IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,
DR. KATHRYN TYLER, VAN F. WELTON, and BRETT BENSON,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO,
Defendant-Appellee.

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,
ROBERT KLEIN ENGLER, and DR. GENE A. REISINGER,
Plaintiffs-Appellants,

v.

VILLAGE OF OAK PARK and DAVID POPE, President,
Defendants-Appellees.

OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON,
DAVID LAWSON, SECOND AMENDMENT FOUNDATION,
INC., and ILLINOIS STATE RIFLE ASSOCIATION,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 08 CV 3645, 08 CV 3696, 08 CV 3697
The Honorable Milton I. Shadur, Judge Presiding

BRIEF OF DEFENDANTS-APPELLEES CITY OF CHICAGO AND VILLAGE OF OAK PARK

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Nos. 08-4241, 08-4243, 08-4244 (consol.)

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 08-4244, 08-4241, 08-4243
Short Caption: NRA, et al. v. City of Chicago; NRA, et al. v. Village of Oak Park; McDonald, et al. v. City of Chicago

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Village of Oak Park

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown, LLP
Klein, Thorpe & Jenkins, Ltd.

(3) If the party or amicus is a corporation:
i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: Date: 4/6/09
Attorney's Printed Name: Hans J. Germann

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Printed Name: Alexandra E. Shea

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CONSTITUTION

FEDERAL AND STATE STATUTES AND LEGISLATIVE MATERIAL

ORDINANCES AND LEGISLATIVE MATERIAL

BOOKS

LAW REVIEWS AND OTHER JOURNALS

OTHER

JURISDICTIONAL STATEMENT

The jurisdictional statements of plaintiffs-appellants are complete and correct.

ISSUES PRESENTED

1. Whether binding Supreme Court precedent precludes plaintiffs' arguments that the Second Amendment is incorporated into the Fourteenth Amendment.

2. Whether the Second Amendment right to weapons in common use should be incorporated by the selective incorporation doctrine as a fundamental liberty interest under the Fourteenth Amendment.

3. Whether plaintiffs' view of the historical evidence of the meaning of the Fourteenth Amendment provides an alternative basis for incorporation where the Supreme Court has rejected that approach and whether, in any event, that evidence establishes a public understanding that the Fourteenth Amendment imposed the Second Amendment on the States.

STATEMENT OF THE CASE

This appeal involves three lawsuits challenging various restrictions that Chicago and Oak Park ordinances place on possession of firearms, including the prohibition of most handguns. One case was filed by the National Rifle Association of America, Inc., and several individuals (collectively, "NRA") against Chicago. Separate Appendix to Brief of NRA ("NRA Sep. App.") A-31. The NRA brought another against Oak Park. Id. at A-42. The third case was filed against Chicago by Otis McDonald, along with several other individuals, the Second Amendment Foundation, and the Illinois State Rifle Association (collectively, "McDonald"). Brief of Plaintiffs-Appellants McDonald ("McDonald Br.") A-1.

All three cases were before the same district court judge. McDonald moved for summary judgment, McDonald Br. A-29, which the district court deferred for some discovery by Chicago, Aug. 18, 2008 Tr. 14-15. Subsequently, plaintiffs filed motions asking the court to rule on the threshold question whether the Second Amendment is incorporated into the Fourteenth Amendment to apply to state and local governments. R. 43 (No. 08-4244); NRA Sep. App. A-74. In response, the district court issued two opinions on December 4, 2008. The first, which was issued in both NRA cases, ruled that the court was bound by precedent squarely holding that the Second Amendment applies only to the federal government and declined plaintiffs' invitation to "overrule" that authority. Brief of Plaintiffs-Appellants NRA ("NRA Br.") SA-13. The court explained that this court had upheld a ban on handguns in Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), and,

in doing so, rejected the argument that "the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate when [Presser v. Illinois, 116 U.S. 252 (1886)] plainly states that '[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government.'" NRA Br. SA-11 (citations omitted). The district court further observed that Quilici also rejected the arguments that "later Supreme Court decisions that had incorporated other Bill of Rights provisions into the Fourteenth Amendment had effectively overruled Presser," and that "the entire Bill of Rights had been implicitly incorporated in the Fourteenth Amendment." NRA Br. SA-12. The district court added that District of Columbia v. Heller, 128 S. Ct. 2783 (2008), "confirmed that both Presser and the Court's predecessor decision in United States v. Cruikshank, 92 U.S. 542 (1875), have held that the Second Amendment applies only to the federal government." NRA Br. SA-12.

The second opinion, issued in McDonald, noted that McDonald, like NRA, "attacks Chicago's handgun ordinance." McDonald Br. A-42. That order adopted the rationale in the NRA cases and denied the McDonald motions for summary judgment and to narrow the legal issues. Id. at A-42, A-43.

At the next status hearing, Chicago and Oak Park made oral motions for judgment on the pleadings in all three cases, Dec. 9, 2008 Tr. 10, which the district court granted, NRA Br. SA-15 to SA-20; McDonald Br. A-43 to A-45.

Plaintiffs appealed. NRA Br. SA-23, SA-25; McDonald Br. A-46. The appeals were consolidated.

STATEMENT OF FACTS

Chicago and Oak Park's Ordinances

In 1982, Chicago enacted a handgun ban, along with other firearms regulations, because "the convenient availability of firearms and ammunition has increased firearm related deaths and injuries" and handguns "play a major role in the commission of homicide, aggravated assaults and armed robbery." Chicago City Council, Journal of Proceedings, Mar. 19, 1982, at 10049. Under Chicago's ordinance, "no person shall . . .possess . . . any firearm unless the person is the holder of a valid registration for such firearm," and no person may possess "any firearm which is unregisterable." Municipal Code of Chicago, Ill. § 8-20-040 (2008). Unregisterable firearms include most handguns. See id. § 8-20-050. Exceptions to the handgun ban include "[t]hose validly registered to a current owner . . . prior to the effective date of this chapter" and those owned by security personnel and licensed private detective agencies. Id. Registerable firearms must be registered before being possessed in Chicago, see id. § 8-20-090(a), and registration must be renewed annually, see id. § 8-20-200(a). Failure to renew registration "shall cause the firearm to become unregisterable." Id. § 8-20-200(c). The registration requirements do not apply to non-residents participating in or traveling to "lawful firearms-related activity" if the weapon is lawfully possessed in another jurisdiction and is kept unloaded and securely wrapped. Id. § 8-20-040(b).

Oak Park's firearms ordinance makes it "unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in

his/her place of business any firearm . . . ." Municipal Code of Oak Park, Ill. § 27-2-1 (2008). The definition of firearms includes "pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." Id. § 27-1-1. The restriction does not apply to "[l]icensed firearms collectors," id. § 27-2-1(K), or "established theater organizations" under certain circumstances, id. § 27-2-1(L).

NRA Lawsuits

NRA filed one lawsuit against Chicago, NRA Sep. App. A-31, and another against Oak Park, id. at A-42, challenging the handgun restrictions. The individual plaintiffs allege that they wish to possess handguns for purposes of self-defense at home. Id. at A-34, A-46.

Count I of NRA's complaint against Chicago alleges that Chicago's handgun ban violates the Second Amendment, allegedly incorporated into the Fourteenth Amendment. NRA Sep. App. A-35. Count II challenges, on equal protection grounds, exceptions allowing the registration of handguns registered to a current owner before 1982, handguns owned by detective agencies and security personnel, and handguns possessed by non-residents participating in certain lawful recreational firearm-related activities. Id. at A-37.[1]

In its complaint against Oak Park, NRA similarly alleged that Oak Pa

[1] Count III, which alleged that restrictions on transportation of firearms through Chicago violate 18 U.S.C. § 926A, NRA Sep. App. at A-38, was dismissed with prejudice by stipulation,
R. 37 (No. 08-4241).

handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment, and that exceptions for licensed firearm collectors and theater organizations deny equal protection. NRA Sep. App. A-42 to A-50.

McDonald Lawsuit Against Chicago

The McDonald lawsuit was filed by the Illinois State Rifle Association, the Second Amendment Foundation, and several individual plaintiffs. McDonald Br. A-2 to A-5. The individual plaintiffs allege that they legally own handguns they wish to possess in their Chicago homes for self-defense; that they applied for permission to possess the handguns in Chicago; and that their applications were refused. See id. Plaintiffs allege in count I that Chicago's handgun ban violates the Second Amendment, incorporated into the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause. Id. at A-9. Counts II, III, and IV raise Second and Fourteenth Amendment claims against the requirements of annual registration of firearms, registration as a prerequisite to possession in Chicago, and the penalty of rendering firearms unregisterable for failure to comply with either requirement. Id. at A-10 to A-11. Count V is an equal protection challenge to the unregisterability penalty. Id. at A-11.

SUMMARY OF ARGUMENT

Plaintiffs' Second and Fourteenth Amendment challenges fail because the Second Amendment does not restrain state and local governments. The Supreme Court has already decided this, as has this court. This court should regard those decisions as binding. Plaintiffs' efforts to avoid Supreme Court precedent are unsound because, even though the Court's incorporation analysis has developed, only the Court itself is free to reconsider its earlier decisions on Second Amendment incorporation. For this reason, the district court properly rejected the plaintiffs' attacks on the gun ordinances, and that judgment should be affirmed.

Moreover, even considering the Supreme Court's more recent approach to incorporation of rights in certain Bill of Rights provisions, plaintiffs' incorporation arguments fail. Rather than automatically incorporate all Bill of Rights provisions, something the Court has repeatedly and expressly rejected, the Court has examined the historical roots and purpose of particular rights in assessing whether they should be incorporated as fundamental liberties under the Due Process Clause. Neither the NRA nor McDonald undertakes such an analysis of the Second Amendment right. And in fact, the inclusion of the Second Amendment in the Bill of Rights says nothing about whether the right it protects – interpreted in Heller as a right to weapons in common use – is a fundamental personal liberty interest within the meaning of the Fourteenth Amendment. Unlike other enumerated rights, the Second Amendment was not codified to protect individual liberty. Rather, although conferring an individually held right, the scope of the Second

Amendment's protection is circumscribed by its primary purpose of preventing federal disarmament of the militia. Nor does the history of the right to arms in England and America, including its development under state constitutions, reveal a deeply rooted right to any particular category of firearms commonly used for self-defense, much less a specific right to handguns, without regard to the danger imposed by the weapon or the availability of other arms that will serve the underlying purpose of self-defense in the home. Under the operative test of "ordered liberty," state and local governments should be free to decide that the right to possess handguns – the type of weapon most responsible for homicides, suicides, and other armed violence – is not implicit in the concept of ordered liberty. Moreover, in our system of federalism, the disagreement over the efficacy of gun regulations actually supports leaving the policy judgment to the States, at least so long as some right to arms for self-defense is preserved.

As an alternative to the Court's selective incorporation approach, plaintiffs argue, based mostly on their view of congressional intent, that the history of the Fourteenth Amendment is a reason to incorporate the Second Amendment. But their varying historical approaches are foreclosed because the Supreme Court has rejected that route to incorporation. Also, the merits of their arguments are seriously flawed. Although some members of Congress endorsed a view that the entire Bill of Rights would be incorporated, many other views were expressed in the debates, including a prominent view that the Fourteenth Amendment was intended to require only non-discrimination by the States. Beyond the few who expressed an

incorporationist understanding of the Fourteenth Amendment in congressional debates, there is little historical evidence showing that the public understood the Fourteenth Amendment generally, or the Privileges or Immunities Clause specifically, would impose the Bill of Rights upon the States.

All of plaintiffs' claims, including their equal protection claims, depend upon incorporation, since, without incorporation, plaintiffs have asserted no fundamental right requiring elevated scrutiny under the Equal Protection Clause. Because the Second Amendment does not apply to Chicago or Oak Park, and the rights it protects are not incorporated, judgment on the pleadings on all counts was proper and should be affirmed.

ARGUMENT

Because handguns "play a major role in the commission of homicide, aggravated assaults and armed robbery," Chicago City Council, Journal of Proceedings, March 19, 1982, at 10049, Chicago has a stringent firearms ordinance that allows possession of only registered firearms and forbids registration of most handguns, see Municipal Code of Chicago, Ill. §§ 8-20-040, 8-20-050. Oak Park, too, prohibits the possession of handguns. See Municipal Code of Oak Park, Ill. § 27-2-1. Handgun bans such as these have withstood attack on both federal and state constitutional grounds in both this court, see Sklar v. Byrne, 727 F.2d 633 (7th Cir. 1984); Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), and the Illinois Supreme Court, see Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984). In Quilici, this court rejected arguments just like the ones plaintiffs make here – that the Second Amendment restricts state and local governments. Nevertheless, invigorated by the decision in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), plaintiffs ask this court to revisit the issue. Their new attacks on the handgun bans should be rejected for the same reason Quilici's claims were: the Second Amendment does not restrict the States.

Even if this court were free to consider incorporation anew, plaintiffs' arguments should be rejected. To begin, Heller did not decide incorporation, since the case involved the federal district. Moreover, as an interpretation of the Second Amendment itself, the Court looked only to the language and original meaning of the constitutional text. And under a proper application of the Court's selective

incorporation framework – which does not include the automatic incorporation NRA proposes – the Second Amendment right to have arms in common use, which Heller held included the right to have a handgun for self-defense in the home, is not a fundamental liberty interest protected by the Due Process Clause. The origins of the Second Amendment, the treatment of the right to arms under state constitutions, the purpose to be served by the right, as well as the concept of ordered liberty itself all demonstrate that the right is not fundamental, and thus the right should not be incorporated into the Fourteenth Amendment.

Plaintiffs' contention that Congress intended either the Fourteenth Amendment generally, see NRA Br. 17, or the Privileges or Immunities Clause specifically, see McDonald Br. 19, to impose the Second Amendment on the States is no basis for incorporation, either. As the Court has made clear, the public understanding of the constitutional text is essential in determining its meaning. With several competing views of the Fourteenth Amendment voiced inside and outside Congress – including a resounding theme of non-discrimination rather than establishment of particular substantive rights – plaintiffs have not shown that the public understood the Fourteenth Amendment to impose the Second Amendment upon States.

McDonald's other Second Amendment challenges include Chicago's annual and "pre-acquisition" registration requirements. See McDonald Br. 42-45. In addition, NRA challenges certain exceptions to the ban, see NRA Br. 43, and McDonald the unregisterability of firearms for which registration or renewal

requirements were not followed, on equal protection grounds, see McDonald Br. 44. These claims all depend on enforcing the Second Amendment against local governments because, without incorporation, there is no basis for elevated scrutiny. On this basis, too, judgment on the pleadings should be affirmed.

I. BINDING SUPREME COURT PRECEDENT HOLDS THAT THE SECOND AMENDMENT DOES NOT RESTRAIN THE STATES.

In United States v. Cruikshank, 92 U.S. 542 (1876), the Court held that the Second Amendment constrains only the federal government:

> The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . . .

Id. at 553. The Court reaffirmed this holding in Presser v. Illinois, 116 U.S. 252 (1886), which rejected a Second Amendment challenge to the State's Military Code:

> a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state.

Id. at 265. Then, in Miller v. Texas, 153 U.S. 535 (1894), the Court held "it is well settled that the restrictions of th[is] amendment[] operate only upon the federal power, and have no reference whatever to proceedings in state courts," id. at 538. Thus, the Court has squarely decided that the Second Amendment inhibits no power of the States. And, of course, "only th[e] [Supreme] Court may overrule one of its precedents." Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam reversal of Ninth Circuit decision that wrongly pronounced Supreme Court precedent not good law). Accordingly, plaintiffs'

reliance on the Second Amendment is foreclosed.

NRA argues that Cruikshank, Presser, and Miller decided only that the Second Amendment does not apply to the States "directly" and not whether it applies indirectly through the Fourteenth Amendment. NRA Br. 26. But the Court's pronouncements that the Second Amendment restrains only the federal government were straightforward and clear, and cannot be rewritten to say, as the NRA does, merely that the Second Amendment does not apply to the States "directly," id.; id. at 28, 29, "by its own force," id. at 26, or "in and of itself," id. at 28. Moreover, in Presser, the Court considered claims that an Illinois statute prohibiting associating as a military organization or parading and drilling with arms without a license violated the Privileges or Immunities Clause and the Due Process Clause of the Fourteenth Amendment, the argument was "so clearly untenable as to require no discussion." 116 U.S. at 268. The Court has since characterized Presser as holding that Second Amendment rights are "not safeguarded against state action by the Privileges and Immunities Clause *or other provision* of the Fourteenth Amendment." Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964) (emphasis added).[2]

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[2] NRA emphasizes Miller's holding that the defendant waived a Fourteenth Amendment claim, suggesting this means the Court did not regard its earlier decisions as decisive on whether the Fourteenth Amendment imposed the Second Amendment upon the States. See NRA Br. 29, 31. This reads far too much into a simple waiver ruling. The Court was free to reconsider its prior decisions, and relying on waiver suggests nothing more than that the Court would not do so when the issue had not been properly preserved. In any event, based on the record before it, the Court concluded there had been "no denial of due process of law; nor did the law of the state, to which reference was made, abridge the privileges or immunities

Heller did not disturb these holdings. To the contrary, the Court expressly acknowledged that these decisions held "the Second Amendment applies only to the Federal Government" and expressly declined to address the question of "Cruikshank's continuing validity on incorporation," since incorporation was "a question not presented" in Heller. 128 S. Ct. at 2813 n.23. Cruikshank could hardly have "continuing validity" on an issue it had not decided in the first instance.

While Heller noted Cruikshank "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases,"128 S. Ct. at 2813 n.23, this observation does not gives license to ignore binding Supreme Court cases. It is well established that when Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the] Court the prerogative of overruling its own decisions." Tenet v. Doe, 544 U.S. 1, 10-11 (2005) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). Accord Agostini v. Felton, 521 U.S. 203, 237-38 (1997). Indeed, even when the foundation of a decision is "inconsistent with later decisions," State Oil Co. v. Khan, 522 U.S. 3, 9 (1997), "it is [the Supreme] Court's prerogative alone to overrule one of its precedents," id. at 20. Thus, although lower courts should generally follow "new doctrinal trend[s] in Supreme Court decisions," McDonald Br. 41 (citation omitted), they are not free to revisit issues that the Supreme Court has already decided,

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of citizens of the United States." 153 U.S. at 539.

based on doctrinal trends or anything else.[3] "The lower courts . . . are not to anticipate the overruling of a Supreme Court decision, but are to consider themselves bound by it until and unless the Court overrules it, however out of step with current trends in the relevant case law the case may be." Saban v. United States Department of Labor, 509 F.3d 376, 378 (7th Cir. 2007). That is particularly true for "application of the Due Process Clause," where "it is for the Court to draw [the line] by the gradual and empiric process of 'inclusion and exclusion.'" Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), overruled on other grounds by Mapp v. Ohio, 367 U.S. 643 (1961).

Not surprisingly, even after Heller, lower courts have adhered to Cruikshank, Presser, and Miller. As the Second Circuit recently held, "[i]t is settled law . . . that the Second Amendment applies only to limitations the federal government seeks to impose on this right," and "Heller . . . does not invalidate this principle." Maloney v. Cuomo, 554 F.3d 56, 58 (2d Cir. 2009) (per curiam). See also Young v. Hawaii, 2009 WL 874517, *4-5 (D. Haw. Apr. 9, 2009); Mr. S. v. Webb, 2009 WL 650542, *8 (D. Conn. Mar. 13, 2009); People v. Abdullah, 870 N.Y.S.2d 886, 886-87 (N.Y. Crim. Ct. Dec. 30, 2008).

Moreover, under principles of *stare decisis*, this court should follow its

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[3] As for occasions when lower federal courts passed on incorporation of other Bill of Rights provisions before the Supreme Court did, see Amicus Brief of 69 State Legislators 15-18, the Court has never expressly endorsed this approach. And while the Court "did not rebuke," id. at 15, or "question," id. at 16, those lower court decisions, neither did it issue an opinion in any of them. These cases thus provide no basis to disregard the numerous Supreme Court cases that unequivocally direct the lower courts to follow Court precedent until the Court itself overrules it.

decision in Quilici, which addressed the same issues of Presser's meaning and continuing validity that plaintiffs raise. In Quilici, this court found it "difficult to understand how . . . Presser supports the theory that the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate" when Presser squarely ruled that the Second Amendment limits only the national government. 695 F.2d at 269. Quilici also expressly rejected arguments that "Presser is no longer good law because later Supreme Court cases incorporating other amendments into the fourteenth amendment have effectively overruled" it, that "Presser is illogical," and that "the entire Bill of Rights has been implicitly incorporated." Id. at 269. And this court reaffirmed the inapplicability of Second Amendment restrictions on the States in Sklar, 727 F.2d at 637, and Justice v. Elrod, 832 F.2d 1048, 1051 (7th Cir. 1987).[4]

This court should adhere to these rulings. "[P]rinciples of stare decisis require that we 'give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or

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[4] Other circuits consistently agree. See, e.g., Thomas v. Members of City Council of Portland, 730 F.2d 41 (1st Cir. 1984) (*per curiam*); Cases v. United States, 131 F.2d 916, 921-22 (1st Cir. 1942); Bach v. Pataki, 408 F.3d 75, 84 (2d Cir. 2005); Love v. Pepersack, 47 F.3d 120, 123-24 (4th Cir. 1995); Edwards v. City of Goldsboro, 178 F. 3d 231, 252 (4th Cir. 1999); Peoples Rights Organization, Inc. v. City of Columbus, 152 F.3d 522, 539 n.18 (6th Cir. 1998); Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 730-31 (9th Cir. 1992). Plaintiffs note that two courts have expressed the view that Presser and Cruikshank have been discredited. See McDonald Br. 37 (citing Silveira v. Lockyer, 312 F.3d 1052, 1066 n.17 (9th Cir. 2002), and United States v. Emerson, 270 F.3d 203, 221 n.13 (5th Cir. 2001)); NRA Br. 32 (same). The cited footnotes were dicta and when the issue was actually presented in the Ninth Circuit, it ruled that the Second Amendment does not limit the States. See Fresno Rifle, 965 F.2d at 730-31.

other supervening developments, such as a statutory overruling." Santos v. United States, 461 F.3d 886, 891 (7th Cir. 2006). Far from being overruled or undermined by a higher court, this court's cases are true to Cruikshank, Presser, and Miller, which Heller recognizes are the Court's last word on the applicability of the Second Amendment to the States, as we explain above. Accordingly, there is no basis for overruling Quilici.

McDonald attempts to evade Quilici by arguing that it did not address the particular argument raised here, and that "[n]o holding in Quilici . . . takes the opposite position from that now pressed." McDonald Br. 33. But Quilici rejected the attempt to avoid Presser based on "later Supreme Court cases," 695 F.2d at 269, and that is plainly a holding "opposite" from McDonald's position that the Court's "more modern jurisprudence" should be followed instead of Presser. McDonald Br. 33. McDonald also attempts to differentiate his argument that Presser's "reasoning has been undercut by subsequent decisions" from Quilici's argument that Presser "is no longer good law" because of those decisions. Id. While McDonald phrases his argument differently, the substance is the same, i.e., that later decisions require a different result. Quilici considered and rejected that very point, and no subsequent Supreme Court decision supports reconsidering that holding.

Plaintiffs further argue that this court should disregard Quilici because the courts must "decide cases in light of intervening Supreme Court decisions." NRA Br. 30 (citations omitted). See also McDonald Br. 38 (Seventh Circuit decisions not binding "when there has been a relevant intervening change in the law") (citations

omitted). But this principle does not apply – as we explain, no intervening decision undermines the Court's holdings that the Second Amendment does not restrict the States. NRA correctly observes that Heller overrules Quilici's holding that the Second Amendment does not protect a "right to keep and bear handguns." NRA Br. 30. McDonald similarly observes that Heller rejected the theory that the Second Amendment protects "collective" rights rather than individual ones. McDonald Br. 37. But these developments do not bear on whether the Second Amendment binds the States. Heller is not, therefore, an "intervening change in the law" on the question of incorporation, id. at 38, nor did it "change," "undercut," or "render[] obsolete," id. at 38-39; or "supercede," NRA Br. 30, holdings in Cruikshank, Presser, and Miller. Indeed, Heller acknowledges that those decisions govern on the issue. There is no reason to reconsider Quilici, which soundly rests upon that undisturbed Supreme Court precedent. Judgment for Chicago and Oak Park should be affirmed on this ground alone.

II. UNDER THE SUPREME COURT'S SELECTIVE INCORPORATION DOCTRINE, THE SECOND AMENDMENT SHOULD NOT BE INCORPORATED.

Even if this court were free to address whether the Second Amendment right can be enforced against the States, it should reject that notion. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), long ago decided that the enumerations of the Bill of Rights restrain only the federal government and not the States. While an enumerated right can be enforced against the States through incorporation, a right is incorporated only after the Court determines, among other

things, that the right is "fundamental to the American scheme of justice" or "necessary to an Anglo-American regime of ordered liberty." Duncan v. Louisiana, 391 U.S. 145, 149 & 150 n.14. (1968). If so, the right is deemed part of the Fourteenth Amendment's Due Process Clause and, as such, protected against state intrusion. See id. at 147-48.

As we explain in detail below, Heller determined that the right conferred by the Second Amendment is a right to keep and bear arms that are in common use.[5] Heller then interpreted that right to include categorical protection for handguns because they are a commonly owned class of weapons. But Heller did no more than construe the meaning of the Second Amendment's text. It did not conduct the type of Fourteenth Amendment analysis of fundamental rights required under Supreme Court precedent, including Duncan. That question was not presented in Heller, and the Court pointedly did not answer it. See 128 S. Ct. at 2813 n.23. The Fourteenth Amendment shows that the Second Amendment right recognized in Heller – which included a handgun as a weapon in common use, including handguns – is not a fundamental right of the sort that is protected by the Due Process Clause.

In addition to the factors typically used to assess whether a right is

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[5] Heller's treatment of this common-use right is actually the decision's less noteworthy aspect, for the Court had discerned that right 70 years earlier. See United States v. Miller, 307 U.S. 174, 179 (1939) (recognizing that militia members used arms "of the kind in common use at the time"). See also Heller, 128 S. Ct. at 2815-16 (discussing Miller). The primary, and novel, question in Heller was not about the scope of the Second Amendment right, but rather who could exercise it – i.e., whether the right is an individual right untethered to service in a militia, or a collective, militia-connected right. See 128 S. Ct. at 2789.

fundamental for purposes of the Fourteenth Amendment's Due Process Clause, which show that incorporation is not appropriate here, other issues Heller also expressly declined to address – such as the wisdom, values, and tradeoffs involved in providing categorical protection to handguns – show that handguns pose very serious problems in modern urban centers. A due process analysis allows state and local governments to assess the costs and benefits of handguns. Particularly where, as here, the government allows the possession of other firearms for the protection of personal liberties like self-defense, there can be no serious claim that merely because a weapon in common use was protected at the time the Constitution was ratified, such a weapon cannot be banned today.

A. Incorporation, Like Other Due Process Issues, Requires Evaluation Of Many Factors And Considerations, And Is Not Automatic.

In most respects, selective incorporation cases are no different from other cases addressing the content of the Due Process Clause. Due process analysis requires precision and "utmost care . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of th[e] Court" and "the matter [be placed] outside the arena of public debate and legislative action." Washington v. Glucksberg, 521 U.S. 702, 720 (1997). The problem arises because of that clause's "spacious language." Duncan, 391 U.S. at 148. Thus, it is critical that the asserted liberty interest be "carefully formulat[ed]." Glucksberg, 521 U.S. at 722. Then, to determine whether that right is fundamental under the Due Process Clause, the courts examine numerous factors, such as the right's

origins in English and American jurisprudence; its prevalence in and treatment under state constitutions; and the purposes, functions, and efficacy of the right. See, e.g., Duncan, 391 U.S. at 151-56. Applying this test, Montana v. Egelhoff, 518 U.S. 37 (1996), found no protection for a criminal defendant's desire to introduce evidence of voluntary intoxication, because the asserted right was not a "principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." Id. at 43. See also id. at 43-45, 48-49, 50-51, 51 n.5 (reviewing "historical practice" in Anglo-American law, degree to which States embraced asserted right, and empirical and policy justifications for restricting the right in "modern times"); Glucksberg, 521 U.S. at 710 (review covers "Nation's history, legal traditions, and practices"); County of Sacramento v. Lewis, 523 U.S. 833, 858-59 (1998) (Kennedy, J., concurring) ("history and tradition are the starting point," but "[t]here is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amendment, is bound to respect.").

The only unique aspect of this inquiry in an incorporation case is that the Court begins by "look[ing] . . . to the Bill of Rights for guidance" to flesh out the amorphous Due Process Clause. Duncan, 391 U.S. at 148. Yet, as is clear from Duncan's resort to the numerous factors outlined above, the Bill of Rights is only a starting point and hardly dispositive. This approach precludes the NRA's argument that codification in the Bill of Rights automatically makes a right a component of

Fourteenth Amendment liberty. See NRA Br. 35-42. The Court has never endorsed such total incorporation of all provisions of the Bill of Rights "based solely on their status as such." Id. at 40. To the contrary, "[t]he notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and therefore incorporates them has been rejected by this Court again and again, after impressive consideration." Wolf, 338 U.S. at 26 (citations omitted). And, of course, neither the Fifth Amendment right to grand jury indictment, see Hurtado v. California, 110 U.S. 516 (1884), nor the Seventh Amendment right to jury trial in civil cases, see Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916), is incorporated.[6]

Instead, the most consistent theme in incorporation jurisprudence is whether a right enumerated within the first Eight Amendments is necessary to secure a regime of ordered liberty. For example, incorporation of the Fourth Amendment's protection against unreasonable search and seizure was based on the Court's conclusion that "the 'security of one's privacy against arbitrary intrusion by the police' is 'implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause.'" Mapp, 367 U.S. at 650 (quoting Wolf, 338 U.S. at 28 (internal quotations omitted). Similarly, the incorporation of First Amendment rights reflected that these rights are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled on other grounds

[6] The Court recently reaffirmed that these rights are not incorporated. See Osborn v. Haley, 549 U.S. 225, 252 n.17 (2007) (Seventh Amendment); Campbell v. Louisiana, 523 U.S. 392, 399 (1998) (Fifth Amendment grand jury indictment).

by Benton v. Maryland, 395 U.S. 784 (1969). And in Glucksberg, the Court held that the Due Process Clause does not encompass a right to assisted suicide because that right was not "deeply rooted in this Nation's history and tradition" so as to be fundamental and "implicit in the concept of ordered liberty." 521 U.S. at 720-21.

Even the cases involving trial rights have looked to whether a given right is "necessary to an Anglo-American regime of ordered liberty." Duncan, 391 U.S. at 149 n.14. Accord Danforth v. Minnesota, 128 S. Ct. 1029, 1034 (2008) (state criminal trials must provide defendants with protections "'implicit in the concept of ordered liberty'") (citing Palko). In contrast, the Court has rejected incorporation of the Fifth Amendment's right to indictment by a grand jury on felony charges on the ground that other procedures can adequately protect an accused's interest against unfounded accusations. See, e.g., Hurtado, 110 U.S. at 534-38. There is thus no basis for the NRA's apparent attempt to distinguish the unincorporated procedural rights under the Fifth and Seventh Amendment on the basis that "substantive" rights are automatically incorporated. See NRA Br. 40, 42. Duncan hints at no distinction between substantive and procedural rights. Instead, as we explain, the test of "ordered liberty" is in the full array of cases.

In short, while there is no "tidy formula for the easy determination of what is a fundamental right" under the Fourteenth Amendment, Wolf, 338 U.S. at 27, it is nevertheless quite settled that only a right that is itself an aspect of ordered liberty merits incorporation within the Fourteenth Amendment. When the Court in Heller referred to "the Fourteenth Amendment inquiry required by our later cases," 128 S.

Ct. at 2813 n.23, this is what it meant.

B. Heller Limited Its Analysis To The Text Of The Second Amendment And Did Not Consider Factors That Govern A Selective Incorporation Analysis.

Plaintiffs seek incorporation of what they describe as a right "to bear arms." McDonald Br. 27; see also NRA Br. 13, 42. Their argument is simply that Heller recognized a fundamental right to self-defense and, in particular, a right to a handgun. Of course, Heller itself explains that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 128 S. Ct. at 2816. But granting whatever it is that the Second Amendment protects, the question here is different. As we have just explained, incorporation under the Due Process Clause requires precise identification of the right at issue and a searching look at a number of factors, in addition to the constitutional text.

Plaintiffs ignore this governing standard. Perhaps even worse, they rely on Heller for issues it did not decide. Heller did not decide anything beyond the original public meaning of the Second Amendment at the time of ratification in 1791. Heller explains that, in examining the meaning of enumerated rights, the Court must do nothing more than determine "the scope they were understood to have when the people adopted them." 128 S. Ct. at 2821. The Court is not free to conduct a "freestanding 'interest-balancing,'" id., and cannot take account of modern developments or conditions, see id. at 2817 ("the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right

cannot change our interpretation of the right"). Pursuing the issue before it, the Court concluded that the right extended to weapons in common use. See id. at 2816-17. The Court then determined that handguns were in common use. See id. at 2817-18. Based on those two conclusions alone, the Court ruled that the federal district's ordinance violated the Second Amendment.

This analysis does not control the due process issue in this case. Both the question the Court answered and the way in which it went about answering it were a world away from the analysis that is appropriate under the inclusive and adaptive test in the Court's due process jurisprudence. As the Court admitted, Heller examined no policy issues; the Second Amendment took "certain policy choices off the table." 128 S. Ct. at 2822. Heller also froze its conception of the right to arms as it existed in 1791.

To be sure, there are words in Heller that can be read out of context to support plaintiffs. For example, Heller observed that handguns are useful for self-defense and that Americans "considered" them to be the quintessential self-defense weapon. 128 S. Ct. at 2818. But that is not the reason Heller found them protected under the Second Amendment. Rather, handguns were protected as a "class of 'arms'" that is commonly owned and "overwhelmingly chosen," id. at 2817, because (as we explain below), in 1791, weapons in common use were necessary for an effective militia. Indeed, this protection exists "[w]hatever the reason" Americans actually decide to possess them, and even if alternative arms are available. Id. at 2818. Conversely, no matter how useful a weapon might be, that does not itself

bring it within the scope of the Second Amendment. Machine guns, for example, are undoubtedly useful for self-defense (indeed, they are standard-issue military equipment precisely because they kill effectively), but they lack constitutional protection because they are not in the class of arms in common use but are instead "dangerous and unusual." Id. at 2817. In short, the touchstone in Heller is not whether a weapon is useful, much less whether it is essential, to self-defense.

Similarly, Heller observed that "[b]y the time of the founding, the right to arms had become fundamental for English subjects." 128 S. Ct. at 2798. But, as we explain in more detail below, the context was its discussion of an individual right (as opposed to a collective right) under English law, and not whether handguns are empirically or logically essential to the exercise of any fundamental personal liberty, such as self-defense. Nor did Heller cite, much less rely upon, any data or evidence establishing a correlation between handguns and effective self-defense. Heller did not address these issues because they were not properly part of the inquiry before it, which, as we explain, was simply the original meaning of the Second Amendment's text.

In this Fourteenth Amendment case, however, the issue is whether plaintiffs have a fundamental liberty interest in self-defense that requires access to a handgun because cannot be meaningfully exercised in any other way. Plaintiffs make no argument at all on this issue. Nor do they even contend that Heller decided it; and, as we explain, it did not. Plaintiffs' sole reliance on Heller is therefore misplaced.

To show that the Second Amendment right is not essential to a fundamental personal liberty under the Fourteenth Amendment, we turn to the Supreme Court's selective incorporation framework.[8] As Duncan requires, we begin with the origins of the Second Amendment, the scope of the right to arms under state constitutions, and the purpose and function of the right. But, as required by the broader inquiry of Fourteenth Amendment due process analysis (as opposed to the strictly textual interpretation in Heller), we also consider how circumstances have changed since 1791 such that extending blanket protection to a particular class of arms is no longer sensible because of the many problems handguns pose in modern urban centers. These factors all show that a categorical right to arms in common use, or to handguns in particular, is not fundamental under the Fourteenth Amendment.

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[8] McDonald, at least, purports to conduct a Duncan analysis, but he analyzes only a general right to arms, see McDonald Br. 25-32, and not the actual Second Amendment right to arms in common use. After concluding that the general right is incorporated, McDonald announces that our ordinances fail because "[h]andgun bans of the sort at issue here clearly violate the Second Amendment." Id. at 42. This evades the critical question whether a common-use right – the actual Second Amendment right relied on in Heller to invalidate the District's handgun ban – is incorporated. The NRA makes the same argument, but does not even purport to conduct a Duncan analysis. See NRA Br. 13, 42. As we explain above, whatever the of a general right to arms for self-defense, the purpose of the common-use right was to ensure the militia, and not to protect essential individual liberties.

C. There Is No Fundamental Categorical Right To Arms In Common Use, To Handguns In Particular, Or To Any Particular Arms For Self Defense.

1. The Second Amendment's origins do not show a fundamental right to arms in common use, including handguns.

As we explain above, Heller did not rest Second Amendment protection for the right to own a handgun on any finding that it (or any other weapon) is actually useful to the exercise of personal liberties. The right enjoyed protection because a handgun is a weapon in common use. Heller therefore supports plaintiffs' bid for incorporation only if the common-use right through which the Court found weapons protected secures essential personal liberties. The history and purpose of the Second Amendment eviscerate that notion. The Second Amendment right to arms in common use was not codified to protect individual liberties. It instead owes its existence to the Founders' federalism aim of protecting a prerogative of the States (the militias) from federal disarmament or the federal standing army.

After the federal government gained the power to raise a standing army, see U.S. Const., Art. I, § 8, cl. 12, and to call forth and organize the state militias, see id. cl. 15, 16, Anti-Federalists feared that the federal government could render the state militias a nullity by disarming the people. Heller, 128 S. Ct. at 2801. "[H]istory showed" the Framers "that the way tyrants had eliminated a militia . . . was not by banning the militia but simply by taking away the people's arms." Id. The feared result was an unopposable federal standing army that could "suppress political opponents." Id. Protecting the right of citizens to keep and bear the arms

necessary to an effective militia quelled this concern. It made the people "better able to resist tyranny" and "render[ed] large standing armies unnecessary." Id. at 2800-01.[9]

The common-use right served the purpose of preserving an effective militia by meeting the two needs the militia had in the founding era. First, "'when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.'" Heller, 128 S. Ct. at 2815 (quoting Miller, 307 U.S. at 179). See also id. at 2817 ("the body of all citizens capable of military service . . . would bring the sorts of lawful weapons that they possessed at home to militia duty"). Second, militia members, drawn from the citizenry in times of crisis, were expected to muster knowing how "to handle and use [arms] in a way that makes those who keep them ready for their efficient use." Id. at 2811-12 (quoting Thomas Cooley, Treatise on Constitutional Limitations 271 (1868)). Accord id. at 2812 ("it would be impossible, in case of war, to organize promptly an efficient force of volunteers unless the people had some familiarity with weapons of war") (citation omitted).

To meet these needs and to ensure that citizens would bring and know how to

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[9] See also Richard Kohn, Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802 2 (1975) ("No principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army in peacetime."); David Yassky, The Second Amendment: Structure, History, and Constitutional Change, 99 Mich. L. Rev. 588, 597 (2000) ("[T]he Constitution meticulously allocated military power between the federal army and the state militias. The purpose of the Second Amendment was to protect this allocation.").

operate the weapons essential in the militia, the Second Amendment protected their right to possess and use the weapons they commonly owned and used for lawful private purposes. "In the colonial and revolutionary war era, small-arms weapons used by militiamen and weapons used in defense of person and home were one and the same." Heller, 128 S. Ct. at 2815 (citations omitted). It was "precisely" by protecting those weapons "typically possessed by law-abiding citizens for lawful purposes" outside the militia, including self-defense, that "the Second Amendment's operative clause furthers the purpose announced in its preface" – i.e., preserving an effective militia. Id. at 2815-16. In short, the common-use right "secur[ed] the militia by ensuring a populace familiar with arms." Id. at 2811.

Heller's view that the Second Amendment codified a "*pre-existing*" individual right to keep and bear arms, 128 S. Ct. at 2797 (emphasis in original), does not show any greater substantive reach. The Second Amendment required codification of an individual right to arms in common use so that all eligible individuals could effectively muster when necessary; and, in 1791, the pre-existing right provided exactly that. But the pre-existing right protected no more than arms in common use – it did not extend to "dangerous and unusual," that is, uncommon, weapons. Id. at 2817. Codifying this right therefore perfectly implemented the Framers' purpose of preserving the militia, and there was no further purpose beyond this.

Thus, while the effect of codification was to "elevate[] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," Heller, 128 S. Ct. at 2821, this was not "the reason" the right

was elevated to constitutional status, id. at 2801. In fact, protection of armed self-defense "had little to do with" why the common-use right was codified, id., which was instead the federalism purpose of "prevent[ing] elimination of the militia" and defusing "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms," id. See also The Federalist, No. 46 (Madison). Indeed, if Heller had seen a purpose of the Framers to protect a right to armed self-defense, it would have asked what weapons are essential to self-defense to determine what kinds of weapons are protected by the Second Amendment. Far from that, as we explain above, the Court expressly disclaimed reliance on a weapon's utility for self-defense and considered only what kinds of weapons were necessary to further the Amendment's military aim of preservation of an effective militia in the States. See id. at 2815-16.

The Second Amendment "interest-balancing by the people" in 1791, 128 S. Ct. at 2821, is therefore atypical of the Bill of Rights. Given the purpose of restraining the federal government, see, e.g., Barron, 32 U.S. (7 Pet.) at 247-48, 250, the balancing conducted by the Framers with respect to most Bill of Rights protections involved limiting the new, powerful federal government in order to protect individual personal liberties. But as Heller itself makes clear, the Second Amendment did not weigh individual personal liberties. Indeed, far from what one would expect in a debate over the proper balance between governmental interests and personal liberties, nothing in the congressional debate over Madison's proposal for the Second Amendment suggests any view that a private arms right

unconnected to preservation of the militia was fundamental. See The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 170-76, 185-91 (Cogan ed. 1997); Jack Rakove, The Second Amendment: The Highest Stage of Originalism, 76 Chi.-Kent L. Rev. 103, 127-28 (2000). In this instance, the interest opposing the federal government's was that of the States. The Second Amendment right therefore stands in stark contrast to those liberty interests that have been incorporated. See, e.g., Duncan, 391 U.S. at 156 (right to trial by jury in serious criminal cases provides "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge").

In short, the Framers' 1791 solution for protection of the militia says nothing about whether a categorical right to weapons in common use, and handguns in particular, is a fundamental personal liberty, and it should carry no weight under the Fourteenth Amendment analysis required for incorporation.[10]

Moreover, the notion that States, in addition to the federal government, could not comprehensively regulate private ownership of the very arms protected against federal intrusion would have been anathema to the Framers. State regulation of those arms was pervasive. States forbade some arms and ammunition and required

[10] In fact, given the Second Amendment's federalism roots, it makes no sense to incorporate the common-use right against the States. States are constitutionally prohibited from maintaining their own standing armies, see U.S. Const. Art. I, § 10, so there is no entity at the state level that requires the military counterbalance provided by the Second Amendment. Moreover, since the militias were controlled by the States themselves, it would turn the purpose of the Second Amendment on its head to turn the protection of the militia against the States.

others. For example, Boston forbade loaded firearms in buildings.[11] Conversely, a 1786 New York law required male citizens of a certain age to equip themselves with "a good Musket or Firelock, a sufficient Bayonet and Belt, a Pouch with a Box therein to contain not less than Twenty-four Cartridges suited to the Bore of his Musket or Firelock, each Cartridge containing a proper Quantity of Powder and Ball, [and] two spare Flints," while a 1785 Virginia law required "a good clean musket carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto." Miller, 307 U.S. at 180-82. In the face of extensive state regulation, the Framers could not have thought that citizens possessed a categorical right to any particular categories of arms.[12]

Tellingly, Heller never uses the word "fundamental" when discussing the Second Amendment right but only when discussing the arms right under English law, which it summarizes as a right to have arms for self-defense. See 128 S. Ct. at 2798 ("the right of having and using arms for self-preservation and defence"). Thus, Heller's statement that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects," id., does not show that the right is

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[11] See Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218 (forbidding loaded firearms in "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building"); Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 510-12 (2004).

[12] The pervasive regulation of specific firearms was part of the States' more comprehensive regulation of the militias. States defined "who was part of the militia, who was excused from duty, and what weaponry the citizens were required to procure to meet this obligation." Cornell & DeDino, A Well Regulated Right, supra at 509. See also id. at 508-10.

fundamental under the Due Process Clause, for at least two reasons. First, as we explain above, Heller did not conduct a Fourteenth Amendment analysis. Second, Heller assessed whether the right was an individual one or one tied to service in a militia, see id. at 2798-99, but did not weigh the importance of the right. In context, then, the word "fundamental" was used to convey that an individual arms right in English law was not novel. Indeed, in this very same section, Heller recognized that the arms right codified in the English Declaration of Rights was highly curtailed. The right was "not available to the whole population, given that it was restricted to Protestants." Id. at 2798 (citing Lois Schwoerer, To Hold and Bear Arms: The English Perspective, in The Second Amendment in Law and History 207, 218 (C. Bogus ed. 2000). The right was further restricted to the wealthy and subject to regulation. See Schwoerer, supra at 215-19. And those regulations were extensive. As noted by St. George Tucker, editor of "the most important early American edition of Blackstone's Commentaries," Heller, 128 S. Ct. at 2799, "[w]hoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England." 2 Blackstone's Commentaries on the Laws of England 143-44 n. 41 (Tucker ed. 1803). Schwoerer also estimates that, due to these restrictions, "perhaps no more than three percent" of the English population could lawfully possess guns. Schwoerer, supra at 219. See also id. at 212, 215 (discussing laws restricting arms ownership to the upper classes and concluding that the restrictive clauses of the English Declaration's arms right "so severely qualified" the right "as

to negate the very meaning of a right").

In fact, like the Second Amendment, the English Declaration of Rights' purpose in codifying the right to arms was to allocate power between governmental bodies – the Crown and Parliament – and not to protect fundamental personal rights. See Carl Bogus, The Hidden History of the Second Amendment, 31 U.C. Davis L. Rev. 309, 382 (1998). Inclusion of the arms right ensured that the Crown would not arrogate to itself the power to determine who could be armed. See id. at 384. Nevertheless, Parliament remained free to regulate the ownership of weapons, as it had for the five hundred years leading up to the Declaration. See id. See also Heller, 128 S. Ct. at 2798 ("like all written English rights [the arms right] was held only against the Crown, not Parliament"). The right recognized in Heller is quite comparable; it was designed to protect against abuses by the federal government. But there was no fear of abuses by the States; to the contrary, the States were the counterweight to the federal government, a result of both their general reserved powers under the Constitution, see U.S. Const. Art. IV, § 4; Amend X, and their control of the militias.

2. The state constitutions do not show a deeply rooted right to arms in common use.

As for state constitutions, the Court looks for a "uniform and continuing acceptance" of a right among the States before that right "enjoy[s] 'fundamental principle' status." Egelhoff, 518 U.S. at 48. The Second Amendment right to arms in common use, including handguns, is not such a right. Instead, the inclusion of any type of right to arms in state constitutions has been gradual, and the language

of state constitutional provisions varies, rarely mirroring the language in the Second Amendment. And among the States recognizing an arms right, that right has not afforded blanket protection of any particular category of arms, including those in common use.

From the time of the founding until well after the Second Amendment's ratification in 1791, eight of the original 13 state constitutions had no right-to-arms provision at all. See Eugene Volokh, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L. & Politics 191, 194-202 (2006) (Connecticut, Delaware, Maryland, New Hampshire, New Jersey, New York, Rhode Island and South Carolina). Some of these States took decades, and others almost two centuries, to create constitutional protection of a right to some type of arms. See id. at 199-202 (Rhode Island provision adopted in 1842; South Carolina's in 1868; New Hampshire's in 1982; Delaware's in 1987). When the Fourteenth Amendment was adopted in 1868, only 22 out of the 37 state constitutions had arms provisions. See Steven Calabresi, et al., Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868, 87 Tex. L. Rev. 7, 50 (2008).

Now, most state constitutions include some type of right-to-arms provision, but six States still have none, see Volokh, supra at 194-200 (California, Iowa, Maryland, Minnesota, New Jersey, New York); and two States have interpreted their constitutional provisions as protecting only a militia-linked right, see Commonwealth v. Davis, 343 N.E.2d 847, 848-50 (Mass. 1976); City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905). Among the rest, the language of the

provisions varies, with only four using the same language as the Second Amendment. See Volokh, supra at 193-202 (Alaska, Hawaii, North Carolina, South Carolina). Some provisions include a "right to bear arms in defense of himself and the state," id. at 193 (Alabama), while others articulate a "right to keep and bear arms, for their common defense," id. (Arkansas), or a "right . . . to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned," id. at 194 (Colorado). Many provisions expressly recognize that the right to arms may be regulated, see, e.g., id. at 194-95 (Florida, Georgia), including regulation "with a view to prevent crime," see, e.g., id. at 203 (Tennessee, Texas). Others provide that prohibiting concealed weapons does not infringe the right. See, e.g., id. at 194-200 (Colorado, Kentucky, Louisiana, Mississippi, Montana, New Mexico).

The gradual inclusion of arms provisions, and the variation among them, demonstrates that the States have taken their time and enjoyed flexibility about whether and how to shape such rights. This is not the sort of "uniform and continuing acceptance" of a right that makes it a liberty interest protected by the Due Process Clause. More important, although state constitutions have articulated the right to arms in various ways, no state constitution expressly guarantees a categorical right to any particular weapon, simply because it is in common use for lawful purposes. To the contrary, many of the 19th century cases recognize that, if particular weapons were protected at all, it was because they were useful for militia-related purposes, and not because they might be useful for other purposes.

In Andrews v. State, 1871 WL 3579, 50 Tenn. 165 (1871), for instance, the Tennessee Supreme Court upheld a statute prohibiting "either publicly or privately to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol," although certain revolvers that were part of the "usual equipment of the soldier" were protected, id. at *11. See also Ex parte Thomas, 97 P. 260, 262 (Okla. 1908) (pistol is not "the character of arms" protected under state constitution, as "most of the states where it has been passed upon" agree); Aymette v. State, 1840 WL 1554, *3, 2 Hum. 154 (Tenn. 1840) (no right to keep and bear an "Arkansas toothpick" that did not "constitute the ordinary military equipment"). But see Bliss v. Commonwealth, 1822 WL 1085, 2 Litt. 90 (Ky. 1822).

Even more important to the due process inquiry is the state courts' treatment of the right to arms into the 20th and 21st centuries. In stark contrast to Heller's focus on original intent as of 1791, it is "our laws and traditions in the past half century" that "are of most relevance" in determining what liberty interests are protected by substantive due process. Lawrence v. Texas, 539 U.S. 558, 571 (2003). Accord Hurtado, 110 U.S. at 528-29 (to hold that "settled usage both in England and this country . . . is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement"). And state courts have consistently recognized that the right to arms is subject to reasonable regulation, a standard that has afforded substantial leeway for state regulation of firearms to promote the safety and welfare of citizens. See Adam Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683,

686 (2007). See also Mosby v. Devine, 851 A.2d 1031, 1044 (R.I. 2004) (collecting cases).[13] Under the reasonable-regulation standard, the courts recognize "the legislative power to regulate arms" as an "inherent part of the 'police power,'" and even a legislative "duty . . . to make reasonable regulations for the purpose of protecting the health, safety and welfare of the people." Adam Winkler, The Reasonable Right to Bear Arms, 17 Stan. L. & Pol. Rev. 597, 601 (2006) (citing cases). As shown by state court decisions striking down blanket bans on the transportation of firearms, which effectively prohibit the bearing of arms altogether, a regulation cannot wholly deprive citizens of arms. See, e.g., City of Junction City v. Mevis, 601 P.2d 1145, 1152 (Kan. 1979); City of Lakewood v. Pillow, 501 P.2d 744, 745 (Col. 1972). See also State v. Dawson, 159 S.E.2d 1, 11 (N.C. 1968) (law that "would amount to a destruction of the right to bear arms would be unconstitutional"); Trinen v. City & County of Denver, 53 P.3d 754, 757 (Col. Ct. App. 2002) (state and local governments may not "enact legislation that renders constitutional provisions nugatory"); State v. McAdams, 714 P.2d 1236, 1237 (Wy. 1986) (same). But courts have regularly upheld firearms regulations that do not approach this high threshold and are not a "total prohibition against the use and possession of firearms," People v. Williams, 377 N.E.2d 285, 286-87 (Ill.

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[13] While the reasonable-regulation standard affords considerable latitude, it is not the same as a rational-basis test. The reasonable-regulation standard asks not whether the law is rationally related to legitimate governmental objectives, but whether it is a "reasonable limitation of the right to bear arms." Mosby, 851 A.2d at 1044. See also Winkler, Scrutinizing the Second Amendment, supra at 717. The standard of review is not presented by this case.

App. Ct. 1978), or that do not "functionally disallow the exercise of the rights," State v. Hamdan, 665 N.W.2d 785, 799 (Wis. 2003). "Altho[u]gh the Legislature may not entirely prohibit the right of the people to keep and bear arms, it can determine that certain arms or weapons may not be kept or borne by the citizen." Rinzler v. Carson, 262 So. 2d 661, 667 (Fla. 1972).

As important, state court decisions, unlike Heller, have not turned on whether the particular type of arm is one in common use. To the contrary, as this court explained in Sklar, under the Illinois Constitution, "the right is only a qualified right to bear some unspecified 'arms' rather than a right to bear any particular type of firearm." 727 F.2d at 637. Where other arms are available, and the right to possess them protected, the right to arms under state constitutions is not infringed. See, e.g., Benjamin v. Bailey, 662 A.2d 1266, 1232 (Conn. 1995) (upholding ban on assault weapons where "citizens have available to them some types of weapons" adequate for self-defense). Thus, when an ordinance does not "prohibit all firearms, it does not prohibit a constitutionally protected right." Quilici, 695 F.2d at 268.

In fact, state courts have routinely affirmed bans of particular classes of firearms, including handguns, see, e.g., Kalodimos, 470 N.E.2d 266; City of Cleveland v. Turner, No. 36126, 1977 WL 201393 (Ohio Ct. App. Aug. 4, 1977), as well as short-barreled shotguns, see, e.g., Carson v. State, 247 S.E.2d 68 (Ga. 1978); State v. Fennell, 382 S.E.2d 231 (N.C. App. 1989), machine guns, see, e.g., Rinzler, 262 So. 2d 661; Morrison v. State, 339 S.W.2d 529 (Tex. Crim. App. 1960), stun

guns, see, e.g., People v. Smelter, 437 N.W.2d 341 (Mich. Ct. App. 1989), assault weapons, see, e.g., Benjamin, 662 A.2d 1226; Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993), and semi-automatic weapons, see, e.g., City of Cincinnati v. Langan, 640 N.E.2d 200 (Ohio Ct. App. 1994).

The scope of the right recognized under state constitutions reflects "a profound judgment about the way in which law should be enforced and justice administered." Duncan, 391 U.S. at 155. Unlike the "deep commitment of the Nation to the right of jury trial in serious criminal cases" that could be discerned from the state constitutions in Duncan, id. at 156, the scope of state right-to-arms provisions reflects no similar deep commitment to categorical protection of certain arms or commitment not to consider and balance harm to the public welfare caused by certain arms. To the contrary, state and local governments routinely ban weapons that are, in their considered judgment, detrimental to the public welfare.

And it is not surprising that state courts have not tarried over whether weapons are popular for self-defense or whether they are in common use. That approach is utterly unworkable. Many of the features that make arms desirable for self-defense also make them attractive for criminal purposes, including homicide, suicide, and other firearms violence: they can be stored where readily accessible; they are small and lightweight; they are easier to control if someone tries to take them away; and they can be pointed at someone with one hand while leaving the other hand free. See Heller, 128 S. Ct. at 2818. Moreover, handguns in particular are overwhelmingly the weapon used in illegal armed violence, and are akin to the

type of dangerous weapons that Heller recognized are not historically protected. See id. at 2817. While the Court in Heller considered them to fall within the ambit of Second Amendment protection, it is reasonable for the States to refuse to provide a right to such dangerous weapons.

3. The purpose of self-defense in the home does not require access to any particular weapon, including those in common use, especially where adequate alternative arms are allowed.

Heller recognized an individual right to arms in common use that persists even after the purpose for codifying the right (the militia) is no longer relevant. Thus, the only remaining purpose to be served by possessing arms is not even the one that motivated its codification, but self-defense. A liberty interest in arms for self-defense protected by the Fourteenth Amendment is at most a right to use some sort of effective arm for self-defense. It does not demand a categorical protection for weapons in common use or any particular class of weapon. Again, unlike the single-minded focus on original intent in Heller, the Court's due process cases take account of other means to the same end. In Hurtado, for example, the Court refused to apply to the States the Fifth Amendment's requirement that felony charges be brought by grand jury indictment, reasoning that the "maxims of liberty and justice" "guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property," 110 U.S. at 532. The Court determined that grand jury indictment – even though obviously deemed important enough by the Framers to be included in the Bill of Rights – was nonetheless not required of the States, and that charging a defendant by information affords due

process when it "considers and guards the substantial interest of the prisoner." Id. at 537-38. And, if the right to grand jury indictment – an individual liberty interest expressly protected by the Fifth Amendment – is not incorporated because the core purpose can be served in other ways, then surely there is no basis to insist on incorporation through the Due Process Clause of a right to a handgun simply because it is in common use, when any purpose of self-defense can be served by other means.

Similarly, in determining that the right to jury trial in criminal cases is a fundamental liberty interest, the Court in Duncan emphasized the purpose behind the right, which is to "protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." 391 U.S. at 156. Even then, the States do not have to require jury unanimity when "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served" by a less than unanimous jury. Apodaca v. Oregon, 406 U.S. 404, 411 (1972). Nor do they have to use 12-person juries because that "cannot be regarded as an indispensable component of the Sixth Amendment" where reliability of a jury "hardly seems likely to be a function of its size," and "neither currently available evidence nor theory suggests that the 12-[person] jury is necessarily more advantageous to the defendant than a jury composed of fewer members." Williams v. Florida, 399 U.S. 78, 98, 101-02 (1970).

The interest in self-defense does not depend on handguns. It can be served

by many means and even many types of firearms. Self-defense, especially of one's home, is furthered by alarms, guard dogs and, in Chicago and Oak Park, rifles and shotguns.[14] Plaintiffs do not even attempt to discredit the utility of long guns for self-defense purposes in the home. At least one Civil War era source Heller relied upon touted "[t]he rifle" as the "efficient weapon" for use as the "tutelary protector . . . in just self-defense." 128 S. Ct. at 2807 (quoting Charles Sumner) (citation omitted). Among experts, there is a wealth of authority that handguns are not the best weapon for self-defense purposes. See Josh Sugarmann, Every Handgun is Aimed at You: The Case for Banning Handguns 58-59 (2001). See also Chris Bird, The Concealed Handgun Manual: How to Choose, Carry, and Shoot a Gun in Self-Defense 140 (2008) (handgun is "a compromise," "the least-effective firearm for self defense," and "the hardest firearm to shoot accurately," while "shotguns and rifles are much more effective in stopping a drug-hyped robber or rapist"); Unintended Consequences: Pro-Handgun Experts Prove that Handguns are a Dangerous Choice for Self-Defense, Violence Policy Center (2001) (available at www.vpc.org/studies/uninsum.htm.).[15] Handguns, therefore, are not essential to serve the core

[14] In this way, Chicago's ordinance differs from the one at issue in Heller. Although the District permitted long guns in the home, they had to be "unloaded and dissembled or bound by a trigger lock or similar device." Heller, 128 S. Ct. at 2788. While Heller did not emphasize that these restrictions limited the utility of long guns as an alternative to handguns, it is clear that they do; and it is equally clear that the availability of long guns makes a difference in assessing whether a regulation banning handguns renders a right to some type of arms for self-defense in the home nugatory.

[15] The amicus brief of International Law Enforcement Educators and Trainers ("ILEET") et al. argues that long guns are "inadequate substitutes" for handguns, but cites no authority for that point. See ILEET Br. 23-24. There is

purpose of any right to arms for self-defense.

4. Under the concept of ordered liberty, local governments should be afforded great latitude in regulating firearms, including weapons in common use.

As we explain above, the concept of "ordered liberty" is at the heart of the Supreme Court's interpretation of the Due Process Clause and its assessment of which rights fall within its protection. E.g., Duncan, 391 U.S. at 150 n.14. In turn, rights are implicit in the concept of ordered liberty when "neither liberty nor justice would exist if they were sacrificed." Glucksberg, 521 U.S. at 721. That the Court modifies "liberty" with the word "ordered" reflects the Lockean principle that, in an organized society (including American), liberty is not unbridled; instead, when individuals enter into organized society, individual liberty must at times yield to secure the greater exercise of liberties by others. See Steven J. Heyman, Natural Rights and the Second Amendment, 76 Chi. Kent L. Rev. 237, 244-46 (2000) (citing and discussing treatises and letter of John Locke). According to Blackstone, "no man that considers a moment, would wish to retain that absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and there would be no security to individuals in any of the enjoyments of life. Political therefore, or, civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the

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ample evidence to show the opposite, as we explain. More important, plaintiffs have not alleged that rifles or shotguns are unsuitable for self-defense purposes.

public." 2 Blackstone Commentaries on the Laws of England 125 (Tucker ed. 1803). Thus, while the law may diminish "natural rights," it "increases the civil liberty of mankind." Id. at 126.

The concept of "due process" amply accommodates these concerns in modern society.

> [B]asic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

Wolf, 338 U.S. at 27. State and local governments, therefore, should not be prevented from prohibiting possession of dangerous weapons simply because, before or despite restrictions on their possession, these weapons have become commonly possessed by law-abiding citizens. Indeed, if this is the test for determining which types of arms are protected from even state and local regulation, a constitutional right to a particular type of firearm could be created simply by flooding the market with it before the legislature moves to prohibit it – a perverse constitutional notion if ever there was one.

In urban environments, where handgun abuse is rampant, the right to possess the type of weapon most responsible for homicides, suicides, and other armed violence is not implicit in the concept of ordered liberty. The exercise of other rights – such as free speech or religious exercise – do not typically carry such

an inherent risk of danger to the liberty interests of others, as do firearms.[16] Handguns, on the other hand, cause death at a rate significantly higher than other generally available firearms. See Sugarmann, supra at 177 (more than two out of three fatalities from firearms violence were caused by handguns, even though two-thirds of guns owned by Americans are rifles or shotguns). Handguns are used to kill human beings in the United States more than all other weapons combined. See id. at 75. A study of data collected between 1976 and 2005 demonstrated that "[h]omicides are most often committed with guns, especially handguns," and nearly 60% of those homicides take place in large cities. Department of Justice, Bureau of Justice Statistics, Homicide Trends in the United States (available at http://www.ojp.gov/bjs/homicide/homtrnd.htm). In 2006 and 2007, handguns were used in 710 homicides in Chicago, while 21 involved rifles or shotguns. See Chicago Police Department, 2006-2007 Murder Analysis in Chicago, 24 (available at www.cityofchicago.org, by following the links to Chicago Police Department, News, Statistical Reports and Homicide Reports). Handguns are also far more frequently

[16] Of course, when they do, even First Amendment rights must in some circumstances yield to the government's interest of preserving public order, safety, or health. See, e.g., Virginia v. Black, 538 U.S. 343, 359-63 (2003) ("true threats" or intimidation); Jehovah's Witnesses in the State of Washington v. King County Hospital Unit No. 1, 390 U.S. 598, 598 (1968) (*per curiam*) (affirming, under Prince v. Massachusetts, 321 U.S. 158 (1944), judgment upholding constitutionality of statutes empowering courts to declare children dependent for purpose of authorizing blood transfusions over religious objections of parents); Prince, 321 U.S. at 166-70 (upholding child labor laws against assertion of right of religious exercise); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("fighting words"); Schenk v. United States, 249 U.S. 47, 51-52 (1919) (speech intended to influence obstruction of draft).

used in suicides than other firearms, see Sugarmann, supra at 38, especially in urban environments, see id. at 36. Finally, handguns are, by definition, concealable and therefore facilitate unlawful use in a manner wholly different from long guns.[17] Thus, in "an urban landscape, the Second Amendment becomes the enemy of ordered liberty, not its guarantor." Lawrence Rosenthal, Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs, 41 Urb. Lawyer 1, 87 (2009).

In these situations, it is the very governmental power to protect residents that is critical to the concept of ordered liberty. Indeed, the Supreme Court has recognized that government action that enhances the "basic human need for security," like the "power to bring an accused to trial[,] is fundamental to a scheme of 'ordered liberty.'" Sell v. United States, 539 U.S. 166, 180 (2003) (quoting Riggins v. Nevada, 504 U.S. 127, 135-36 (1992)). Enforcing handgun control laws can make a difference in curbing firearms violence. See, e.g., Rosenthal, supra at 30-44 (discussing studies showing New York City crime reduction correlating to police tactics directed at handguns); Colin Loftin, et al., Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia, 325 New Eng. J. Med. 1615 (1991) (District's handgun ban coincided with abrupt decline in firearms-caused homicides with no comparable decline elsewhere in the region). Although gun-rights advocates disagree, see, e.g., ILEET Br. 24-26, debate

[17] Heller acknowledged the constitutionality of prohibitions on carrying concealed weapons. See 128 S. Ct. at 2816-17 & n.26. It is unlawful in Illinois. See 720 ILCS 5/24-1(a)(4) (2006).

over how to strike the balance between stopping gun violence while enabling self-defense is precisely what has led the States to leave these policy judgments to their legislatures and to consistently tolerate gun regulation so long as it stops short of nullifying the right to arms.[18] The Court in Heller did not claim that any marginal utility of handguns for self-defense is so great that it is not offset by their greater likelihood to be unlawfully carried and used. And the stakes of gun violence are so high that, subject to a constitutional floor, States should have the greatest flexibility to create and enforce firearms policies.

It also makes sense that the Constitution would restrain the federal government more than States in the scope of its power to regulate firearms. Not only was it a fear of federal, not State, disarmament that inspired the Second Amendment, but reserving to the States the power to regulate within certain spheres is a hallmark of federalism that is as much a part of the constitutional design as the Bill of Rights. See U.S. Const. Art. IV § 4; Amend. X. The federal government does not feel the deleterious effects of handgun abuse as acutely as do state and local governments. Firearms regulation is a quintessential issue on which a state or local government can "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Chandler v.

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[18] ILEET grossly distorts the findings reported in Philip J. Cook, et al., Underground Gun Markets, 117 Econ. J. F558 (2007). See ILEET Br. 25. In fact, the authors emphasize, based on their study of underground gun markets, that an important contributing factor to the high transaction costs of underground gun markets is that handguns are illegal in Chicago, see 117 Econ. J. F581, and concludes "law enforcement efforts targeted at reducing gun availability at the street level seem promising," id. at F582.

Florida, 449 U.S. 560, 579 (1981). See also United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (noting that it is doubtful anyone "would argue that it is wise policy to allow students to carry guns on school premises," and under "the theory and utility of our federalism . . . States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

Thus, along with the history and purpose of the right to arms for self-defense, the concept of ordered liberty leads only to the conclusion that any right of armed self-defense does not demand protection of the right to possess any particular type of arms, including a handgun.

III. CONGRESSIONAL INTENT UNDERLYING THE FOURTEENTH AMENDMENT IS NO BASIS TO INCORPORATE THE SECOND AMENDMENT.

Plaintiffs argue that, aside from selective incorporation under the Due Process Clause, the Fourteenth Amendment incorporates the entire Bill of Rights through the Privileges or Immunities Clause, see McDonald Br. 19, or makes at least the Second Amendment applicable to the States, see NRA Br. 19-26. As we explain in Part I, the Supreme Court's square holding that the Second Amendment does not apply to the States forecloses this argument, just as it forecloses other arguments for incorporation. Beyond that, the Court has specifically rejected this approach to incorporation. Indeed, McDonald acknowledges that the argument for incorporation under the Privileges or Immunities Clause "is foreclosed by The Slaughter-House Cases," McDonald Br. 19, and that full incorporation of the Bill of

Rights "has never commanded a Court," id. at 20 n.5. And, in Adamson v. State of California, 332 U.S. 46 (1947), overruled on other grounds by Malloy, Justice Black made the case for incorporating Bill of Rights provisions based upon Fourteenth Amendment legislative history, see id. at 68 (Black, J., dissenting), but a majority of the Court disagreed, see id. at 52-53; id. at 63-64 (Frankfurter, J., concurring). The Court has, instead, adopted the selective incorporation approach we discuss above. Moreover, there is no reason to abandon the selective incorporation model where that approach has not proven unworkable and there have been no changes in the law or facts that warrant a new approach.

Besides being inconsistent with Supreme Court precedent, plaintiffs' arguments wilt under scrutiny. Heller holds that, to discern the meaning of constitutional provisions, one must look to "public understanding" of the words. 128 S. Ct. at 2805.

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

Id. at 2788 (citations omitted). Thus, the focus is on the understanding of voters and citizens. The plaintiffs do not hew to this approach, but focus almost exclusively on their reading of congressional intent, despite Heller's warning that "[i]t is dubious to rely on such history to interpret a text" if it is "widely understood" to mean something else. Id. at 2804. And the evidence of the public understanding of the Fourteenth Amendment generally, and the Privileges or Immunities Clause

in particular, does not reveal that ordinary citizens at the time the Fourteenth Amendment was adopted understood it to make the Second Amendment applicable to States.

As Heller explains, after the Civil War, there was "discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves," including how to put a stop to disarmament by southern States. 128 S. Ct. at 2810. That discussion produced the Fourteenth Amendment, the Freedmen's Bureau Act, see Act of July 10, 1866 § 14, 14 Stat. 173, 176, and the Civil Rights Act of 1866, see Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. Representative John Bingham, who drafted the Amendment, and Senator Jacob Howard, who introduced it in the Senate, expressed a view that the Fourteenth Amendment would address this issue by making the Bill of Rights applicable to States. See McDonald Br. 22-23; NRA Br. 22-23. But theirs was just one of several views expressed during debate. While "the Amendment's central principle" was to establish a "national guarantee of equality before the law," even Republicans "disagreed among themselves" about the "precise definition of equality before the law," and "did not deny one Democrat's description of the Amendment as 'open to ambiguity and . . . conflicting constructions.'" Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877 257 (1988). Indeed, plaintiffs themselves do not read the legislative history the same way. McDonald believes that the drafters intended the words "Privileges or Immunities" to include the first eight amendments of the Constitution. See McDonald Br. 22-23. NRA

does not take this position; it more narrowly claims the Fourteenth Amendment was "intended to protect the right to have arms from state violation," NRA Br. 17, but never explains which clause accomplished this.

As one scholar observes, there is support in legislative history for "no fewer than four interpretations of the . . . Privileges and Immunities Clause." David P. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 406 (2008). Some representatives denied that there was any settled meaning of the words "privileges and immunities," Cong. Globe 39th Cong., 1st Sess. 3039 (Sen. Hendricks), 3041 (Sen. Johnson) (1866), or described the Amendment as "open to ambiguity and . . . conflicting constructions," id. at 2467 (Rep. Boyer). One representative explained his view that the Amendment "allows Congress to correct the unjust legislation of the states, so far that the law which operates upon one man shall operate equally upon all." Id. at 2459 (Rep. Stevens). As one historian observes, during the debates, "the familiar precepts of liberty and equality . . . surface frequently," but "the amendment's proponents reached no agreement" about how the Amendment's ambiguous language would resolve specific issues. William Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 61-62 (1988). He concludes that "[o]nly one historical conclusion can . . . be drawn: namely, that Congress and the state legislatures never specified whether section one was intended to be simply an equality provision or a provision protecting absolute rights as well." Id. at 123.

Another scholar observes that, "[p]erhaps the single most frequently

expressed understanding of the proposed Amendment was that it constitutionalized the Civil Rights Act of 1866." Rosenthal, supra at 58; see id. n.297 (listing representatives who expressed this view). But that statute required only non-discrimination, providing that "all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to previous condition of slavery or involuntary servitude . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for security of person and property, as is enjoyed by white citizens." 14 Stat. 27.

As plaintiffs emphasize, the Freedmen's Bureau Act was another of Congress's efforts to restore order and address disarmament of freed slaves. It, too, required the States to treat citizens equally, including with respect to the right to bear arms, by providing that "where the ordinary course of judicial proceedings has been interrupted by rebellion . . . the right to . . . have full and equal benefit of all laws . . . including the right to bear arms, shall be secured and enjoyed by all citizens of such State or district without respect or race or color, or previous condition of slavery." 14 Stat. 176. The debates preceding enactment reflect this anti-discrimination purpose. See, e.g., NRA Br. 19-20 (quoting Senator Trumball's statement that it would protect the "full and equal benefit of all laws and proceedings for the security of person," and Representative Chandler's statement that "'[t]he right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term") (citations omitted). Moreover, the Freedmen's Bureau Act is not itself an example of broad congressional restraint of

state governments, since it applied only in areas where "the ordinary course of judicial proceedings has been interrupted by rebellion" and "constitutional relations to the government have been practically discontinued," and only until such state government was "restored." 14 Stat. 176.

Moreover, as Heller teaches, the drafters' intent is only one piece of assessing the public understanding of constitutional terms, since the point is to discern how the words were understood "by the voters." 128 S. Ct. at 2788. There is little evidence outside the congressional debates showing that certain members of Congress "clearly, publicly, and candidly conveyed" an incorporationist "intent to the country." George C. Thomas, III, The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthall, 68 Ohio St. L.J. 1627, 1657 (2007). As for the treatises of the day, the 1868 and 1871 editions of Thomas Cooley's "massively popular" treatise, 128 S. Ct. at 2812, restated the rule of Barron and "nowhere suggested" that the Fourteenth Amendment "applied the Bill of Rights to the states," while an 1873 edition "more clearly rejected the incorporation doctrine," Bryan Wildenthal, Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73 19-20, 24 (2009) (available at ssrn.com/abstract=1354404). Among other leading treatises, some reflected incorporationist views, while others did not reflect this purported great change in the constitutional landscape. See id. at 25-99.

As for the state ratification process, scholars tend to agree that there is a dearth of evidence about those debates. Nevertheless, there is evidence that some

viewed the Amendment as an anti-discrimination rule, or to embody the Civil Rights Act. See Rosenthal, supra at 62; James E. Bond, The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania, 18 Akron L. Rev. 435, 448-49 (1985). Even Republicans who espoused incorporationist views of the Fourteenth Amendment in congressional debates often explained it in the ratification process as requiring the states to treat citizens equally. See Saul Cornell, A Well-Regulated Militia 174 (2006). For instance, Representative Bingham himself portrayed the Fourteenth Amendmen as "the golden rule," requiring "equal laws and equal and exact justice," and even declared that "[i]t takes from no State any right which hitherto pertained to the several States of the United States." Id. (quoting speeches reported in Cincinnati Commercial).

Moreover, as Heller also illustrates, judicial opinions around the time that a constitutional provision is adopted are potent evidence of public understanding. See 128 S. Ct. at 2808-11. But Supreme Court decisions in the wake of Fourteenth Amendment ratification reflect no public understanding that it incorporated the Bill of Rights. In Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321 (1868), the Court rejected Fifth and Sixth Amendment challenges to a state indictment, based on Barron. If the public understood the Privileges or Immunities Clause to undo Barron, as Rep. Bingham claimed in Congress, surely that would not have gone

unnoticed by the Supreme Court or Twitchell's lawyer.[19] And in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), the majority rejected the claim that the Privileges or Immunities Clause imposed the Bill of Rights on the States, describing it instead as protecting only rights that are national in scope, such as to use navigable waters, move from state to state, and assert rights under treaties, see id. at 79-80. Just two years later, in Edwards v. Elliott, 88 U.S. (21 Wall.) 532 (1874), the Court unanimously rejected a claim that the Seventh Amendment right to trial by jury was a privilege and immunity of citizenship. Then, Cruikshank, decided in 1876, held that the Second Amendment restrains only Congress. Moreover, Cruikshank described the purpose of the Fourteenth Amendment as ensuring that the States do not deny "[t]he equality of the rights of citizens," "but no more." 92 U.S. (2 Otto) at 555. Court decisions of the era simply do not display a public understanding that either the Bill of Rights generally, or the Second Amendment in particular, was incorporated into the Fourteenth Amendment.

In short, with so many competing takes on the Fourteenth Amendment's meaning, the incorporationist views of some members of Congress provide no solid ground upon which to build an entirely new framework for incorporation.

IV. JUDGMENT ON THE PLEADINGS WAS PROPER ON ALL COUNTS.

Because the Second Amendment is not imposed upon the States through the

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[19] Indeed, Twitchell's lawyer was, himself, a "constitutional theorist who had promoted the concept of incorporation," and his failure to argue incorporation in Twitchell indicates he "did not share Bingham's understanding" that the Fourteenth Amendment accomplished that. Thomas, supra at 1653.

Fourteenth Amendment, the district court properly granted judgment on the pleadings. As for plaintiffs' attacks on the handgun bans, these claims depend upon incorporation of the right to handguns Heller discerned in the Second Amendment common-use right. Indeed, plaintiffs do not argue that, even without incorporation of the Second Amendment right, the Chicago and Oak Park handgun bans are unreasonable regulation – or invalid under any other level of scrutiny. And if a right to arms enjoys Fourteenth Amendment protection at all, it is only arguably the far more limited right to some type of arm for self-defense and does not extend to any particular category of weapons, provided the right can be exercised without that particular type of arm.

McDonald also challenged, on Second Amendment grounds, Chicago's annual and pre-acquisition registration requirements and the penalty of unregisterability for failure to comply with those requirements. See McDonald Br. A-10 to A-11.[20] Those claims fail because the Second Amendment does not restrict the States, as we have explained. Besides that, the registration and renewal requirements impose

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[20] McDonald also appeals the denial of summary judgment. See McDonald Br. 45. Because judgment on the pleadings was proper, this court need not address the merits of McDonald's summary judgment motion. Regardless, McDonald is plainly not entitled to summary judgment. Chicago does not accept all of McDonald's allegations as true, and McDonald has not yet answered discovery. Nor has Chicago had the opportunity to respond to McDonald's motion. "Summary judgment . . . should not be granted until the party opposing the motion has had an adequate opportunity for discovery." Farmer v. Brennan, 81 F.3d 1444, 1449 (7th Cir. 1996). Moreover, "a litigant who fails to answer potentially relevant discovery requests on schedule will be unable to demand summary judgment until after he remedies his failure." Id. at 1450. If judgment on the pleadings were reversed, the case should be remanded for discovery and response to the summary judgment motion.

only a minor burden on firearms owners. "[N]ot every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right." Planned Parenthood v. Casey, 505 U.S. 833, 873 (1992). Accord Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (not all burdens on voting rights are constitutional infringements). In particular, any historically rooted right to arms is infringed only by regulation that effectively vitiates the right to arms, and Chicago's registration requirements certainly do not do that. A firearm owner must only complete paperwork and pay a fee. And the penalty of non-registerability for a failure to comply with these requirements is not unduly burdensome, either. Compliance with simple registration requirements will avoid that penalty, and a qualified owner who has failed to do so can still possess a different registerable firearm – and the heightened incentive to comply with registration requirements for that one is a positive good. Annual registration and registration before possessing a firearm in Chicago is, at most, inconvenient – plaintiffs do not even allege that these requirements prevent them from possessing arms for self-defense in their home.

The plaintiffs' equal protection challenges fail, too. NRA's equal protection claim against Chicago attacked the exceptions for handguns registered before the ban; owned by detective agencies and security personnel; and possessed by non-residents participating in or traveling to lawful firearm-related recreation. See NRA Sep. App. A-37. NRA's claim against Oak Park attacked exceptions for licensed firearm collectors and theater organizations. See id. at A-42 to A-50. This court has already determined that, without Second Amendment incorporation,

firearms regulations do not "impinge upon any federal constitutional rights," and so the Second Amendment is no basis for elevated scrutiny under the Equal Protection Clause. Sklar, 727 F.2d at 637. And NRA makes no claim that these regulations do not pass rational-basis scrutiny. To the contrary, NRA recognizes that, without Second Amendment incorporation, its equal protection claims fail, since it opposed the motion for judgment on the pleadings solely on the ground that the district court erred in holding that the Second Amendment does not apply to Chicago and Oak Park. See Dec. 9, 2008 Tr. 10, 12, 14. See also id. Tr. 6 ("we think that Counts 2 and 3 are driven by Count 1, the incorporation issue"). Since the district court's ruling on incorporation was correct, judgment on the pleadings for NRA's equal protection claims was proper as well.

McDonald's equal protection challenge to the unregisterability penalty for weapons possessed without proper registration, see McDonald Br. 44, similarly fails. Again, without the Second Amendment, there is no basis for heightened scrutiny. McDonald hints that the registration requirements do not even pass rational-basis scrutiny, see id., but clearly they do. The renewal and pre-acquisition requirements allow Chicago to keep an up-to-date inventory of legally-possessed guns; to facilitate fast and reliable tracing of crime guns; and to reduce illegal firearms sales by creating accountability for gun owners. And the penalty of non-registerability is an eminently rational means of ensuring compliance. Indeed, the Illinois Appellate Court has held just that. See Hunt v. Daley, 677 N.E.2d 456, 462 (Ill. App. Ct. 1997).

McDonald asserts that People's Rights Organization v. City of Columbus, 152 F.3d 522 (6th Cir. 1998), held that it is "unconstitutional to base registerability of firearms upon prior compliance with registration law," McDonald Br. 44, but that misrepresents the holding. That case involved an equal protection challenge to a law that banned assault weapons but included a grandfather clause excepting certain weapons that had been lawfully registered. See 152 F.3d at 531. The registration requirement, however, was unconstitutionally vague about which weapons were "assault weapons" that must be registered. See id. The court held that, under those circumstances, it was irrational to treat previously registered firearms differently than unregistered ones. See id. Neither that case, nor any other, supports the proposition that, where non-registration cannot be blamed on a vague ordinance, individuals who do not comply with registration laws cannot be treated differently than individuals who have.

CONCLUSION

For all these reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)(I)

In accordance with Fed. R. App. P. 32(a)(7)(C)(I), and this court's April 9, 2009 order granting the appellees leave to file an oversized brief not to exceed 18,000 words, I certify that the Brief of the Defendants-Appellees City of Chicago and Village of Oak Park complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i) because it contains 16,641 words, beginning with the words "JURISDICTIONAL STATEMENT" on page 1 and ending with the words "Respectfully submitted" on page 64. In preparing this certificate, I relied on the word count of the word-processing system used to prepare the brief, which was WordPerfect 12.

SUZANNE M. LOOSE, Attorney

CERTIFICATE OF COMPLIANCE WITH 7TH CIR. R. 31(e)(1)

In accordance with 7th Cir. R. 31(e)(1), I certify that a digital version of the Brief of the Defendants-Appellees City of Chicago and Village of Oak Park has been furnished to the court.

SUZANNE M. LOOSE, Attorney

CERTIFICATE OF SERVICE

I certify that I caused the Brief of the Defendants-Appellees to be served by placing two bound paper copies and one computer disk containing the digital version in an envelope with sufficient postage affixed and directed to the persons named below at the addresses indicated, and by depositing the envelopes in the United States mail box located at 30 North LaSalle Street, Chicago, Illinois, 60602, before 5:00 p.m. on April 17, 2009.

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