefit of creditors performing his or her functions as an assignee, if the assignment includes firearms.
(G) A transmutation of property between spouses pursuant to Section 850 of the Family Code. {-
SEC. 7. -} {+
SEC. 6. +} Section 12070.5 is added to the Penal Code, to read:
12070.5. (a) Notwithstanding Section 12070, any person who knowingly sells any handgun ammunition by mail to anyone other than a licensed firearms dealer is guilty of a misdemeanor punishable by imprisonment in a county jail for not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both the fine and imprisonment.
(b) Any person who is not a licensed firearm dealer who knowingly receives any handgun ammunition directly through the mail is guilty of a misdemeanor punishable by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both the fine and imprisonment.

(c) A person may order handgun ammunition through a local firearms dealer and take possession of that ammunition only after furnishing the dealer with clear evidence of his or her identity and a California Handgun License or California Arsenal License issued pursuant to Section 12071 or 12076.
(d) This section shall become operative July 1, 1996. {-
SEC. 8. -} {+
SEC. 7. +} Section 12072.3 is added to the Penal Code, to read:
12072.3. (a) No person, corporation, or dealer licensed under Section 12071, shall, with respect to any activity involving the sale of firearms, employ any of the following:
(1) A person under the age of 18 years, unless the licensee does not sell pistols, revolvers, or other firearms capable of being concealed upon the person.
(2) A person under the age of 21 years if the licensee sells the type of firearms described in paragraph (1).
(3) A person described in Section 12021 or 12021.1.
(4) A person described in Section 8100 or 8103 of the Welfare and Institutions Code.
(b) Prior to employing a person to perform the activity described in subdivision (a), the licensee shall submit the

records necessary for a background check of that person to the Department of Justice. The department shall conduct the background check and, following a 15-day waiting period, the licensee may employ the person for whom the background check is conducted unless the department informs the licensee that the person is a person described in paragraph (3) or (4) of subdivision (a).

(c) Any licensee who employs a person in violation of this section shall be punished by imprisonment in a county jail for a period of one year or by a fine of not exceeding one thousand dollars ($1,000), or by both the fine and imprisonment. {-

SEC. 9. -} {+

SEC. 8. +} Section 12076 of the Penal Code is amended to read:

12076. (a) The purchaser or transferee of any firearm shall be required to present clear evidence of his or her identity and age, as defined in Section 12071, to the dealer, and the dealer shall require him or her to sign his or her current legal name and affix his or her residence address and date of birth to the register in quadruplicate. The salesperson shall affix his or her signature to the register in quadruplicate as a witness to the signature and identification of the purchaser or transferee.

Commencing July 1, 1996, the purchaser or transferee of any handgun ammunition shall also be required to present clear evidence of his or her identity and age, as defined in Section 12071, and a valid California Handgun License, to the dealer, except as provided in subdivision (b). Any person furnishing a fictitious name or address or knowingly furnishing any incorrect information or knowingly omitting any information required to be provided for the purposes of this subdivision and any person violating any provision of this section is guilty of a misdemeanor.

(b) Nothing in subdivision (a) shall apply to any agency duly authorized to perform law enforcement duties in California, or to peace officers, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, who, in the course and scope of their employment are authorized to, and do, carry firearms.

(c) Two copies of the original sheet of the register, on the date of sale or transfer, shall be placed in the mail, postage prepaid, and properly addressed to the Department of Justice in Sacramento. The third copy of the original shall be mailed, postage prepaid, to the chief of police, or other head of the police department, of the city or county wherein the sale or transfer is made. Where the sale or transfer is made in a district where there is no municipal police department, the third copy of the original sheet shall be mailed to the sheriff of the county wherein the sale or transfer is made.

The third copy for firearms, other than pistols, revolvers, or other firearms capable of being concealed upon the person shall be destroyed within five days of receipt and no information shall be compiled therefrom.

(d) The department shall examine its records, as well as those records that it is authorized to request from the State Department of Mental Health pursuant to Section 8104 of the Welfare and Institutions Code, in order to determine if the purchaser or transferee is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code.

If the department determines that the purchaser or transferee is a person described in Section 12021 or 12021.1 of this code

or Section 8100 or 8103 of the Welfare and Institutions Code, it shall immediately notify the dealer and the chief of the police department of the city or county in which the sale or transfer was made, or if the sale or transfer was made in a district in which there is no municipal police department, the sheriff of the county in which the sale or transfer was made, of that fact.

If the department determines that the copies of the register submitted to it pursuant to subdivision (b) contain any blank spaces or inaccurate, illegible, or incomplete information, preventing identification of the purchaser or transferee or the pistol, revolver, or other firearm to be purchased or transferred, or if any fee required pursuant to subdivision (d) is not submitted by the dealer in conjunction with submission of copies of the register, the department may notify the dealer of that fact. Upon notification by the department, the dealer shall submit corrected copies of the register to the department, or shall submit any fee required pursuant to subdivision (d), or both, as appropriate and, if notification by the department is received by the dealer at any time prior to delivery of the firearm to be purchased or transferred, the dealer shall withhold delivery until the conclusion of the waiting period described in Sections 12071 and 12072.

(e) The Department of Justice may charge the dealer a fee sufficient to reimburse all of the following:

(1) (A) The department for the cost of furnishing this information.

(B) The department for the cost of meeting its obligations under paragraph (2) of subdivision (b) of Section 8100 of the Welfare and Institutions Code.

(2) Local mental health facilities for state-mandated local costs resulting from the reporting requirements imposed by the amendments to Section 8103 of the Welfare and Institutions Code, made by the act which also added this paragraph.

(3) The State Department of Mental Health for the costs resulting from the requirements imposed by the amendments to Section 8104 of the Welfare and Institutions Code made by the act which also added this paragraph.

(4) Local mental hospitals, sanitariums, and institutions for state-mandated local costs resulting from the reporting requirements imposed by Section 8105 of the Welfare and Institutions Code.

(5) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code.

(6) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code.

The fee established pursuant to this subdivision shall not exceed the sum of the actual processing costs of the department, the estimated reasonable costs of the local mental health facilities for complying with the reporting requirements imposed by the act which added paragraph (2) to this subdivision, the costs of the State Department of Mental Health for complying with the requirements imposed by the act which added paragraph (3) to this subdivision, the estimated reasonable costs of local mental hospitals, sanitariums, and institutions for complying with the reporting requirements imposed by the act which added paragraph (4) to this subdivision, the estimated reasonable

costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code, and the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code created by the act which added paragraph (6) to this subdivision.

(f) (1) The Department of Justice may charge a fee sufficient to reimburse it for each of the following:

(A) For the actual costs associated with the preparation, sale, processing, and filing of forms or reports required or utilized pursuant to Section 12078 if neither a dealer nor a law enforcement agency acting pursuant to Section 12084 is filing the form or report.

(B) For the actual processing costs associated with the submission of a Dealers' Record of Sale to the department by a dealer or of the submission of a LEFT to the department by a law enforcement agency acting pursuant to Section 12084 if the waiting period described in Sections 12071, 12072, and 12084 does not apply.

(C) For the actual costs associated with the preparation, sale, processing, and filing of reports utilized pursuant to subdivision (l) of Section 12078.

(2) If the department charges a fee pursuant to subparagraph (B) of paragraph (1) of this subdivision, it shall be charged in the same amount to all categories of transaction that are within that subparagraph.

(3) Any costs incurred by the Department of Justice to implement this subdivision shall be reimbursed from fees collected and charged pursuant to this subdivision. No fees shall be charged to the dealer pursuant to subdivision (d) or to a law enforcement agency acting pursuant to paragraph (6) of subdivision (d) of Section 12084 for costs incurred for implementing this subdivision.

(g) All money received by the department pursuant to this section shall be deposited in the Dealers' Record of Sale Special Account of the General Fund, which is hereby created, to be available, upon appropriation by the Legislature, for expenditure by the department to offset the costs incurred pursuant to this section and Sections 12289 and 12809.

(h) (1) Only one fee shall be charged pursuant to this section for a single transaction on the same date for the sale or transfer of any number of firearms that are not pistols, revolvers, or other firearms capable of being concealed upon the person or for the taking of possession of those firearms.

(2) In a single transaction on the same date for the sale or transfer of any number of firearms that are pistols, revolvers, or other firearms capable of being concealed upon the person, the department shall charge a reduced fee pursuant to this section for the second and subsequent firearms that are part of that sale or transfer.

(i) Only one fee shall be charged pursuant to this section for a single transaction on the same date for taking title or possession of any number of firearms pursuant to subdivision (i) of Section 12078.

(j) Whenever the Department of Justice acts pursuant to this section as it pertains to firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person, the department's acts or omissions shall be deemed to

be discretionary within the meaning of the California Tort Claims Act pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code. {-

SEC. 10. -} {+

SEC. 9. +} Section 12101 of the Penal Code is amended to read:

12101. (a) A minor may not possess a pistol, revolver, or other firearm capable of being concealed upon the person or firearm ammunition unless he or she has the written consent of his or her parent or legal guardian or unless he or she is accompanied by his or her parent or legal guardian, while he or she has that firearm or firearm ammunition in his or her possession.

(b) A person under the age of 21 years shall not purchase any handgun ammunition, as defined in Section 12322, and a person under the age of 18 years shall not purchase any firearm ammunition, including, but not limited to, handgun ammunition.

(c) Every person who violates this section is guilty of a misdemeanor. Every person who violates this section shall be punished, upon the second and each subsequent conviction, by imprisonment in the state prison or in a county jail not exceeding one year. Every person who violates this section who has been convicted previously of a crime set forth in subdivision (b) of Section 12021.1 or in Section 12020, 12220, 12520, or 12560, shall be punished by imprisonment in the state prison or in a county jail not exceeding one year. {-

SEC. 11. -} {+

SEC. 10. +} Section 12326 is added to the Penal Code, to read:

12326. (a) The Attorney General may ban the sale and manufacture of any type of handgun bullet that tests show is capable of piercing a body vest, as defined in subdivision (c) of Section 12022.2.

(b) For the purpose of implementing and enforcing this section, the Attorney General, once a year, shall compile a list that includes handgun ammunition that is capable of piercing a body vest, as defined in subdivision (c) of Section 12022.2. {-

SEC. 12. Section 12327 is added to the Penal Code, to read:

12327. Every person who possesses or purchases in excess of 1,000 rounds of handgun ammunition without a valid California Arsenal License is guilty of a misdemeanor.

This section shall become operative on July 1, 1996.

SEC. 13. -} {+

SEC. 11. +} Section 12551 of the Penal Code is amended to read:

12551. Every person who sells to a minor any firearm or firearm ammunition is guilty of a misdemeanor, except a person licensed under Section 12071 shall be subject to subdivisions (c) and (f) of Section 12072. {-

SEC. 14. -} {+

SEC. 12. +} No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same

date that the act takes effect pursuant to the California Constitution. {-
SEC. 15. -} {+
SEC. 13. +} The amendments to Section 12070 of the Penal Code made by Section 6 of this act shall become operative on July 1, 1995. {-
SEC. 16. -} {+
SEC. 14. +}The amendments to Section 12076 of the Penal Code made by Section 9 of this act shall become operative on July 1, 1996.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Sheriff Clay Parker, et al. v. State of California, et al.**

No.: **F062490**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On February 22, 2012, I served the attached **JOINT APPENDIX, VOLUME VII, Pages JA001697-JA001966** by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight, addressed as follows:

Carl Dawson Michel, Esq.
Clinton Barnwell Monfort. Esq.
Michel and Associates, PC
180 East Ocean Blvd., Ste. 200
Long Beach, CA 90802
(Attorneys for Respondents)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 22, 2012, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

SA2011101434