No. 08-1521

IN THE
Supreme Court of the United States

OTIS MCDONALD ET AL.,
Petitioners,
v.
CITY OF CHICAGO ET AL.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE MARYLAND ARMS COLLECTORS' ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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INTEREST OF AMICUS CURIAE[1]

The Maryland Arms Collectors' Association, Inc., is a Not For Profit Corporation voluntary membership corporation. It was established in 1949 and is incorporated in Maryland. Membership requirements include being a United States citizen, being at least 18 years of age, and having no criminal record. Its over 200 individual members are bound together by a common interest in the collecting, preserving, using, and/or studying of any type of arms and/or accessories pertaining to the arms field. The firearms that are collected include pistols, rifles, and shotguns. The collections cover a variety of historical periods, including colonial and modern times. Many members keep these arms for traditional purposes, such as defense of self and family.

Collecting firearms is a popular hobby in all fifty states. Most members of the Maryland Arms Collectors' Association (MACA) reside in Maryland, one of six states with no guarantee to bear arms in its state constitution. The other states also with no such guarantee are California, Iowa, Minnesota, New

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[1] Rule 37.6 notice.
The parties have consented to the filing of this brief, reflected in letters filed by the parties with the Clerk of the Court. Counsel of record for all parties received written advance timely notice of intent to file this brief. No counsel for a party authored the brief in whole or in part. No counsel for a party or party made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided by NRA Civil Rights Defense Fund, a not for profit 501(c)(3) fund.

Jersey, and New York. The lack of a guarantee to bear arms is a detriment to millions of law-abiding adults.

MACA files this brief because its members are among the people who enjoy no protection to keep their arms unless this Court holds that the Second Amendment applies to the states through incorporation of the due process clause or through incorporation of the privileges or immunities clause of the Fourteenth Amendment The Fourteenth Amendment was adopted in 1868 to curb abuses of constitutional rights by the states, including the right to keep and bear arms. Maryland's constitution has no right to bear arms. A right to keep and bear arms guarantee was proposed at the Maryland constitutional convention, but it was defeated. Why was the proposal defeated? According to records of the debates in the Maryland constitutional convention of 1867, some delegates assumed the Second Amendment applied to the states and that such a guarantee, therefore, would not be necessary in the Maryland constitution. And there were other delegates with racist reasons; for example, the proposal that "every citizen has the right to bear arms in defence of himself and State" was subject to an attempt to amend by inserting "white" after the word "every." Stephen P. Halbrook, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 111 to 113 (Greenwood Press 1989). See also Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Georgetown L. J. 309, 342-49 (1991).

SUMMARY OF ARGUMENT

The right to keep and bear arms is incorporated against the States by the Fourteenth Amendment, and the people of Maryland have been waiting for that recognition since 1868 when the amendment proposed by the 39th Congress was ratified by the States.

Congressman John A. Bingham, the author of Section 1 of the Fourteenth Amendment, called the Fourteenth Amendment the "amendment to enforce the Bill of Rights."[2]

In the words of University of Akron law professor Richard L. Aynes, "the Fourteenth Amendment had a very practical purpose. It was designed to offer federal protection to the most precious rights of American citizens that pre- and post-Civil War events demonstrated were so essential." The protection of Second Amendment rights was part of that design.[3]

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[2] John A. Bingham. Reprinted distribution pamphlet of speech "One country, one Constitution, and one people. Speech of Hon. John A. Bingham, of Ohio, in the House of Representatives, February 28, 1866, in support of the proposed amendment to enforce the bill of rights." Library of Congress, Rare Books, AC901.M5, Vol. 475, No. 11 Misc. Pam.

[3] Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future,* 18 J. Contem. Legal Issues ___ (forthcoming 2009).

In the words of Wake Forest University law professor Michael Kent Curtis, the modern historian of the Fourteenth Amendment, "The rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States [included] the right ... to bear arms."[4]

Michigan State University law professor Michael Anthony Lawrence says there are two ways that the right to keep and bear arms applies to the states: First, it could be incorporated by the Privileges or Immunities Clause of the Fourteenth Amendment. Second, it could be incorporated by the Due Process Clause of the Fourteenth Amendment.[5] Direct application is foreclosed by *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247-51 (1833).

The history of the adoption of the Fourteenth Amendment shows that its Privileges or Immunities Clause was intended to protect the Second Amendment from infringement by the states. Privileges and immunities under Article IV, Section 2 of the U.S. Constitution included "the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393, 417 (1857). Surely it is not

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[4] Michael Kent Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 104 (Duke University Press 1986). See pp. 52, 53, 56, 72, 88, 140-1 and 164 for debate extolling the right to arms expressly.

[5] Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Missouri L. Rev. 1 (2007).

surprising that the Second Amendment was understood to have been intended to be included in the privileges or immunities clause of the Fourteenth Amendment. However, employing this kind of original-meaning jurisprudence would require revisiting the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), and *United States v. Cruikshank*, 92 U.S. 542 (1876).

The Second Amendment also applies to the states through the Fourteenth Amendment's Due Process Clause. This option achieves the protection of the right to keep and bear arms from state infringement by applying well-established rules on selective incorporation. The right to keep and bear arms meets the test of being "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n. 14 (1968). *District of Columbia v. Heller*, 128 S.Ct. 2783, 2798-99, 171 L.Ed.2d 637 (2008), emphasizes this right was "one of the fundamental rights of Englishmen." *Heller* also stresses that the "inherent right of self-defense has been central to the Second Amendment right," which explains why the right to arms is "fundamental" in the sense articulated in *Duncan*'s incorporation test. 128 S.Ct. at 2817. The right protected by the Second Amendment meets the Court's test of what is "fundamental" far more easily than other rights that have already been incorporated, some of which were never even included in the fundamental provisions of the English Bill of Rights. Nelson Lund, *Anticipating the Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 195 (2008).

ARGUMENT

I. Incorporation Is Possible Under the Privileges or Immunities Clause.

Incorporation of the Second Amendment could occur through the Privileges or Immunities Clause. That Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV, § 1. Professor Laurence H. Tribe endorses incorporation of the Second Amendment through the Privileges or Immunities Clause. According to Professor Tribe, the Second Amendment "directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action." Laurence H. Tribe, I AMERICAN CONSTITUTIONAL LAW 901-02 n.221 (3rd Ed., Foundation Press 2000). In *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), a plurality of this Court incorporated part of the First Amendment through the privileges or immunities clause of the Fourteenth Amendment.

Incorporation through privileges or immunities is supported by the intent of the framers of the Fourteenth Amendment and by public understanding at the time the amendment was adopted.

A. Incorporation is supported by the intent of the framers of the 14th Amendment:

As Harvard law professor Mark Tushnet argues in *The Future of the Second Amendment*,[6]

> [T]he next step will be litigation challenging state and local gun control regulation, in which the first issue will be whether the Fourteenth Amendment makes the restrictions the Second Amendment imposes on the national government applicable to the states as well. On originalist grounds, such an "incorporation" seems to me unquestionably correct. The debates over the Fourteenth Amendment's adoption are replete with comments that one of the Amendment's benefits would be to ensure that the South's freedmen would be able to protect themselves from marauding whites by guaranteeing their own right to arm themselves. The only embarrassment is a doctrinal one: all these references described the right to keep and bear arms as one of the privileges of the citizenship that the Fourteenth Amendment guaranteed and contemporary incorporation doctrine rests not on the privileges and immunities clause of the Fourteenth Amendment, but rather on its due process clause.

See also Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. Contemp.

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[6] Mark Tushnet, *The Future of the Second Amendment*, 1 Albany Gov't L. Rev. 354, 355 n. 4 (2008).

Legal Issues ___ (forthcoming 2009), available at http://ssrn.com/abstract=1354404 (posted March 6, 2009, and revised September 9, 2009).

The Fourteenth Amendment must be read as a whole. People who are not citizens of the United States would continue to be protected under the equal protection and due process clause. *Plyler v. Doe*, 457 U.S. 202 (1982). Therefore, incorporation under privileges or immunities would not undermine the rights of non-citizens because their rights are protected by the Fourteenth Amendment's guarantee to equal protection and due process.

B. Incorporation is supported by public understanding of the 14th Amendment at the time of adoption:

Research by legal scholar David T. Hardy found that "[t]he legislative history of the Amendment, and of related legislation, was reported to the public in detail that seems unbelievable to a modern political enthusiast, accustomed to the electronic media's sound bites and to print journalism that focuses upon condensing, digesting and interpreting events for the reader."[7]

When Congressman Bingham gave his floor speeches in the House of Representatives on February 26 and 28, 1866, he made clear his argument that the

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[7] David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68,* 30 Whittier L. Rev. 695 (2009).

proposed Amendment would serve to enforce the Bill of Rights against the states. The New York Herald newspaper, at the time considered the "the most largely circulated journal in the world,"[8] carried Bingham's February 26 speech on the front page. When he spoke again on February 28, the Herald again carried his speech on the front page. David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695 (2009).

When Senator Jacob Howard spoke in the Senate on May 23, 1866, he also described the Fourteenth Amendment as needed to protect liberties guaranteed by the Federal Bill of Rights, needed so that the same rights enforced against the Federal government would be enforced against the States. *Id.* Hardy's research found that the day after Senator Howard's speech, the New York Times reported in transcript-like detail Sen. Howard's floor speech."

The American citizens who ratified the Fourteenth Amendment would have understood that the Amendment was being offered to enforce the entire Bill of Rights on the States. Persons who would suggest that Senator Howard's speech was not widely known by citizens of the time "must deal with the fact that his description [of the Amendment] made front pages of the New York Times and the New York Herald, was carried in the Philadelphia Inquirer, and was covered by many smaller papers." *Id.*

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[8] *New York Herald History*, http://nyherald.com/new-york-herald-history/

II. Incorporation is possible under the Due Process Clause.

Selective incorporation through the Due Process Clause of the Fourteenth Amendment is the modern method used to apply guarantees in the Bill of Rights to the states. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to criminal jury); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against compelled self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of evidence obtained by unreasonable search and seizure); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Establishment Clause).

Applying the sort of Fourteenth Amendment inquiry required by this Court in the above cases compels a finding that the Second Amendment applies to the states.

A. The 2nd Amendment meets the *Duncan* and *Glucksburg* fundamentalities test:

The Fourteenth Amendment prevents "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Constitution Amendment XIV, § 1. Under the doctrine known as substantive due process, this Clause "guarantees more than fair process, and the `liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). With this doctrine, due process encompasses certain "fundamental" rights. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). Selective

incorporation is a species of substantive due process, in which the rights that the Due Process Clause protects include some of the substantive rights enumerated in the first eight amendments of the Bill of Rights to the Constitution. *See Twining v. New Jersey*, 211 U.S. 78, 99 (1908) ("[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."). *See also Glucksberg*, 521 U.S. at 720 (speaking of enumerated rights together with implied fundamental rights in the context of substantive due process). Both selective incorporation and substantive due process require a positive response to the following question: Is a right so fundamental that the Due Process Clause guarantees it? Substantive due process addresses unenumerated rights; selective incorporation, by contrast, addresses enumerated rights.

Under the familiar early formulation of *Palko v. Connecticut*, 302 U.S. 319 (1937), only those rights "implicit in the concept of ordered liberty" were incorporated. However, *Palko* was overruled by *Benton v. Maryland*, 395 U.S. 784 (1969).

This Court ultimately abandoned the imprecise test in *Palko* in favor of a more concretely historical one. In *Duncan*, the Court recognized that it had abandoned the imprecise rule in *Palko* for an analysis grounded in the "actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country." 391 U.S. at 149 n. 14. Therefore,

incorporation turns on "whether given this kind of system a particular procedure is fundamental -- whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* In determining whether the Due Process Clause incorporated the right to jury trials in criminal cases, *Duncan* noted that every American state "uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict." *Id.* This Court also reviewed the place of the right in pre-Founding English law and in the Founding era itself. *Id.* at 151-54. This Court cited the English Declaration and Bill of Rights, Blackstone's COMMENTARIES, early state constitutions, and other evidence from the Founding era.

B. The 2nd Amendment meets the well-established selective incorporation rules:

Just as *Duncan* defined "fundamental rights" as those "necessary to an Anglo-American regime of ordered liberty," so also this Court has determined, outside the context of incorporation, that only those institutions and rights "deeply rooted in this Nation's history and tradition" can be fundamental rights protected by substantive due process. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). This Court noted the similarity between this general substantive due process inquiry and the incorporation test stated in *Duncan*. *See also Glucksberg*, 521 U.S. at 721 ("Our Nation's history, legal traditions, and practices ... provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause."

Internal quote from *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Therefore, incorporation is logically a part of substantive due process. Applying this test, the right to keep and bear arms ranks as fundamental, meaning "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n. 14. Therefore, the Fourteenth Amendment incorporates it. Furthermore, the right is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 721. Guided by both *Duncan* and *Glucksberg*, history shows that the attitudes and historical practices of the Founding era and the post-Civil War period compel a finding that this right is deeply rooted in this Nation's history and tradition.

The Second Amendment guarantees a right that is not limited to citizens of the United States. It reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Language throughout *District of Columbia v. Heller*, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), states that the right to keep and bear arms is fundamental by characterizing it in the same way that other opinions described enumerated rights found to be incorporated. The prefatory clause of the Second Amendment describes part of the right it protects. This Court held in *Heller* that the phrase necessary to the "security of a free State," means necessary to the "security of a free polity." *Heller*, 128 S.Ct. at 2800. Hence, the text of the Second Amendment already holds that the right it protects relates to an institution, the militia, which is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n. 14. The parallel

is striking, particularly because the militia historically comprised all able-bodied male citizens. *Heller*, 128 S.Ct. at 2799.

Even before the Second Amendment, this necessary "right of the people" existed as "one of the fundamental rights of Englishmen." *Id*. at 2797-98. *Heller* identified several reasons why the militia was considered "necessary to the security of a free state." First, "it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary.... Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id*. at 2800-01. In addition to these civic purposes, *Heller* characterized the right to keep and bear arms as a corollary to the individual right of self-defense. *Id*. at 2817 ("[T]he inherent right of self-defense has been central to the Second Amendment right."). Thus the right contains both a political component (a means to protect the public from tyranny) and a personal component (a means to protect the individual from threats to life or limb). The personal component protects the fundamental right to life and personal security and autonomy. "The right to defend oneself from a deadly attack is fundamental." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982). The right is fundamental for a practical reason: a person has to be alive to enjoy a right.

As reasoned in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), *rehearing en banc granted*,

> We begin with the Founding era. *Heller* reveals evidence similar to that on which *Duncan* relied to conclude that the Due Process Clause incorporated the right to a jury in criminal cases. The analysis in both *Heller* and *Duncan* began with the 1689 English Declaration of Right (which became the English Bill of Rights). *Compare Heller*, 128 S.Ct. at 2798 (noting that the Declaration of Right included the right to bear arms), *with Duncan*, 391 U.S. at 151 (noting that the Declaration of Right included the right to a jury trial).

The English Bill of Rights was a clear statement of the "undoubted rights and liberties" of Englishmen. As such, it was a precursor to our own Bill of Rights. (English Bill of Rights, 1689, 1 Wm. & Mary, ch. 2, sec. 7.)

Continuing with the reasoning as found in *Nordyke*:

> Thus the right to keep and bear arms shares ancestry with a right already deemed fundamental. *Cf. State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion) (relying solely on the presence of a prohibition against cruel and unusual punishments in the English Bill of Rights for the conclusion that it is incorporated into the Due Process Clause of the Fourteenth Amendment).

The parallel continues. *Heller* noted the emphasis that Blackstone placed on the right, just as *Duncan* had looked to Blackstone. *Compare Heller*, 128 S.Ct. at 2798 ("Blackstone ... cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen"), *with Duncan*, 391 U.S. at 151-52 (citing Blackstone). This is significant because Blackstone "constituted the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 706, 715 (1999). His [Blackstone's] theoretical treatment of the right to bear arms provides insight into how American colonists would have understood it.

Blackstone gave the right to bear arms pride of place in his scheme. He divided rights of persons into absolute rights and relative rights. *See* William Blackstone, 1 COMMENTARIES *123-24 (1765). It is "the principal aim of society," according to Blackstone, "to protect individuals in the enjoyment of those absolute rights," *id.* at *124-25; England alone among nations had achieved that aim. Blackstone defined these absolute rights as "personal security, personal liberty, and private property." *Id.* at *141. However, the English Constitution could secure the actual enjoyment of these rights only by means of certain "barriers" designed "to protect and maintain [them] inviolate." *Id.* The right to bear arms ranked among these

"bulwarks of personal rights." *Id*. Blackstone considered the right "a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id*. at *144. *See also Heller*, 128 S.Ct. at 2798-99 ("[T]he right secured in 1689 as a result of the [abuses of the Stuart monarchy] was by the time of the founding understood to be an individual right protecting against both public and private violence."). For readers of Blackstone, therefore, the right to bear arms closely followed from the absolute rights to personal security, personal liberty, and personal property. It was a right crucial to safeguarding all other rights. Blackstone's view of the right to bear arms pervades the writings of the Revolutionary generation. *See, e.g.*, Samuel Adams, Letter to the Editors, Boston Gazette, February 27, 1769, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 90 (Philip B. Kurland & Ralph Lerner eds. 1987). It also suffused public discourse at the time of the Fourteenth Amendment's enactment. *See* Amar, *supra,* at 261-64 (providing examples); *infra* pp. 4492-94.

The behavior and words of the colonists themselves also demonstrate the right's importance. As *Heller* pointed out, the American colonists of the 1760s and 1770s strongly objected to royal infringements on the

right to keep and bear arms, just as they objected to the Crown's interference with jury trials, a fact that *Duncan* highlighted. *Compare Heller*, 128 S.Ct. at 2799 ("[T]he Crown began to disarm the inhabitants of the most rebellious areas[, which] provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms."), *with Duncan*, 391 U.S. at 152 ("Royal interference with the jury trial was deeply resented."). A year before the Boston Massacre in 1770, one pamphleteer commented on the tensions between suspicious colonists and the British troops quartered in the city:

> Instances of the licentious and outrageous behavior of the *military conservators* of the peace still multiply upon us, some of which are of such a nature ... as must serve fully to evince that a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defense, was a measure as *prudent* as it was *legal*: such violences are always to be apprehended from military troops, when quartered in the body of a populous city.... It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.

A Journal of the Times, March 17, 1769, New York Journal, Supp. 1, April 13, 1769, *quoted* in Stephen Halbrook, A RIGHT TO BEAR ARMS 7 (1989). Thus, the events of the age confirmed Blackstone's assessment of the nature of the right.

Revolutionary agitators and theoreticians further advocated this Blackstonian view of the right to keep and bear arms. Two years after the Boston Massacre, Samuel Adams wrote, in a report of one of the Committees of Correspondence, that

> [a]mong the Natural Rights of the Colonists are these[:] First, a right to Life; Secondly, to Liberty; thirdly, to Property; *together with the Right to support and defend them in the best manner they can* -- Those are evident Branches of, rather than deductions from, the Duty of Self-Preservation, commonly called the first Law of Nature.

Samuel Adams, *The Rights of the Colonists* (1772), *reprinted* in 5 *The Founder's Constitution*, *supra*, at 394, 395 (emphasis added). Writing to an American unionist in 1775, Alexander Hamilton threatened armed resistance to British invasions of American rights. *See* Alexander Hamilton, *The Farmer Refuted* (1775) *reprinted* in 1 THE WORKS OF ALEXANDER HAMILTON 55, 163 (Henry Cabot Lodge ed., 1904) ("If [Great Britain] is determined to enslave us, it must be by force of arms; and to attempt this, I again assert,

> would be nothing less than *the grossest infatuation, madness itself*."); *see also id.* at 62-64 (referring to Blackstone's conception of "absolute rights").
>
> Thus, if the suspension of trial by jury, taxation without representation, and other offenses constituted the most offensive instances of British tyranny, the ability to call up arms-bearing citizens was considered the essential means of colonial resistance. Indeed, the attempt by British soldiers to destroy a cache of American ammunition at Concord, Massachusetts, sparked the battles at Lexington and Concord, which began the Revolutionary War.

Seizures were not confined to armories and magazines. The British also seized the arms of individual civilians. Bostonians were forced to surrender 1,778 muskets, 973 bayonets, 634 pistols, and 38 blunderbusses. Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON AND OF THE BATTLES OF LEXINGTON, CONCORD AND BUNKER HILL 95 (6th ed. 1903). The July 6, 1775, *Declaration of the Causes and Necessity of Taking Up Arms* by the Continental Congress included the complaint that the inhabitants of Boston were disarmed by British General Gage. DOCUMENTS OF AMERICAN HISTORY 92, 94 (5TH ED. 1949).

From *Nordyke*:

> For the colonists, the importance of the right to bear arms "was not merely speculative theory. It was the lived experience of the[ ] age." Akhil Reed Amar, *supra*, at 47 (referring

to Locke's conception of the right of revolution).

This lived experience informed the colonists when they set out to form a government. They considered, by the light of experience as well as of education, that preserving the right to bear arms was the appropriate way both to resist the evil of standing armies and to render the evil unnecessary. *See Heller*, 128 S.Ct. at 2800-01. Advocating for the new Constitution, Hamilton argued that "if circumstances should at any time oblige the government to form an army of any magnitude[,] that army can never be formidable to the liberties of the people while there is a large body of citizens... who stand ready to defend their own rights and those of their fellow-citizens." The Federalist No. 29, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As it was to many of his fellow citizens, a citizenry possessed of arms and trained in their use "appear[ed] to [Hamilton] the only substitute that c[ould] be devised for a standing army, and the best possible security against it, if it should exist." *Id*.

This brief survey of our history reveals a right "deeply rooted in this Nation's history and tradition." Moreover, whereas the Supreme Court has previously incorporated rights that the colonists fought for, we have here both a

right they fought for and the right that allowed them to fight.

Evidence from the post-Revolutionary years strengthens this impression. Supreme Court Justice James Wilson, one of the framers of the Pennsylvania Constitution and of the Federal Constitution, referred, in one of his lectures on the common law (delivered serially from 1790 to 1791), to the right of self-defense as "the great natural law of self-preservation, which... cannot be repealed, or superseded, or suspended by any human institution .... [It is] expressly recognized in the constitution of Pennsylvania." James Wilson, Lecture on the Right of Individuals to Personal Safety, *in* 3 The Works of the Honorable James Wilson 77, 84 (Bird Wilson ed., Phila., Lorenzo Press 1804). St. George Tucker, editor of "the most important early American edition of Blackstone's Commentaries," *Heller*, 128 S.Ct. at 2799, extolled the right to bear arms as the "true palladium of liberty." St. George Tucker, *View of the Constitution of the United States*, *in* 1 *Blackstone's Commentaries* app. at 300 (St. George Tucker ed., Phila., William Birch Young & Abraham Small 1803). Emphasizing the right's importance, Tucker cautioned that "[w]herever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." *Id*. Justice

> Joseph Story, in his influential Commentaries on the Constitution, echoed that sentiment. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1890, at 746 (Boston, Hilliard, Gray & Col. 1833) ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers....").

Eighteenth century Americans consistently demanded that the right to arms be written into the Constitution. In ratifying the Constitution, several of the state conventions recommended the addition of a bill of rights and specified the rights that it should guarantee. The only provisions common to all of the bill of rights demands were freedom of religion and the right to arms. Of the state ratifying conventions that recommended a bill of rights, five suggested a right to arms.[9] Only four mentioned due process,[10] or sought a prohibition on cruel and unusual punishment,[11] or requested that the right to assemble for redress of grievances be guaranteed.[12] By way of comparison,

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[9] Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836), 1:326 (New Hampshire), 3:659 (Virginia), 1:328 (New York), 1:335 (Rhode Island), 4:244 (North Carolina).

[10] Elliot, DEBATES, 1:326 (New Hampshire), 3:658 (Virginia), 1:328 (New York), 1:334 (Rhode Island).

[11] Elliot, DEBATES, 1:328 (New York), 1:335 (Rhode Island), 3:658 (Virginia), 4:244 (North Carolina).

only three mentioned free speech[13] and/or the various specific criminal procedure rights except for double jeopardy, which only New York mentioned.[14]

From *Nordyke* comes the history of the importance of the right to keep and bear arms in the state constitutions:

> [S]tate constitutions confirm the importance of the right to keep and bear arms throughout our history. "Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights[, and b]etween 1789 and 1820, nine states adopted [such] analogues." *Heller*, 128 S.Ct. at 2802-03. Thus, as of 1820, thirteen of the twenty-three states admitted to the Union had Second Amendment analogues. We must take account of this prevalence of state constitutional analogues to the Second Amendment, just as the Supreme Court noted the ubiquity of state constitutional provisions guaranteeing juries in criminal cases when it incorporated that right. *See Duncan*, 391 U.S. at 153-54. The statistics are not as overwhelming as those before the Court in *Duncan*, but they are nonetheless compelling.

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[12] Elliot, DEBATES, 1:328 (New York), 1:335 (Rhode Island), 3:658-9 (Virginia), 4:244 (North Carolina).

[13] Elliot, DEBATES, 1:335 (Rhode Island), 3:659 (Virginia), 4:244 (North Carolina).

[14] Elliot, DEBATES, 1:328 (New York).

> These materials reflect a general consensus, in case law as well as in commentary, on the importance of the right to keep and bear arms to American republicanism. *See*, *e.g.*, *Heller*, 128 S.Ct. at 2805-09, 2805-09 (discussing materials). They show the continued vitality of the right that the Englishmen of the Glorious Revolution declared, Blackstone lauded, and the American colonists depended upon.

And, finally, a survey of the period immediately following the Civil War supports incorporation of the Second Amendment through the Fourteenth Amendment. Again, from *Nordyke*:

> Although it has not been considered dispositive in Fourteenth Amendment cases, the understanding of the Framers of that Amendment logically influences whether a right is fundamental, in the sense of deeply rooted in our history and traditions and necessary to an Anglo-American conception of ordered liberty.
>
> As *Heller* recognized, "[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." 128 S.Ct. at 2809-10; *see also* Akhil Reed Amar, *supra*, at 192 (noting that "slavery led to state repudiation of virtually every one of

the ... freedoms [in the Bill of Rights]"). One major concern in these debates was the disarming of newly freed blacks in Southern states by statute as well as by vigilantism. *See Heller*, 128 S.Ct. at 2810. Many former slave states passed laws to that effect. *See*, *e.g.*, Act of Nov. 29, 1865, 1865 Miss. Laws 165 ("[N]o freedman, free Negro or mulatto ... shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife...."). General Charles H. Howard, in a letter provided to Congress, reported to the head of the Freedmen's Bureau that the "militia organizations in the opposite county of South Carolina (Edgefield) were engaged in disarming the negroes.... Now, at Augusta, ... I have authentic information that these abuses continue. In southwestern Georgia, I learned that the militia had done the same, sometimes pretending to act under orders from United States authorities." Report of the Joint Committee on Reconstruction, H.R.Rep. No. 39-30, pt. 3, at 46 (1st Sess.1866).

The Framers of the Fourteenth Amendment sought to end such oppressions. During the debates surrounding the Freedmen's Bureau Act, the Civil Rights Act, and the Fourteenth Amendment, Senator Pomeroy listed among the "indispensable" "safeguards of liberty" someone's "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866), *quoted in Heller*, 128 S.Ct. at 2811.

Representative Bingham, a principal author of the Fourteenth Amendment, argued that it was necessary to overrule *Barron* and to apply the Bill of Rights to the states. In his [Bingham's] view, *Barron* was wrongly decided because the Bill of Rights "secur[ed] to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of persons -- those rights dear to freemen and formidable only to tyrants." Cong. Globe *Id*. at 1090. Representative James Wilson, a supporter of the Fourteenth Amendment, described Blackstone's scheme of absolute rights as synonymous with civil rights, in a speech in favor of the Civil Rights Act of 1866 (a precursor to the Fourteenth Amendment). Cong. Globe *Id*. at 1115-19. Similarly, Representative Roswell Hart listed "the right of the people to keep and bear arms," among other rights, as inherent in a "republican government." Cong. Globe *Id*. at 1629. The reports and testimony contain similar evidence, confirming that the Framers of the Fourteenth Amendment considered the right to keep and bear arms a crucial safeguard against white oppression of the freedmen. Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 9-38 (1998); *see also* Akhil Reed Amar, *supra*, at 261-66.

The target of the right to keep and bear arms shifted in the period leading up to the Civil

> War. While the generation of 1789 envisioned the right as a component of local resistance to centralized tyranny, whether British or federal, the generation of 1868 envisioned the right as a safeguard to protect individuals from oppressive or indifferent local governments. *See* Akhil Reed Amar, *supra*, at 257-66. But though the source of the threat may have migrated, the antidote remained the same: the individual right to keep and bear arms, a recourse for "when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 Blackstone, *supra*, at *144.

The right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the "true palladium of liberty." Colonists relied on the right to keep and bear arms to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging the right less than a century later. The crucial role that this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental and that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. Even today, forty-four states have a guarantee to bear arms. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 205 (2006).

Thus, because the right to keep and bear arms meets the criteria set by *Duncan* and by *Glucksberg*, the Second Amendment must be incorporated through the due process clause of the Fourteenth Amendment.

C. This Court may incorporate under the due process clause without calling into question any of its prior case law:

We note also that this Court may incorporate under the due process clause without calling into question any of its prior case law. *Cruikshank* and similar cases have long been treated by this Court as precedent governing only incorporation under the privileges or immunities clause.

A century ago, this Court acknowledged the independence of the two approaches to incorporation. In *Twining v. New Jersey*, 211 U.S. 78 (1908), it first ruled that "exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment…" *Id.* at 99. It then noted

> The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the

> first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law….

Id. *Cruikshank* rejected incorporation of three rights: freedom of association, the right to arms, and the right not to be illegally deprived of life. When this Court held freedom of association to be protected by the due process clause, *N. A. A. C. P. v. Alabama*, 357 U.S. 449, 460-63 (1958), it did not overrule *Cruikshank*: in fact, it did not mention that decision. Likewise, when this Court upheld a due process right against unjustified deprivation of life, *Tennessee v. Garner*, 471 U.S. 1 (1985), there was no mention of *Cruikshank*. Under due process incorporation, *Cruikshank* is irrelevant.

III. "States-as-laboratories" does not trump essential liberties.

The "States-as-laboratories" dictum, cited by the court below, is not a valid argument against incorporation. Justice Sutherland made that clear in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 279-80 (1932):

> It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in our

> constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.

States served as laboratories for such practices as slavery and Jim Crow laws. The Constitution trumps a state's illegal "experimentation."

IV. Convicted felons and the mentally disturbed have no right to arms.

Heller's pronouncement to this effect has been criticized as unsubstantiated. Actually the court just did not bother to cite the substantiating evidence because the issue was foreign to the issues before it. As to why felons and the unbalanced have no right to arms, the short answer is that in the minds of the Founders they had no civil rights at all. Felons were without property rights. They were civilly dead, and often truly dead since capital punishment was the normal punishment for felony. The insane were not civilly dead, but they had lost the right to control their property. *See*, *e.g.*, Don B. Kates & Clayton Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings Law Journal 1339 (2009).

The right to arms was extended only to trustworthy people. In other words, it did not extend to felons or the unbalanced. Incorporation of the Second Amendment would have no change in this area.

CONCLUSION

The decision below should be reversed. The people of Maryland and the people of the other States have been waiting since 1868 for the recognition that the right to keep and bear arms is incorporated against the States through the Fourteenth Amendment.

Respectfully submitted,

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