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

IN THE

United States Court of Appeals for the Seventh Circuit

OTIS MCDONALD, ET AL., *and*
NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, ET AL., AND VILLAGE OF OAK PARK,

Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District of Illinois
Hon. Milton I. Shadur, Senior District Judge

BRIEF OF HISTORIANS AND LEGAL SCHOLARS SAUL CORNELL, JONATHAN LURIE, WILLIAM MERKEL, WILLIAM NELSON, AND GEORGE THOMAS AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

JONATHAN HACKER
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE CLINIC
1575 Massachusetts Ave.
Cambridge, MA 02138
(202) 383-5300

MATTHEW M. SHORS
Counsel of Record
GEOFFREY M. WYATT
ANTON METLITSKY
JUSTIN FLORENCE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amici Curiae

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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

None.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE HISTORICAL RECORD DOES NOT SUPPORT APPELLANTS' ARGUMENT ABOUT INCORPORATION UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE 3

A. Historical Evidence Does Not Support The Radical Constitutional Shift Contemplated By Appellants' Theory 4

B. The Fourteenth Amendment Was Not Widely Understood To Incorporate The Full Bill Of Rights 6

1. State Conventions Were Unaware Of The Total Incorporation Theory 7

2. The Leading Treatises Of The Era Were Unaware Of The Total Incorporation Theory 9

3. Courts And Practicing Lawyers Of The Period Were Unaware Of Total Incorporation 10

C. Congress's Intent Is Unclear 11

1. The Total Incorporation Theory Was Not Widely Accepted or Understood in Congress 11

2. Congress May Have Intended the Privileges or Immunities Clause To Be An Equality Provision 14

D. The Public Did Not Understand The Second Amendment To Be Specifically Incorporated 17

II. EVEN IF THE FOURTEENTH AMENDMENT INCORPORATED THE INDIVIDUAL RIGHT TO BEAR ARMS AGAINST THE STATES, THAT RIGHT WAS WIDELY UNDERSTOOD TO ALLOW FOR SIGNIFICANT LEGISLATIVE SAFETY REGULATION 19

A. The Right To Bear Arms Under State Constitutions During The Antebellum Period Was Widely Understood To Be Subject To Safety Regulation By State Legislatures 19

B. The Fourteenth Amendment Did Not Alter the States' Robust Authority To Regulate The Right To Bear Arms Or Outlaw Specific Classes Of Weapons Such As Handguns 22

1. Many Post-Fourteenth-Amendment State Constitutions Authorized Legislatures To Enact Reasonable Safety Regulations Of Weapons 23

2. Legislative Regulation Of Firearms Was Ubiquitous, Sometimes Banning Entire Classes Of Dangerous Weapons, Including Handguns 25

3. Courts Routinely Upheld Restrictions On Carrying Handguns Such As Pistols Or Revolvers 27

4. Leading Treatises Recognized States' Authority To Regulate Arms To Protect The Public Safety 29

CONCLUSION 30

APPENDIX A:
Amici Curiae's Names & Institutional Affiliations 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Andrews v. State,
50 Tenn. 165 (1871) 11, 19, 27, 28

Aymette v. State,
21 Tenn. 154 (1840) 21

Barron v. Baltimore,
32 U.S. (7 Pet.) 243 (1833) 4

Barton v. State,
66 Tenn. 105 (1874) 26

Bliss v. Commonwealth,
12 Ky. 90 (1822) 22

Campbell v. Morris,
3 H. and McH. 535 (Md. 1797) 6

Clark v. Dick,
5 F. Cas. 865 (C.C.D. Mo. 1870) 11

Commonwealth v. Byrne,
61 Va. 165 (1871) 11

Corfield v. Coryell,
6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) 5, 12

Day v. State,
37 Tenn. 496 (1857) 21

District of Columbia v. Heller,
128 S. Ct. 2783 (2008) 7, 9

Dycus v. State,
74 Tenn. 584 (1880) 26

English v. State,
35 Tex. 473 (1871) 28

Ex parte Thomas,
97 P. 260 (Okla. 1908) 29

Fife v. State,
31 Ark. 455 (1876) 28

Gitlow v. New York,
268 U.S. 652 (1925) 3

Greenwood v. State,
65 Tenn. 567 (1873) 11

Hill v. State,
53 Ga. 472 (1874) 29

Justices v. Murray,
76 U.S. (9 Wall.) 274 (1870) 11

N. M. R. Co. v. Maguire,
49 Mo. 490 (1872) 11

Paul v. Virginia,
75 U.S. (8 Wall.) 168 (1868) 6

State v. Buzzard,
4 Ark. 18 (1842) 21

State v. Chandler,
5 La. Ann. 489 (1850) 21

State v. Jackson,
21 La. Ann. 574 (1869) 11

State v. Jumel,
13 La. Ann. 399 (1858) 21

State v. Reid,
1 Ala. 612 (1840) 21

State v. Shumpert,
1 S.C. 85 (1869) 11

State v. Wilburn,
66 Tenn. 57 (1872) 28

State v. Workman,
35 W. Va. 367 (1891) 29

Twitchell v. Commonwealth,
74 U.S. (7 Wall.) 321 (1869) 11

Constitutional Provisions

U.S. CONST. art. I, § 10 4

ALA. CONST. of 1868, art. I, § 28 25

ARK. CONST. of 1868, art. I, § 5 25

CAL. CONST. of 1879 23

COLO. CONST. of 1876, art. II, § 13 25

DEL. CONST. of 1897, art. I, § 20 25

FLA. CONST. of 1885, art. I, § 20 24

GA. CONST. of 1868, art. I, § 14 24

GA. CONST. of 1877, art. I, § 22 24

IDAHO CONST. of 1889, art. I, § 11 24

ILL. CONST. of 1870 23

KY. CONST. of 1850, art. XIII, § 25 22

KY. CONST. of 1891, § 1.7 25

LA. CONST. of 1879, art. III 25

MISS. CONST. of 1890, art. III, § 12 25

MO. CONST. of 1875, art. II, § 17 25

MONT. CONST. of 1889, art. III, § 13 25

NEB. CONST. of 1875 23

N.C. CONST. of 1875, art. I, § 30 25

N.D. CONST. of 1889 23

N.Y. CONST. of 1894 23

ORE. CONST. of 1857, art. I, § 27 25

PA. CONST. of 1874, art. I, § 21 25

S.C. CONST. of 1868, art. I § 28 25

S. DAK. CONST. of 1889, art. VI, § 24 25

TENN. CONST. of 1870, art. I, § 26 24

TEX. CONST. of 1869, art. I, § 13 23

TEX. CONST. of 1876, art. I, § 23 24

UTAH CONST. of 1896, art. I, § 6 24

VA. CONST. of 1870 23

WASH. CONST. of 1889, art. I, § 24 25

W. VA. CONST. of 1872 23

WYO. CONST. of 1889, art. I, § 24 25

Statutes

Act of July 10, 1866, § 14, 14 Stat. 173 (1866) 16

An Act To Suppress the Use of Bowie Knives (1837) (Ala.) 21

Ark. Act of Apr. 1, 1881 .... 25, 27

1881 Colo. Rev. Stat. p. 229 § 149 25

Fla. Act of Aug. 8, 1868 27

Fla. Act of Feb. 12, 1885, ch. 3620, § 1 25

Ill. Act of Apr. 16, 1881 .... 25, 27

1880 Ky. Gen. Stat. ch. 29, § 1 25

1850 Mass. Gen. Laws, ch. 194, § 2 27

1893 Neb. Cons. Stat. § 5604 26

N. Dak. Pen. Code § 457 (1895) 26, 27

1879 N.C. Sess. Laws ch. 127 26

Act of Mar. 18, 1859, 1859 Ohio Laws 56 20

Laws of Oregon 1885, An Act to Prevent Persons from Carrying Concealed Weapons, § 1-4 .... 25, 26

1880 S.C. Acts 448, § 1 .... 25, 26

S. Dak. Terr. Pen. Code § 455 (1877) 25, 27

S. Dak. Terr. Pen. Code § 457 (1877) 26

Act of Jan. 27, 1838, ch. CXXXVII, 1837-1838 Tenn. Pub. Acts 200 21

Tenn. Act of June 11, 1870 27

1879 Tenn. Pub. Acts ch. 96 27

1879 Tenn. Pub. Acts ch. 186 26

Tex. Act of Apr. 12, 1871 .... 26, 27

1869–1870 Va. Acts 510 26

W. Va. Code ch. 148, § 7 (1870) 26

Wash. Code § 929 (1881) 25, 26

1876 Wyo. Comp. Laws ch. 52, § 1 .... 25, 26

Legislative History

CONG. GLOBE, 39th Cong., 1st Sess. 337 (1866) 17

CONG. GLOBE, 39th Cong., 1st Sess. 1073 (1866) 17

CONG. GLOBE, 39TH Cong., 1ST Sess. 1095 (1866) 16

CONG. GLOBE, 39TH Cong., 1ST Sess. 1117 (1866) 16

CONG. GLOBE, 39TH Cong., 1ST Sess. 1760 (1866) 16

CONG. GLOBE, 39TH Cong., 1ST Sess. 2459 (1866) 15

CONG. GLOBE, 39TH Cong., 1ST Sess. 2465 (1866) 13, 15, 18

CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) 17

CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866) 17

CONG. GLOBE, 39TH Cong., 1st Sess. 2961 (1866) 14

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CONG. GLOBE, 42D Cong., 1st Sess. 576 (1871) 14

Other Authorities

1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE (2d ed. rev. 1872) 10

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Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39 16

James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985) 7, 16

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THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (1868) 9

THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA (1891) 29

SAUL CORNELL, A WELL-REGULATED MILITIA (2006) 8, 20, 21

CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (1999) 20, 21

William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1951)....................12

John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 CENT. L.J. 259 (1874) 9, 29, 30

Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615 (2006)....................18

Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) 8

John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 16

2 JAMES KENT, COMMENTARIES ON AMERICAN LAW (William Kent ed., 7th ed. 1851)....................6

RONALD M. LABBE & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003) 5, 13

Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO L.J. 933 (1984)....................6

Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140 (1949) 5

WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988) 5, 15, 17

JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (1868) 10

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George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1* (Mar. 14, 2009 draft)..........7

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BENJAMIN VINCENT, HAYDN'S DICTIONARY OF DATES (American ed. 1867) 11

1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: PRINCIPLES, PLEADING AND EVIDENCE (7th ed. 1874) 10

INTEREST OF *AMICI CURIAE*

Amici are historians and law scholars who have taught courses and published scholarship on the Second Amendment, the Reconstruction Amendments, and related issues.

We file this brief in support of the Appellees. We believe, based on our study as historians and legal scholars, that the historical case for incorporation of the Bill of Rights in general, or the Second Amendment in particular, under the Privileges or Immunities Clause is at least ambiguous, and is far less clear than Appellants and their *amici* maintain.

Moreover, we believe, based on our study, that at the time of ratification of the Fourteenth Amendment, states were widely understood to be authorized to regulate the right to bear arms in like manner as the ordinances challenged in this case.

Amici's names and institutional affiliations (listed for identification purposes) are set forth in Appendix A.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

We submit this brief for two reasons. *First*, we wish to respond to the claim made by Appellants and their *amici* that the Fourteenth Amendment's Privileges or Immunities Clause provides an independent historical basis for applying the Second Amendment against the states. We have studied the period surrounding adoption of the Fourteenth Amendment, and the historical record does not reveal that the Privileges or Immunities Clause was understood to incorporate the Bill of Rights as a whole, or the Second Amendment in particular. Treatises, state ratification debates, and judicial opinions from the period suggest a lack of clear understanding by the legal profession or the public at large that these provisions limited the states. In light of that historical evidence, the isolated statements Appellants cite from a handful of Congressmen are insufficient to establish a legislative intent to incorporate the Bill of Rights, let alone a general public understanding of incorporation.[1]

Second, the historical record indicates that reasonable state safety regulations—including bans on particular types of weapons—have long been understood to be consistent with the individual right to keep and bear arms. In the Reconstruction period, numerous states adopted constitutional right-to-bear-arms

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[1] The question whether the Second Amendment should be incorporated under the Due Process Clause is outside the scope of this brief.

provisions that explicitly permitted reasonable safety regulations. Legislatures in these and other states also banned entire classes of weapons in a manner similar to the provisions at issue in this case. To take one example, Tennessee outlawed the carrying of "any … belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol." Courts repeatedly upheld regulations like Tennessee's against constitutional attack. And treatises reaffirmed that reasonable safety regulations were consistent with a constitutional right to bear arms.

For these reasons, the historical record does not disclose that the Privileges or Immunities Clause would have been understood to invalidate provisions like the ones challenged in this case.

ARGUMENT

I. THE HISTORICAL RECORD DOES NOT SUPPORT APPELLANTS' ARGUMENT ABOUT INCORPORATION UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE

The Supreme Court looks to the Fourteenth Amendment's Due Process Clause to determine whether particular guarantees in the Bill of Rights restrict the states as well as the federal government. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). Settled precedent holds that the Due Process Clause does not incorporate the full Bill of Rights or the Second Amendment. Brief of Defendants-Appellees 23-24. Thus, appellants and their *amici* instead argue that a different section of the Fourteenth Amendment—the Privileges or Immunities Clause—

"was originally intended and understood to incorporate the [full] Bill of Rights … against the states." McDonald Brief 19; Professors Brief 7-11. The NRA also argues that the Privileges or Immunities Clause was understood to incorporate the Second Amendment specifically. NRA Brief 17-26. The historical record does not support these claims.

A. Historical Evidence Does Not Support The Radical Constitutional Shift Contemplated By Appellants' Theory

As originally designed, the U.S. Constitution imposed only a handful of specifically enumerated limits on the states. *See, e.g.*, U.S. CONST. art. I, § 10. In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247-50 (1833), the Supreme Court confirmed that the Bill of Rights did not apply to states. Accordingly, states remained free to enforce laws inconsistent with the Bill of Rights—and many states indeed adopted and enforced such laws.

Thus, total incorporation of the Bill of Rights against the states would have radically altered the existing constitutional structure. *See, e.g.*, George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1629 (2007) (hereinafter Thomas, *Riddle*) (total incorporation would have been "a seismic shift in the tectonic plates that underlie our government").

If the text of the Privileges or Immunities Clause provided evidence that it was meant to effectuate this radical change, then a detailed historical inquiry would

be unnecessary. But that Clause does not refer to the Bill of Rights, and nothing in its text suggests that it applies those provisions to the states. Indeed, the parallel language in Article IV's Privileges and Immunities Clause was not linked to the Bill of Rights: the leading nineteenth-century opinion interpreting that provision, *Corfield v. Coryell*, offered a list of "fundamental" rights that, although not intended as comprehensive, made no reference to the Bill of Rights. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230). Thus, if the Fourteenth Amendment's drafters "really did intend to incorporate the Bill of Rights, it is obvious that they chose language which was designed to conceal their purpose, not to express it." Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 159 (1949); *see* RONALD LABBE & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 2 (2003) ("Uncertainty about what the new provision meant, as well as its application and scope, characterized both congressional debates and contemporary commentary."); WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 60 (1988).

Moreover, even if the Fourteenth Amendment's Privileges or Immunities Clause covered the Bill of Rights in some sense, the text could be (and was by many) read simply to provide for nondiscriminatory *enforcement* of those rights rather than a *substantive* guarantee. The year the Fourteenth Amendment was

adopted, a unanimous Supreme Court affirmed that Article IV's Privileges and Immunities Clause guaranteed only equality of treatment with respect to fundamental rights. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868).[2] The Fourteenth Amendment's similarity to Article IV does not appear accidental: the Amendment may have been intended to grant Congress the authority to enforce Article IV—that is, to continue passing antidiscrimination statutes in the mold of the Civil Rights Act and the Freedmen's Bureau Act. *See* Earl Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO L.J. 933, 966 (1984); *see also infra*, section C.2 (discussing these statutes).

B. The Fourteenth Amendment Was Not Widely Understood To Incorporate The Full Bill Of Rights

If the public had understood the proposed Privileges or Immunities Clause to incorporate the full Bill of Rights, the issue would presumably have been noisily debated during ratification debates. But the historical record is notable only for its silence. *See* Thomas, *Riddle*, at 1646-47. Appellants and their *amici* offer no proof from the historical record that the public understood the Fourteenth

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2 *Paul*'s holding reflected a common understanding of the provision. *See, e.g.*, *Campbell v. Morris*, 3 H. and McH. 535, 565-66 (Md. 1797) (Chase, J.); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 35 (William Kent ed., 7th ed. 1851).

Amendment to incorporate any part of the Bill of Rights.[3] The silence from state ratifying conventions, treatise-writers, lawyers, and courts across the country undermines Appellants' historical claim.

1. State Conventions Were Unaware Of The Total Incorporation Theory

Records of the state ratification debates in the press and on the campaign trail do not reveal that state delegates understood the Privileges or Immunities Clause to apply the Bill of Rights against the states. The public debates took place amidst the heated 1866 elections; yet despite the popularity "of the notion that the federal government was intervening too much in local matters," there "was no vigorous discussion of the idea that … state judiciaries were going to be subservient to Congress and the federal courts." George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1*, at 22 (Mar. 14, 2009 draft), *available at* http://ssrn.com/abstract=1392961. "There is no record in Pennsylvania, Ohio, or Illinois of any advocate of the 14th amendment explaining that the privileges and immunities clause guaranteed those rights enshrined in the Bill of Rights." *See* James E. Bond,

[3] Appellants instead rely on statements of a handful of Congressmen, which are not as helpful as they suggest, *see infra*, Part I.C. Regardless, the Supreme Court puts little weight on such statements. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008) (Court aims "to determine the public understanding of a legal text").

The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania, 18 AKRON L. REV. 435, 450 (1985).

Influential Republican Congressmen who stumped for the Fourteenth Amendment "argu[ed] that the Fourteenth Amendment did nothing more than require the states to treat their citizens equally." SAUL CORNELL, A WELL-REGULATED MILITIA 174 (2006). For example, Representative John Bingham—one of the principal drafters of the Amendment whose speech in Congress is oft-cited for the total incorporation theory, *see infra* Part I.C.1— emphasized the "notion that the amendment simply forced the states to abide by the principle of equality before the law." *Id.* at 174. State legislators do not appear to have disagreed. Many of the states that ratified the Fourteenth Amendment had on their books, and did not repeal, constitutional and statutory provisions incompatible with the Bill of Rights. *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 84-132 (1949). And five states abolished or amended their grand jury clauses *after* ratifying the Fourteenth Amendment, demonstrating that legislators did not believe themselves constrained by the Bill of Rights. *See* Thomas, *Riddle*, at 1654 n.131 (citing constitutional amendments in California, Colorado, Georgia, Wisconsin, and Kansas).

2. The Leading Treatises Of The Era Were Unaware Of The Total Incorporation Theory

Leading treatise-writers during Reconstruction similarly failed to contemplate total incorporation. The influential judge and professor Thomas Cooley published a "massively popular" treatise the same year the Fourteenth Amendment was ratified, *Heller*, 128 S. Ct. at 2811, but was silent on total incorporation. *See* THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 19 (1868) (Da Capo Press 1972). Rather, Cooley favorably cited *Barron*, which had settled that the Bill of Rights did not restrain the states. If the Fourteenth Amendment had been widely understood to reverse *Barron*, Cooley's ignorance would be surprising.

John Dillon, another influential scholar of the period, also showed no awareness of total incorporation. He published a comprehensive survey of American thinking about the meaning of the right to bear arms in a series of articles in 1874 in which he concluded that "none of the first amendments apply to the states, but that all of them are merely restrictive upon the federal power." *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 CENT. L.J. 259, 295 (1874) (citing *Barron*). He observed that "there would seem to remain no doubt that if the question should ever arise in [the Supreme] [C]ourt it would be held that the second amendment of the federal constitution is restrictive upon the general government merely, and not upon the states." *Id.* at 296.

Other scholars followed this trend. Bishop and Wharton, authors of leading treatises on criminal law, failed to discuss total incorporation. *See* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE (2d ed. rev. 1872); 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: PRINCIPLES, PLEADING AND EVIDENCE (7th ed. 1874). Although Pomeroy and Bateman touched on the Fourteenth Amendment's impact, both authors hinted at antidiscrimination interpretations of the Privileges or Immunities Clause. *See* JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 150-51 (1868) (stating that the then-pending Fourteenth Amendment would "remedy" the situation where a "certain state contains clauses securing to the people the right of keeping and bearing arms," but "the legislature of the same state passes statutes by which certain classes of the inhabitants—say negroes—are required to surrender their arms"); WILLIAM O. BATEMAN, POLITICAL AND CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA 259 (1876) (concluding that the Fourteenth Amendment "*prohibits* the denial or abridgment of such right as was *previously vested*, 'on account of race, color, or previous condition of servitude'").

3. Courts And Practicing Lawyers Of The Period Were Unaware Of Total Incorporation

Leaders of the bar and bench also demonstrated no awareness of total incorporation. In a series of cases following ratification of the Fourteenth

Amendment, courts repeatedly reiterated that the bill of rights did not restrict the states. Attorneys did not argue for total incorporation, and courts did not contemplate it. *See, e.g.*, *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 278 (1870); *Twitchell v. Commonwealth*, 74 U.S. (7 Wall.) 321, 325-26 (1869); *Clark v. Dick*, 5 F. Cas. 865, 867 (C.C.D. Mo. 1870); *Greenwood v. State*, 65 Tenn. 567, 568 (1873); *N. M. R. Co. v. Maguire*, 49 Mo. 490, 495 (1872); *Commonwealth v. Byrne*, 61 Va. 165, 186 (1871); *Andrews v. State*, 50 Tenn. 165, 174-75 (1871); *State v. Jackson*, 21 La. Ann. 574, 575 (1869); *State v. Shumpert*, 1 S.C. 85, 86 (1869). This silence among judges and practitioners—like that among state legislators and leading treatise-writers—rebuts Appellants' historical claims.

C. Congress's Intent Is Unclear

Lacking evidence that the public understood the Privileges or Immunities Clause to have incorporated the Bill of Rights, Appellants and their *amici* instead point to the speeches of a few Congressmen. These quotes are insufficient to establish even Congress's intent, let alone the public understanding of the provision.

1. The Total Incorporation Theory Was Not Widely Accepted or Understood in Congress

The Congress that debated the Fourteenth Amendment consisted of 52 Senators and 192 Representatives. BENJAMIN VINCENT, HAYDN'S DICTIONARY OF DATES 18 (American ed. 1867). Roughly a handful—at most, one Senator and five

Representatives—are on record as favoring total incorporation. *See* Thomas, *Riddle*, at 1640-47 (citing statements of Senator Howard and Representatives Bingham, Price, Wilson, Hale, and Thayer). The remaining members of the 39th Congress "'simply did not speak on the point, either one way or the other; and neither did they say anything from which their views on the subject can be inferred.'" *Id.* (quoting William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. Chi. L. Rev. 1, 71 (1951)).[4]

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[4] Appellants' *Amici* rely on vague statements by Senator Nye and Representatives Donnelly and Woodbridge to the effect that the Fourteenth Amendment would protect against some State interference with certain "natural and personal rights." Scholars Brief 11, nn.3, 4. But these statements are question-begging: The Fourteenth Amendment expressly provided *some* protection against state action; these legislators did not address whether it incorporated the full protections of the Bill of Rights. Appellants' *Amici* also note that Senators Trumbull, Wilson, and Raymond "invoked [the] broad definition of privileges and immunities" provided in *Corfield*, *supra*. Scholars Brief 11 & n.5. But *Corfield* did not include the Bill of Rights in whole or in part in its listing of fundamental rights. Finally, although Appellants' *Amici* cite Representative Thaddeus Stevens, his statements only support an antidiscrimination theory, *see infra*, Part I.C.2. And while Crosskey would have included Representatives Hotchkiss, Kelley, and Fransworth as favoring total incorporation, Crosskey, *supra*, at 71, their speeches in Congress leave their views unclear. *See* Thomas, *Riddle*, at 1645-46.

The historical record does not disclose whether any members of the 39th Congress, other than the six just identified,[5] believed the "total incorporation" theory was the best interpretation of the Fourteenth Amendment. Appellants' *amici* are therefore forced to argue that Congressional silence signaled widespread agreement with the total incorporation theory. *See* Scholars Brief 10. The historical evidence undermines this claim.

Members of Congress frequently expressed confusion over the meaning of the Privileges or Immunities Clause, and legislators were unable to offer a working definition of the provision. *See* LABBE & LURIE, *supra*, at 4. In debate, legislators who opposed the measure pressed its supporters to explain what its words meant. *See* Thomas, *Riddle*, at 1633, 1646. That challenge would have been implausible if the Fourteenth Amendment was widely known to incorporate the Bill of Rights. Yet "none of the other proponents [of the Amendment] used [the total incorporation] theory to rebut the claim of lack of clarity." *Id.* at 1646.

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[5] There are doubts even about those who *did* speak of incorporation. Representative Price spoke only of incorporating the freedom of speech, and even then his concern might have been equal treatment. *See* Thomas, *Riddle*, at 1643. And Representative Thayer (R-Pa.) said only that the Amendment would "bring[] into the Constitution what is found in the bill of rights *of every State of the Union*." CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866) (emphasis added). But at the time of Representative Thayer's comments, the States did not adhere to the *federal* Bill of Rights, and not all States safeguarded a right to bear arms, *see infra*, Part I.D.

This confusion persisted. Three years after the Fourteenth Amendment was adopted, Congress remained uncertain of the Amendment's meaning, with some contending that the Privileges or Immunities Clause merely reaffirmed the analogous provision found in Article IV. Senator Trumbull (R-Ill.) mused that the Privileges or Immunities Clause "amounts to the same thing" as Article IV and that "[i]t is a repetition of a provision in the Constitution as it before existed," though "stat[ing] it in a little different language." CONG. GLOBE, 42d Cong., 1st Sess. 576-77 (1871). Similar comments had been made in 1866. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. part iv, 2961 (1866) (Sen. Poland, R-Vt.) (Fourteenth Amendment secured "nothing beyond what was intended by the original provision" in Article IV). But by 1871, when Senator Trumbull's statements were made, the *Paul* Court had already definitively interpreted Article IV as an antidiscrimination rule. If the Fourteenth Amendment was widely known to have *substantively* incorporated the Bill of Rights, the difference between the provisions would have been obvious.

2. Congress May Have Intended the Privileges or Immunities Clause To Be An Equality Provision

Even if Congress intended the Privileges or Immunities Clause to cover the Bill of Rights, the question remains whether the Clause was meant as a *substantive* guarantee of those rights, or a rule ensuring their nondiscriminatory enforcement. The historical materials do not settle that question either.

During Congressional debates, several Republicans argued that "the amendment did not protect specific fundamental rights or give Congress and the federal courts power to interfere with state lawmaking that either created or denied rights" but rather would only "prevent the states from discriminating arbitrarily between different classes of citizens." NELSON, *supra*, at 115. In making this argument, they brought the Fourteenth Amendment's provision in line with Article IV's. *See supra*, Part I.C.1 (discussing *Paul*). For example, Representative Stevens (R-Pa.) explained the Fourteenth Amendment "allow[ed] Congress to correct the unjust legislation of the States, so far that the law which operates on one man shall operate *equally* upon all." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Representative Hotchkiss (R-N.Y.) understood it to mean that "no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another." *Id.* at 1095. Representative Wilson (R-Iowa) explained that the word "immunities" would "merely secure to citizens of the United States equality in the exemptions of the law." *Id.* at 1117. Representative Thayer (R-Pa.) urged support for the Amendment because it was "necessary for the equal administration of the law." *Id.* at 2465. And Senator Morrill (R-Me.) emphasized that the "principle of equality before the law … does not prevent the State from qualifying the rights of the citizen according to the public necessities." CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866).

Legislation passed alongside the Fourteenth Amendment further suggests an antidiscrimination objective. The Civil Rights Act of 1866, which the Fourteenth Amendment was meant to constitutionalize,[6] explicitly enacted an antidiscrimination rule. *See* Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 58-59 (2009). Senator Trumbull reasoned that the Act would "in no manner interfere … with the municipal regulations of any State which protects all alike in their rights of person and property." CONG. GLOBE, 39th Cong., 1st Sess. 1760-61 (1866). Similarly, the Freedmen's Bureau Act, *see infra*, section D, which was passed to protect, among other things, the freedmen's "right to bear arms," Act of July 10, 1866, § 14, 14 Stat. 173, 176 (1866), protected that right only to the extent of precluding discriminatory treatment. *See* Rosenthal, *supra*, at 73.[7]

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[6] *See, e.g.*, Bond, *supra*, at 444.

[7] The 39th Congress's penchant for antidiscrimination rules is unsurprising. "[I]n 1866, when people discussed abridgements of the privileges or immunities of citizens, they mainly were talking about laws that deprived certain classes of citizens of the civil rights accorded to everyone else." John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992). And antidiscrimination rules were likely viewed as sufficiently effective: "It was not until the Ku Klux Klan violence of 1868 through 1872 that Republicans began to realize that superficially equal laws did not guarantee full protection of rights." Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 50.

"Only one historical conclusion can therefore 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." NELSON, *supra*, at 123.

D. The Public Did Not Understand The Second Amendment To Be Specifically Incorporated

While members of the Reconstruction Congress expressed concern about the disarmament of freedmen, the historical evidence does not establish that they sought to incorporate a substantive right to bear arms against the states—or that the public understood the Fourteenth Amendment to do so.

First, as discussed above, historical evidence suggests the possibility that the Privileges or Immunities Clause was understood as a nondiscrimination rule. This antidiscrimination rationale is consistent with many of the statements made on the floor of Congress that refer to the right to bear arms.[8] And it is consistent with the

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[8] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1073 (1866) ("As citizens of the United States [freedmen] have equal right to protection, and to keep and bear arms for self-defense") (Sen. Nye); CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866) ("Florida makes it a misdemeanor for colored men to carry weapons without a license… . Cunning legislative devices are being invented in most of the states to restore slavery in fact.") (Rep. Julian); CONG. GLOBE, 39th Cong., 1st Sess. 337 (1866) ("[Freedmen] ask also that they should have the constitutional protection in keeping arms … .") (Sen. Sumner). *But see, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (introducing Fourteenth Amendment in Senate, refers to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as … the right to keep and bear arms.") (Sen. Howard).

Freedmen's Bureau Act, which proscribed *only* discriminatory laws regulating gun possession.

Second, although prominent advocates of the Fourteenth Amendment understood it to safeguard no more than "what is found in the bill of rights *of every State of the Union*," CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866) (Rep. Thayer, R-Pa.) (emphasis added), there was no consensus at the time of the Amendment's adoption that a *state* constitution should safeguard the individual right to bear arms. In 1868, only twenty-two out of thirty-seven state constitutions expressly guaranteed any arms right. *See* Steven G. Calabresi & Sara E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 TEX. L. REV. 7, 50 (2008). Indeed, "[m]ost Republicans did not advocate a full incorporation of the Second Amendment into their civil rights policy while even their most reactionary critics sought tighter restrictions on arms bearing within their local communities." Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615, 619 (2006).

Third, as detailed in the following Part, several states whose constitutions did contain a right-to-bear-arms provision regulated that right in significant ways, both before and after the Fourteenth Amendment's adoption. These robust regulations, including outlawing specific classes of weapons such as handguns,

were not affected by the Fourteenth Amendment. In the immediate aftermath of that Amendment's adoption, courts understood that a state legislature was not "limited in its powers" to regulate arms by the federal Constitution, since that Constitution was only "a limitation, whatever be its construction and meaning, upon the powers of the" federal government. *See, e.g.*, *Andrews*, 50 Tenn. at 175. It follows that the Fourteenth Amendment was not understood to prohibit reasonable regulation of arms by the states.

II. EVEN IF THE FOURTEENTH AMENDMENT INCORPORATED THE INDIVIDUAL RIGHT TO BEAR ARMS AGAINST THE STATES, THAT RIGHT WAS WIDELY UNDERSTOOD TO ALLOW FOR SIGNIFICANT LEGISLATIVE SAFETY REGULATION

Even if the Fourteenth Amendment protects the individual right to bear arms, that right was widely understood—both before and after the Reconstruction Amendments—to allow for significant state safety regulation of the carrying of dangerous weapons, including handguns.

A. The Right To Bear Arms Under State Constitutions During The Antebellum Period Was Widely Understood To Be Subject To Safety Regulation By State Legislatures

Several examples of extensive state regulations of firearms based on concerns of public safety mark the historical record prior to the Fourteenth Amendment's ratification. These regulations included bans on entire classes of weapons. Judicial challenges to these laws were overwhelmingly unsuccessful. And the principal successful challenge was deemed such an outlier by the people

that it was ultimately overturned by constitutional amendment. In sum, regulations that stopped short of entirely disarming the citizenry were approved.

In the early part of the nineteenth century, the states were confronted with a new problem. Weapons had grown smaller and more dangerous, and the practice of traveling with concealed weapons such as handguns and knives had become pervasive in the South and elsewhere. *See* CORNELL, *supra*, at 138-141. Perceiving a threat to their citizens' safety, many state legislatures enacted laws prohibiting carriage of concealed weapons. Kentucky passed the first of these in 1813, prohibiting the wearing of a "pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon," with a narrow exception for "when traveling on a journey." An Act to Prevent Persons in this Commonwealth from Wearing Concealed Arms, Except in Certain Cases (1813), *reprinted in* CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 133-34 (1999). Louisiana enacted a similar ban the same year. Other states quickly followed suit.[9]

Several states decided not only to outlaw the carrying of concealed weapons, but to establish bans on entire classes of concealable weapons. Alabama, for example, imposed a tax on the sale or giving of Bowie Knives or Arkansas Tooth-

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[9] See statutes from Alabama, Virginia, Arkansas, and Indiana, *reprinted in* CRAMER, *supra*, at 145-52, and from Ohio, Act of Mar. 18, 1859, 1859 Ohio Laws 56.

picks. *See* An Act To Suppress the Use of Bowie Knives (1837), *reprinted in* CRAMER, *supra*, at 146. Tennessee banned the wearing, sale or giving of the same. *See* Act of Jan. 27, 1838, ch. CXXXVII, 1837-1838 Tenn. Pub. Acts 200, *reprinted in* CRAMER, *supra*, at 148-49; *see also* CORNELL, *supra*, at 142 (describing the Alabama and Tennessee statutes as "more robust" than earlier statutes by "effectively moving from regulation to prohibition of certain classes of weapons.").

State courts repeatedly upheld these statutes, even when the state constitution explicitly protected the right to bear arms. *See, e.g.*, *Day v. State*, 37 Tenn. 496, 499 (1857); *Aymette v. State*, 21 Tenn. 154, 159-61 (1840) (right to keep weapons is unqualified, but right to bear arms for purposes other than the common defense can be regulated); *State v. Buzzard*, 4 Ark. 18, 21 (1842); *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850) (upholding a ban on concealed weapons that was "absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons"); *State v. Jumel*, 13 La. Ann. 399, 400 (1858) (upholding a concealed-weapons law because it only banned a "*particular mode* of bearing arms which is found dangerous to the peace of society"); *State v. Reid*, 1 Ala. 612, 616-17 (1840) (holding that it was permissible for the state to regulate weapons "merely to promote personal security" by prohibiting the wearing of weapons "in such a manner as is calculated to exert an unhappy

influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others").

The major outlier is *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), which declared Kentucky's concealed-weapons ban in conflict with its constitution. But the legislature reacted forcefully to the decision and amended the state constitution to allow a concealed-weapons ban. *See* KY. CONST. of 1850, art. XIII, § 25.

Thus, it was generally recognized in the period before enactment of the Fourteenth Amendment that state legislatures—while not empowered to *disarm* their citizens—could nevertheless react to threats to the public safety through reasonable regulation of the right to bear arms, including outlawing certain classes of weapons.

B. The Fourteenth Amendment Did Not Alter the States' Robust Authority To Regulate The Right To Bear Arms Or Outlaw Specific Classes Of Weapons Such As Handguns

The passage of the Fourteenth Amendment did not alter states' broad authority to regulate possession of firearms. State constitutions, regulations, and judicial decisions of the period following adoption of the Fourteenth Amendment demonstrate that states continued to enjoy broad authority to balance the right to

bear arms against requirements of public safety, and in striking that balance, to regulate (and even ban) dangerous weapons, including handguns.[10]

1. Many Post-Fourteenth-Amendment State Constitutions Authorized Legislatures To Enact Reasonable Safety Regulations Of Weapons

A majority of state constitutions adopted at the time of or after passage of the Fourteenth Amendment protected some right to bear arms. But, as detailed below, the majority of the new constitutions that included right-to-bear-arms provisions—fifteen of twenty-four—expressly limited those rights by authorizing legislative regulation.[11] It is unlikely that these states believed they were violating the federal Constitution in allowing for such regulation. Thus, to the extent the states believed they were bound by the Second Amendment, they did not understand that provision to prevent reasonable safety regulation.

Three new state constitutions subjected the right to general legislative limitation. In 1868, Texas's Republican-dominated constitutional convention drafted a provision subjecting "the right to keep and bear arms" to "such regulations as the legislature may prescribe." TEX. CONST. of 1869, art. I, § 13.

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[10] The historical materials described in this Part could also be interpreted to show that the public did not view the Fourteenth Amendment as incorporating the Second Amendment.

[11] Several new state constitutions declined to protect arms rights. *See* CAL. CONST. of 1879; ILL. CONST. of 1870; NEB. CONST. of 1875; N.Y. CONST. of 1894; N.D. CONST. of 1889; VA. CONST. of 1870; W. VA. CONST. of 1872.

Over the next several decades, Idaho and Utah enacted similar provisions, with Idaho providing that "the Legislature shall regulate the exercise of this right by law" and Utah providing that "nothing herein shall prevent the legislature from defining the lawful use of arms." IDAHO CONST. of 1889, art. I, § 11; UTAH CONST. of 1896, art. I, § 6.

Other state constitutional provisions—such as one Texas enacted in 1876—specifically granted the legislature the somewhat narrower "power, by law, to regulate the wearing of arms, with a view to prevent crime." TEX. CONST. of 1876, art. I, § 23. Tennessee enacted a provision substantially identical to Texas's. *See* TENN. CONST. of 1870, art. I, § 26. Georgia and Florida granted even broader power to their legislatures, allowing for regulation of the manner of bearing arms without tying the power to the prevention of crime.[12] *See* FLA. CONST. of 1885, art. I, § 20; GA. CONST. of 1868, art. I, § 14; GA. CONST. of 1877, art. I, § 22. Seven other states expressly authorized regulation of firearms by noting that their

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[12] Florida's grant of legislative authority was effectively as sweeping as that of Idaho, Utah, and the Texas Constitution of 1869. The right protected is only the "right to *bear* arms," FLA. CONST. of 1885, art. I, § 20 (emphasis added); it provides no right to *keep* arms. The power to "prescribe the manner in which they may be borne," *id.*, was thus the power to regulate the constitutional right in its entirety.

protections should not be construed to deny legislatures the power to regulate concealed weapons.[13]

2. Legislative Regulation Of Firearms Was Ubiquitous, Sometimes Banning Entire Classes Of Dangerous Weapons, Including Handguns

Even more than during the antebellum period, state legislatures routinely regulated weapons in the years following the Fourteenth Amendment's adoption. Even when new state constitutions contained a right to bear arms not expressly subject to legislative regulation,[14] legislatures still regulated firearms.[15] Several even imposed outright bans on handguns.

The most common regulations of the period were concealed-weapons laws. At least fifteen states prohibited the carrying of concealed pistols and deadly weapons, some explicitly covering all firearms or all weapons.[16] Although three of

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13 *See* COLO. CONST. of 1876, art. II, § 13; KY. CONST. of 1891, § 1.7; LA. CONST. of 1879, art. III; MISS. CONST. of 1890, art. III, § 12; MO. CONST. of 1875, art. II, § 17; MONT. CONST. of 1889, art. III, § 13; N.C. CONST. of 1875, art. I, § 30.

14 *See* ALA. CONST. of 1868, art. I, § 28; ARK. CONST. of 1868, art. I, § 5; DEL. CONST. of 1897, art. I, § 20; ORE. CONST. of 1857, art. I, § 27; PA. CONST. of 1874, art. I, § 21; S.C. CONST. of 1868, art. I § 28; S. DAK. CONST. of 1889, art. VI, § 24; WASH. CONST. of 1889, art. I, § 24; WYO. CONST. of 1889, art. I, § 24.

15 *See* Ark. Act of Apr. 1, 1881; Laws of Oregon 1885, An Act to Prevent Persons from Carrying Concealed Weapons, § 1–4, p. 33; 1880 S.C. Acts 448, § 1; S. Dak. Pen. Code § 455 (1877); Wash. Code § 929 (1881); 1876 Wyo. Comp. Laws ch. 52, § 1.

16 *See* Ark. Act of Apr. 1, 1881; 1881 Colo. Rev. Stat. p. 229 § 149; Fla. Act of Feb. 12, 1885, ch. 3620, § 1; Ill. Act of Apr. 16, 1881; 1880 Ky. Gen. Stat. ch. 29,

these statutes excepted travelers, persons on their own premises, or those with a legitimate fear of attack,[17] the majority contained no such exceptions.

Concealed-weapon laws were not, however, the only types of laws state legislatures understood themselves empowered to enact. At least three states banned the carrying of non-military handguns. For example, Tennessee criminalized carrying, "publicly or privately, any … belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand." 1879 Tenn. Pub. Acts ch. 186. The only people excepted from the statute were military personnel and those performing specified law enforcement functions. *Id.* The Tennessee Supreme Court construed the act to apply even "upon one's own farm or premises, or in fact in any place." *Dycus v. State*, 74 Tenn. 584, 585 (1880); *see also Barton v. State*, 66 Tenn. 105, 105-06 (1874).

Wyoming forbade anyone from "bear[ing] upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or

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§ 1; 1893 Neb. Cons. Stat. § 5604; 1879 N.C. Sess. Laws ch. 127; N. Dak Pen. Code § 457 (1895); Laws of Oregon 1885, An Act to Prevent Persons from Carrying Concealed Weapons, § 1–4, p. 33; 1880 S.C. Acts 448, § 1; S. Dak. Terr. Pen. Code § 457 (1877); Tex. Act of Apr. 12, 1871; 1869–1870 Va. Acts 510; Wash. Code § 929 (1881); W. Va. Code ch. 148, § 7 (1870).

[17] *See* 1893 Neb. Cons. Stat. § 5604; 1879 N.C. Sess. Laws ch. 127; 1880 S.C. Acts 448, § 1.

village." 1876 Wyo. Comp. Laws ch. 52, § 1. Arkansas and Texas each had similar bans. *See* Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871. Other states outlawed the sale of non-military pistols,[18] or prohibited specific weapons that were public dangers.[19] It was thus widely understood in the years following adopting of the Fourteenth Amendment that states could balance any right to bear arms against the state's duty to protect the public against dangerous weapons. And that authority included outlawing the carrying of handguns.

3. Courts Routinely Upheld Restrictions on Carrying Handguns Such As Pistols Or Revolvers

State courts recognized state legislative authority to regulate dangerous weapons such as handguns. The Tennessee Supreme Court's *Andrews* decision is representative. Plaintiffs challenged a statute that forbade any person to "publicly or privately carry any … pocket pistol … or revolver," Tenn. Act. of June 11, 1870, asserting "that it is in violation of, and repugnant to" the Second Amendment of the U.S. Constitution and Tennessee's constitution. 50 Tenn. at 171. The court interpreted the statute to "amount[] to a prohibition to keep and use such weapons for any and all purposes." *Id.* at 187. Although the court held that the federal

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[18] *See* Ark. Act of Apr. 1, 1881; 1879 Tenn. Pub. Acts ch. 96.

[19] *See* Fla. Act of Aug. 8, 1868; Ill. Act of Apr. 16, 1881; 1850 Mass. Gen. Laws, ch. 194, § 2; N. Dak. Pen. Code § 457 (1895); S. Dak. Terr. Pen. Code § 455 (1877).

Constitution did not limit the state legislature, *id.* at 175, it interpreted the state right-to-bear-arms provision *in pari materia* with the Second Amendment, *id.* at 177. But this right did not extend to "every thing that may be useful for offense and defense." *Id.* at 179. Rather, the constitution protected only "the usual arms of the citizen of the country," and weapons such as the pocket pistol and revolver could therefore be prohibited altogether. *Id.* Even the use of protected weapons, such as "the rifle … , the shot gun, the musket, and repeater," could "be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good." *Id.* at 179-80. *See also State v. Wilburn*, 66 Tenn. 57, 59-60 (1872).

Similarly, the Arkansas Supreme Court upheld that state's prohibition on carrying pistols. *See Fife v. State*, 31 Ark. 455 (1876). Specifically following the decision in *Andrews*, the Arkansas court upheld that State's prohibition as a lawful "exercise of the police power of the State without any infringement of the constitutional right" to bear arms. *Id.* at 461. So too, the Texas Supreme Court upheld a conviction for carrying an unloaded pistol for the purpose of getting it repaired, and concluded that such carrying is not "in any way protected either under the State or Federal Constitution." *English v. State*, 35 Tex. 473, 473, 478 (1871). Courts in Georgia, West Virginia, and Oklahoma followed suit. *See Hill*

v. State, 53 Ga. 472, 474 (1874); *State v. Workman*, 35 W. Va. 367, 373 (1891); *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908).

At the time of the Fourteenth Amendment, then, the constitutional right to bear arms—whether state or federal—was not believed to preclude appropriate safety regulations, including broad bans of categories of weapons such as pistols and revolvers.

4. **Leading Treatises Recognized States' Authority To Regulate Arms To Protect The Public Safety**

The major legal treatises of the day reinforce what the state constitutions, regulations, and judicial decisions make clear: states were widely understood to have authority to regulate weapons. Some commentators explicitly observed that the "right in the people to keep and bear arms, although secured by … the constitution, is held in subjection to the public safety and welfare." JOEL TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW 394 (1867). Treatise-writers further emphasized that the right to bear arms protected weapons "suitable for the general defence of the community against invasion or oppression," but that other firearms were subject to general regulation. *See* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 282 (1891).

As Judge John Dillon explained, even where there is a right to bear arms, "the peace of society and the safety of peaceable citizens plead loudly for

protection against the evils which result from permitting other citizens to go armed with dangerous weapons." Dillon, *supra*, at 287. And so the law must "strike some sort of balance between these apparently conflicting rights." *Id.* In the wake of the Fourteenth Amendment's adoption, the public would have seen the ordinances challenged in this case—which, much like the laws of Tennessee and other states at the time, prohibit the keeping of handguns while allowing other types of firearms—as striking a reasonable balance between the individual's right to bear arms for self-defense, and the public's expectation that the state will protect them from the dangers inherent in small and dangerous weapons.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court affirm the judgments below.

Respectfully submitted,

By: s/Geoffrey M. Wyatt____

MATTHEW M. SHORS
Counsel of Record
GEOFFREY M. WYATT
ANTON METLITSKY*
JUSTIN FLORENCE**
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

JONATHAN HACKER
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE CLINIC
1575 Massachusetts Ave.
Cambridge, MA 02138
(202) 383-5300

* Admitted in New York only; supervised by principals of the firm.

** Admitted in Massachusetts only; supervised by principals of the firm.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 29(C)(5) AND 32(A)(7)(C)

Undersigned counsel certifies that the attached brief complies with the type-volume limitations in Fed. R. App. P. 29(d) because this brief contains 6,998 words, less than half the amount allowed for a party's principal brief under Fed. R. App. P. 32(a)(7)(B)(i), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as required by Fed. R. App. P. 29(c), because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2003.

s/Matthew M. Shors
Matthew M. Shors
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300

APPENDIX A

Names and Institutional Affiliations (Listed For Identification Purposes Only)

of Amici Historical and Legal Scholars

Prof. Saul Cornell, Ohio State University

Prof. Jonathan Lurie, Rutgers University in Newark

Prof. William Merkel, Washburn University School of Law

Prof. William E. Nelson, New York University School of Law

Prof. George C. Thomas III, Rutgers School of Law-Newark

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2009, two bound copies and a disc containing one Portable Document Format (pdf) copy of the foregoing Brief of Historians and Legal Scholars Saul Cornell, Jonathan Lurie, William Merkel, William Nelson, and George Thomas as *Amici Curiae* in Support of Affirmance, as well as one copy and one pdf copy of the Statutory Appendix thereto, were served by FedEx to the following:

Mara S. Georges
Corporation Counsel, City of Chicago
30 N. LaSalle St., Ste. 800
Chicago, IL 60602
(312) 744-8519

Raymond L. Heise
Village Attorney of Oak Park
123 Madison St.
Oak Park, IL 60302
(708) 358-5660

David G. Sigale
Law Firm of David G. Sigale, P.C.
4300 Commerce Ct., Ste. 300-3
Lisle, IL 60532
(630) 452-4547

William N. Howard
Freeborn & Peters LLP
311 S. Wacker Dr., Ste. 3000
Chicago, IL 60606
(312) 360-6415

Stephen A. Kolodziej
Brenner, Ford, Monroe & Scott, Ltd.
33 N. Dearborn St., Ste. 300
Chicago, IL 60602
(312) 781-1970

I also certify that on the same date, the original and fifteen copies of Brief of Historians and Legal Scholars Saul Cornell, Jonathan Lurie, William Merkel, William Nelson, and George Thomas as *Amici Curiae* in Support of Affirmance, as well as ten copies of the Statutory Appendix, were filed by FedEx with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit. Finally, a disc containing pdf copies of the brief and appendix were also filed by FedEx with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit.

s/Geoffrey M. Wyatt
GEOFFREY M. WYATT