

**FROM HELLER TO CHICAGOLAND:
WILL RECONSTRUCTION COME TO THE WINDY CITY?**

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I. INTRODUCTION

After the Supreme Court held in *District of Columbia v. Heller* that a handgun ban violates the individual right to have arms for self defense,¹ lawsuits were filed against Chicago and adjoining municipalities claiming that their handgun bans violate the Second Amendment as incorporated into the Fourteenth Amendment. Some repealed their ordinances, while Chicago and Oak Park held firm. The U.S. Court of Appeals for the Seventh Circuit held that the issue could only be decided by the Supreme Court, which in turn held that the right to keep and bear arms is protected from infringement not only against the federal government, but also against the states and localities.²

In front of the Supreme Court, Chicago argued that the Fourteenth Amendment was not understood to protect Second Amendment rights from infringement by states and political subdivisions thereof. It further contended that, for legal and policy reasons, the right should not be incorporated. The following critically analyzes Chicago's arguments from this author's perspective. The Supreme Court's analysis and rejection of those arguments will undoubtedly be the subject of commentaries for some time to come.

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1 *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

2 *Nat'l Rifle Ass'n v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *rev'd. sub nom.*, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). The Court granted certiorari in *McDonald* but not in *Nat'l Rifle Ass'n*. However, the NRA remained a party under the category of respondent in support of petitioner. The author is counsel for the NRA.

II. THE FOURTEENTH AMENDMENT WAS UNDERSTOOD TO PROTECT THE RIGHT TO KEEP AND BEAR ARMS

The Fourteenth Amendment was commonly understood to protect the right of the people to keep and bear arms from state infringement. Chicago would rewrite the Amendment to include nothing more than nondiscrimination, which would allow the deprivation of rights, as long as it is applied equally to all citizens.³ If only the Black Code prohibitions on possession of firearms applied to everyone equally, Chicago implies, they would have been acceptable.

While keeping and bearing arms was universally described as a “right,” Chicago seeks to pigeon-hole that activity solely as a purported “privilege or immunity” about which only confusion existed. Chicago also argues that total incorporation was not envisioned, while the only issue here is whether Second Amendment incorporation was understood.

A. *The Historical Record Supports an Understanding that the Second Amendment is Incorporated*

1. The Text

When the Fourteenth Amendment was adopted, it was commonplace to refer to Bill of Rights guarantees as “rights, privileges, and immunities.” While the Bill of Rights uses the term “right” but not “privileges or immunities,”⁴ the Amendment was understood to protect substantive “rights.” The premise of the Due Process Clause is the *right* of every person not to be deprived of life, liberty, or property without due process.⁵ That the Court’s jurisprudence has found fundamental Bill of Rights freedoms to be protected under the Due Process Clause rather than the Privileges-or-Immunities Clause is consistent with the general understanding that the Amendment would protect such freedoms.

3 Brief for Respondents City of Chicago and Vill. of Oak Park at 53-80, *McDonald v. City of Chicago*, No. 08-1521 (U.S., Dec. 30, 2009) [hereinafter Chicago Brief].

4 *Id.* at 54-55.

5 *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (all men are endowed with “certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”).

Chicago endorses Rep. Michael C. Kerr's remarks distinguishing "rights" from "privileges or immunities,"⁶ but ignores the fact that Kerr was arguing that the Fourteenth Amendment did not protect "rights" and thus protection for "rights, privileges, and immunities" in what became the Civil Rights Act of 1871 (today's 42 U.S.C. § 1983) was unconstitutional.⁷ In introducing the bill, Rep. Samuel Shellabarger explained that it would enforce "rights" protected by the Amendment.⁸ In upholding protection for these same rights, the Court has relied on Shellabarger and other supporters and rejected arguments made by opponents such as Kerr.⁹

For Chicago to suggest at this late date that the Fourteenth Amendment does not guarantee "rights" because that word does not appear in the text would render the Amendment meaningless.

2. Judicial Decisions

Chicago argues that judicial decisions released just after adoption of the Amendment reflect no incorporationist understanding.¹⁰ However, none of these cases involved whether the Second Amendment or other Bill of Rights guarantees were incorporated.

The Fourteenth Amendment was not mentioned in *Twitchell v. Pennsylvania* (1868)¹¹ or *Edwards v. Elliott* (1874).¹² In the *Slaughter-*

6 Chicago Brief, *supra* note 3, at 56-57.

7 CONG. GLOBE, 42d Cong., 1st Sess. App. 47 (1871). However, Kerr also said that "the first eleven amendments" guarantee "to the people certain great personal rights" which are "fundamental." *Id.* at 46.

8 *Id.* at 68.

9 *E.g.*, *Patsy v. Bd. Of Regents of Fla.*, 457 U.S. 496, 503-06 (1982); *Monroe v. Pape*, 365 U.S. 167, 170-80 (1961), *overruled in part*, *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 665-85 (1978).

10 Chicago Brief, *supra* note 3, at 58-61.

11 *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321, 325-26 (1868) (holding Amendments V & VI not applicable to the states).

12 *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532, 557 (1874) (holding Amendment VII not applicable to the states). The lower court decisions cited by Chicago did not consider incorporation. See *United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.D.S.C. 1871) (No. 14,893) (Amendment IV restricts the United States, not private persons); *Rowan v. State*, 30 Wis. 129, 148-50 (1872) (grand jury indictment not required for due process).

House Cases (1872),¹³ Chicago concedes, “the precise question whether Bill of Rights guarantees were privileges or immunities of national citizenship was not presented”¹⁴

United States v. Cruikshank (1876)¹⁵ held only that First and Second Amendment rights, which predated the Constitution, may not be violated by private parties.¹⁶ State action not even being involved, the Court had no occasion to discuss incorporation.¹⁷

3. Congressional Action

Chicago argues that nondiscrimination was the only effect of the Fourteenth Amendment and related civil rights legislation,¹⁸ as if the Black Codes were deficient only because their prohibitions did not apply to everyone equally.

The Freedmen’s Bureau Act (1866) protected the “full and equal benefit” of laws for “personal liberty” and “personal security,” “including the constitutional right to bear arms.”¹⁹ The Civil Rights Act of 1866 protected the “full and equal benefit” of laws “for the security of person and property.”²⁰ These words belie Chicago’s claim that the enactments protected only equality.²¹

Just because equality was *one* purpose, Chicago argues that it was

13 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

14 Chicago Brief, *supra* note 3, at 60.

15 *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1876).

16 As Justice Bradley opined in the lower court, the Fourteenth Amendment “prevents the states from interfering with the right to assemble,” but, as also with the court alleging “conspiracy to interfere with certain citizens in their right to bear arms”: “In none of these counts is there any averment that the state had, by its laws interfered with any of the rights referred to” *United States v. Cruikshank*, 25 Fed. Cas. 707, 714-15 (C.C.D. La. 1874) (No. 14,897).

17 On the *Cruikshank* case, see STEPHEN P. HALBROOK, FREEDMAN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 159-82 (1998). See also CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008); LEEANA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008).

18 Chicago Brief, *supra* note 3, at 62-70.

19 Freedmen’s Bureau Act, ch. 200, § 14, 14 Stat. 173, 176-77 (1866).

20 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

21 Chicago Brief, *supra* note 3, at 62-63.

the *only* purpose of the Fourteenth Amendment.²² It quotes Rep. Henry Raymond on “equality of rights,” but neglects his statement that as a citizen, the African American has “a right to defend himself and his wife and children; a right to bear arms”²³

Noting that Southern courts voided the Civil Rights Act, Rep. George W. Julian pointed to laws prohibiting African Americans from testifying, possessing firearms, or renting land: “Cunning legislative devices are being invented in most of the States to restore slavery in fact.”²⁴ The goal was not to allow restoration of such incidents of slavery among citizens equally, but to recognize fundamental rights.

Introducing the Fourteenth Amendment, Senator Jacob Howard referred to “personal rights” like “the right to keep and bear arms,” explaining that the Amendment would compel the States “to respect these great fundamental guarantees.”²⁵ He did not mention indictment by grand jury or jury trial in civil cases.²⁶ He distinguished the rights of “all persons” from the “privileges and immunities” held only by “citizens.”²⁷

Howard further referred to “those great fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.”²⁸ Firearms were prohibited to slaves, and despots banned possession of firearms by commoners.²⁹ However, lack of a grand jury or civil jury did not reduce a people to slavery or despotism.

Not even the *opponents* of the Amendment on which Chicago relies³⁰ (without identifying them as such) disputed Howard’s explanation.

22 *Id.* at 64-65.

23 CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866).

24 *Id.* at 3210.

25 *Id.* at 2765-66.

26 *Id.* at 2765.

27 *Id.* at 2766. Chicago inaccurately portrays Howard as limiting Bill of Rights provisions to “privileges or immunities of national citizenship.” Chicago Brief, *supra* note 3, at 66.

28 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

29 A popular school textbook commented: “Some tyrannical governments resort to disarming the people, and making it an offence to keep arms In all countries where despots rule with standing armies, the people are not allowed to keep guns and other warlike weapons.” JOSEPH BARTLETT BURLEIGH, *THE AMERICAN MANUAL; OF THE THINKER, (PART III., COMPLETE IN ITSELF.)* 212 (Philadelphia, Lippincott, Grambo & Co. 1854).

30 Chicago Brief, *supra* note 3, at 66.

Sen. Thomas A. Hendricks (D-Ind.) objected that “the rights and immunities of citizenship” were not “very accurately defined.”³¹ Yet such terms seemed clear enough when he objected to the Freedmen’s Bureau Bill because it might apply in his State: “We do not allow to colored people there [sic] many civil rights and immunities which are enjoyed by the white people.”³² One such right was the right to bear arms.³³

Sen. Reverdy Johnson (D.-Md.) objected to the Privileges-or-Immunities Clause, saying “I do not understand what will be the effect of that.”³⁴ But as counsel for the slave owner in *Dred Scott*, Johnson was aware that citizenship “would give to persons of the negro race . . . the full liberty of speech . . . , and to keep and carry arms wherever they went.”³⁵

Chicago suggests that Rep. John A. Bingham “did not clearly articulate” incorporation.³⁶ Yet Bingham said that the Amendment would “arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today.”³⁷

Chicago discounts Bingham’s reiteration of incorporation in debate on the Civil Rights Act of 1871 because it was “long after the ratification of the Amendment.”³⁸ But the Court has relied on that same speech in explaining the scope of the Amendment.³⁹ On the same page of that speech, Bingham characterized “the right of the people to keep and bear arms” as one of the “limitations upon the power of the States . . . made so by the Fourteenth Amendment.”⁴⁰

Chicago quotes speeches which did not refer to the Second

31 CONG. GLOBE, 39th Cong., 1st Sess. 3039 (1866).

32 *Id.* at 318.

33 IND. CONST. art. I, § 32 (1851), reprinted in *THE STATE CONSTITUTIONS AND THE FEDERAL CONSTITUTION AND ORGANIC LAWS OF THE TERRITORIES AND OTHER COLONIAL DEPENDENCIES OF THE UNITED STATES OF AMERICA* 414 (Charles Kettleborough ed., 1918).

34 Chicago Brief, *supra* note 3, at 66-67 (citing CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866)).

35 *Scott v. Sandford*, 60 U.S. 393, 416-17 (1857).

36 Chicago Brief, *supra* note 3, at 67.

37 CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866). *See also id.* at 1291-92.

38 Chicago Brief, *supra* note 3, at 67-68.

39 *Monell v. Dep’t of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 685 & n.45 (1978) (noting that Bingham drafted the Amendment with *Barron v. Mayor of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833), in mind, and citing CONG. GLOBE, 42d Cong., 1st Sess. App. 85 (1871)).

40 CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1871).

Amendment or the Bill of Rights.⁴¹ Yet there were countless references to the Second Amendment not only in speeches, but also in executive branch reports and in hearings before committees investigating abuse of freedmen's rights.⁴²

4. Ratification

Records in the states that ratified the Amendment indicate that it was understood to protect Second Amendment rights.⁴³ Chicago incorrectly asserts that there was “no incorporationist understanding” in the states.⁴⁴ Yet its own authority describes the relationship among the Amendment, the Civil Rights Act, and the Freedmen's Bureau Act, as well as the Black Codes those provisions negated.⁴⁵ The right to have arms was a central issue involving those provisions. Further, the Amendment was said broadly to protect “natural rights” such as “life, liberty, self-protection.”⁴⁶

41 Chicago Brief, *supra* note 3, at 69.

42 See HALBROOK, *supra* note 17, at 1-55.

43 The Southern states were required to adopt constitutions and laws consistent with the Fourteenth Amendment. Georgia adopted the language of the Second Amendment, GA. CONST. art. I, § 14 (1868) reprinted in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES, Part 1 at 412 (Ben Perley Poore ed., Washington, Government Prtg. Office 2d ed. 1878), and passed a law and declaring as rights “the enjoyment of personal security, of personal liberty, private property . . . , and to keep and bear arms.” CONG. GLOBE, 40th Cong., 3d Sess. 3 (1868). A proposal in the 1868 Texas convention would have applied to that State “the inhibitions of power enunciated in articles from one to eight inclusive, and thirteen, of the amendments to the Constitution of the United States,” which was said to cover the same ground as the previous State Bill of Rights. 1 JOURNAL OF THE RECONSTRUCTION CONVENTION: WHICH MET AT AUSTIN, TEXAS 233, 235 (Austin, Tracy, Siemering & Co. 1870). See generally HALBROOK, *supra* note 17, at 71-74, 87-106.

44 Chicago Brief, *supra* note 3, at 70 (citing James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, & Pennsylvania*, 18 AKRON L. REV. 435, 448-49 (1985)).

45 Bond, *supra* note 44, at 443-44.

46 *Id.* at 445-46 (quoting DANVILLE PLAINDEALER (Ill.), Sept. 6, 1866, at 2, cols. 1-2). See *State v. Carew*, 47 S.C.L. (13 Rich.) 498, 547 (Ct. Err. 1866) (Aldrich, J., dissenting) (“freedom of speech” and “the right of the people to keep and bear arms” were “natural rights which existed independently of law, and with

Chicago quotes the 1908 study by Horace Flack as stating that public statements did not show “whether the first eight Amendments were to be made applicable to the States or not.”⁴⁷ However, Flack’s sentence did not end with “or not” – it continued: “but it may be inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it.”⁴⁸

Flack also wrote of Sen. Howard’s speech explaining that the Amendment would protect the right to have arms and other Bill of Rights guarantees: “By declarations of this kind, by giving extracts or digests of the principal speeches made in Congress, the people were kept informed as to the objects and purposes of the Amendment.”⁴⁹ Chicago underrates publication of Howard’s speech in the *New York Times* and elsewhere because it was “lengthy” and “special attention” was not given to the portions about Bill of Rights guarantees.⁵⁰ Yet contemporaries found his speech “clear and cogent”⁵¹ and “very forcible and well put.”⁵²

Chicago argues that some states did not amend their laws to require certain Bill of Rights procedures such as indictment by grand jury.⁵³ Such inaction about obscure procedural matters of little interest to the public shows nothing about the understanding of First and Second Amendment protections. Moreover, support for civil rights was not universal.⁵⁴

which neither States nor Congress were allowed to interfere.”).

47 Chicago Brief, *supra* note 3, at 70 (quoting HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 153-54 (1908)).

48 FLACK, *supra* note 47, at 153-54 (1908).

49 *Id.* at 142.

50 Chicago Brief, *supra* note 3, at 72.

51 *The Reconstruction Committee’s Amendment in the Senate*, N.Y. TIMES, May 25, 1866, at 4.

52 HALBROOK, *supra* note 17, at 36 (citing CHICAGO TRIBUNE, May 29, 1866, at 2, col. 3).

53 Chicago Brief, *supra* note 3, at 73.

54 After rejecting the Fourteenth Amendment, Maryland held a constitutional convention. It rejected a proposal that “every citizen has the right to bear arms in defence of himself and the State” after an amendment failed to say “white citizen”; it was objected that “Every citizen of the State means every white citizen, and none other.” PHILLIP B. PERLMAN, *DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867* 151 (1867). However, Maryland demanded compensation to slave owners. MD. CONST. art. III, § 37 (1867)

5. Treatises

Timothy Farrar, George W. Paschal, and John N. Pomeroy agreed that the states may not infringe on the right to keep and bear arms.⁵⁵ Joel P. Bishop did not believe the Grand Jury Clause to be applicable to the states,⁵⁶ but he wrote that the Second Amendment “seems to be of a nature to bind both the state and national legislatures”⁵⁷

Thomas W. Cooley merely restated the *Barron* rule in his *Constitutional Limitations* (1868, 1871),⁵⁸ but incorporation was not mentioned. Francis Wharton’s *Treatise on the Criminal Law* (1874) stated that certain procedural guarantees did not apply to the states.⁵⁹ But he wrote about the Fourteenth Amendment: “The incapacity of state legislatures to destroy personal rights is now as fully manifested, as, at the time of the adoption of the first group of amendments, was the incapacity of congress to destroy personal rights.”⁶⁰

A. *The Amendment was Understood to Eradicate State Violation of Rights Such as Having Arms, Not to Allow Equal Deprivation*

Civil rights legislation and the Fourteenth Amendment were understood to eradicate violations of rights such as free speech and having

reprinted in Perley, *supra* note 43 at 899.

55 TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 58-59, 145 (Boston, Little, Brown & Co. 1867); JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* 150-52 (Edmund H. Bennett ed., Boston & N.Y., Houghton, Mifflin, & Co., 10th ed. rev. & enlarged 1868); GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* 86, 256 (Washington, D.C., W.H. & O.H. Morrison, Law Booksellers 1868).

56 Chicago Brief, *supra* note 3, at 74.

57 2 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* 74 (Boston, Little, Brown, and Co. 4th ed. 1868), *cited with approval* in *English v. State*, 35 Tex. 473, 474-75 (1872).

58 Chicago Brief, *supra* note 3, at 73.

59 *Id.* at 74 (citing 1 FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: PRINCIPLES, PLEADINGS, AND EVIDENCE* 208-09, 467-68 (Philadelphia, Kay & Brother 1874)).

60 FRANCIS WHARTON, *COMMENTARIES ON LAW* 718 (Philadelphia, Kay & Brother 1884).

arms, not – as Chicago maintains – to allow the states to violate the rights of all persons equally.⁶¹

Commenting on the petition of South Carolina freedmen complaining that they were prohibited from firearms possession, Chicago claims that there was “no hint that an equality requirement would not suffice.”⁶² But Sen. Charles Sumner said that “they should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press” – not that they could be equally deprived of these rights.⁶³ Nor was equal treatment the only issue⁶⁴ that Sen. Henry Wilson had in mind when he complained that state forces were “visiting the freedmen, disarming them, perpetrating murders and outrages on them”⁶⁵

The prohibitions on African Americans to which Lyman Thrumbull referred included not only “having firearms,” but also “exercising the functions of a minister of the Gospel” and other “badges of slavery.”⁶⁶ He referred to “the great fundamental rights set forth in this bill,” not to mere equality.⁶⁷ The same could be said for Sen. John Pool when he noted that Klansmen would say “that everybody would be Kukluxed in whose house fire-arms were found,” and referred to “the right to security in one’s own house,”⁶⁸ and when Sen. Thayer referred to violation of “[t]he rights of citizenship, of self-defense, of life itself”⁶⁹

Chicago asserts that the state firearm laws were not understood to be subject “to a more stringent nationalized standard.”⁷⁰ Yet the states could not prohibit mere possession of firearms, such as in the Black Codes. Gen. Sickles’ order recognized “civil rights and immunities” as including “[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms,” excluding the unlawful carrying of concealed weapons.⁷¹

61 See Chicago Brief, *supra* note 3, at 75-76.

62 *Id.* at 75-76.

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

64 See Chicago Brief, *supra* note 3, at 76.

65 CONG. GLOBE, 39th Cong., 1st Sess. 40 (1866).

66 *Id.* at 474.

67 *Id.* at 475.

68 *Id.*, 41st Cong., 2d Sess. 2719 (1870) (“that everybody”); *id.* at 2722 (“the right to security . . .”).

69 *Id.* at App. 322.

70 Chicago Brief, *supra* note 3, at 77.

71 CONG. GLOBE, 39th Cong., 1st Sess. 908-09 (1866).

That Congress disbanded the militias in the Southern states does not support Chicago's position.⁷² Sen. Wilson's bill would have made the militias – which he said were “taking arms away from men who own arms, and committing outrages” – “disbanded and disorganized.”⁷³ But since the militias were defined to include all male citizens, Sen. Willey noted the “constitutional objection against depriving men of the right to bear arms”⁷⁴ The term “disarmed” was stricken from the bill, which then passed.⁷⁵

Chicago points to state laws and decisions that do not reflect an understanding that the Fourteenth Amendment would prohibit states from prohibiting firearms in common use.⁷⁶ Yet the laws merely regulated the carrying of arms; they did not prohibit them.

Reconstruction-era decisions cited by Chicago reflect the understanding that the right to have arms protected rifles, shotguns, and handguns. *Andrews v. State* held “that the rifle of all descriptions, the shot gun, the musket, and repeater, are such [protected] arms; and that under the Constitution the right to *keep* such arms, cannot be *infringed* or *forbidden* by the Legislature.”⁷⁷ *English v. State* held that “‘arms’ . . . refers to the arms of a militiaman or soldier,” which included “the musket and bayonet” and “the sabre, holster pistols and carbine.”⁷⁸ *Hill v. State* upheld a ban on carrying certain arms “to any court of justice,” on the basis that the people, “being unrestricted in the bearing and using of [arms], except under special and peculiar circumstances, there is no infringement of the constitutional guarantee.”⁷⁹

Finally, as with voting rights under the Fifteenth Amendment, it cannot be assumed that all state laws on the books after the adoption of

72 See Chicago Brief, *supra* note 3, at 77.

73 CONG. GLOBE, 39th Cong., 2d Sess. 1848-49 (1867).

74 *Id.* at 1848.

75 Act of March 2, 1867, ch. 170, 14 Stat. 485, 487 (1867).

76 See Chicago Brief, *supra* note 3, at 77-78.

77 50 Tenn. 165, 179 (1871) (emphasis in original); see *id.* at 187 (“the pistol known as the repeater”).

78 35 Tex. 473, 476 (1872). Similarly, *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891), opined that “the kind of arms referred to in the [second] amendment” were “weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets”

79 53 Ga. 472, 474-76 (1874).

the Fourteenth Amendment were consistent therewith.⁸⁰

III. THE FOURTEENTH AMENDMENT PROTECTS THE RIGHT TO KEEP AND BEAR ARMS

A. *Application of the Second Amendment Does Not Impact Federalism*

Requiring states to recognize the same fundamental rights as the United States does not impact the interests which federalism secures.⁸¹ The Second Amendment embodied a right “inherited from our English ancestors,”⁸² while “federalism was the unique contribution of the Framers to political science and political theory.”⁸³ As the Supreme Court has said, “to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual.”⁸⁴

The “States-as-laboratories” dictum is cited as an argument against incorporation.⁸⁵ But as the majority stated: “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.”⁸⁶

Chicago avers that the Second Amendment is the only Bill of

80 See *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring) (“the Act was passed for the purpose of disarming the negro laborers [T]here has never been . . . any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution”).

81 See Chicago Brief, *supra* note 3, at 10-13.

82 *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

83 *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring). Federalism divides authority “for the protection of individuals,” *New York v. United States*, 505 U.S. 144, 181 (1992), and “is one of the Constitution’s structural protections of liberty,” *Printz v. United States*, 521 U.S. 898, 921 (1997).

84 *Pointer v. Texas*, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring).

85 See Chicago Brief, *supra* note 3, at 11 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

86 *New State Ice Co., v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting) (citing, *inter alia*, *Near v. Minnesota*, 283 U.S. 697 (1931)) (“[In *Near*], the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press.”).

Rights provision recognizing a right to possess a “highly dangerous physical item.”⁸⁷ Yet the pen protected by the First Amendment is arguably mightier than the sword protected by the Second. Untold millions perished because of the ideologies of Communism and Nazism, but the *Communist Manifesto* and *Mein Kampf* may be freely read. The terrorists of 9/11 who used box cutters were inspired by religious fanaticism, yet such religious ideas may be freely taught.

Chicago asserts “a wider range of opinion” on firearms regulations “than on any other enumerated right.”⁸⁸ Like the suppression of illegally seized evidence, which is widely seen as a “technicality”? And just how diverse is opinion on handgun bans, which do not exist anywhere in the United States but Chicago and Oak Park?

Chicago argues that the rights protected by the Due Process Clause may expand and shrink over time.⁸⁹ Yet *Lawrence v. Texas* (2003) taught of an expansion, not a restriction, of rights: “laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”⁹⁰

B. *Policy Arguments are Irrelevant to the Incorporation Issue*

Chicago argues that firearm prohibitions limit crime, and thus that the city may subordinate the firearm rights of owners to the state’s interest in protecting its citizens.⁹¹ Yet the issue here is purely legal – whether the Fourteenth Amendment protects the right to keep and bear arms, because it was originally understood to do so and because that right is fundamental. “The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”⁹²

87 Chicago Brief, *supra* note 3, at 11.

88 *Id.*

89 *See id.*, at 12 (citing *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003)).

90 *Lawrence*, 539 U.S. at 579. As for Chicago’s ban on handguns in the home, *Lawrence* has a lesson: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.” *Id.* at 562.

91 Chicago Brief, *supra* note 3, at 12-17.

92 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008). The rejected “interest-balancing” test would have relied on the same kinds of legislative

Chicago argues that “in ‘an urban landscape, the Second Amendment becomes the enemy of ordered liberty, not its guarantor.’”⁹³ Yet only the law-abiding are protected by the Amendment, which would not be implicated in the parade of horrors imagined by Chicago: “Criminal street gangs with the right to carry guns” using violence “to control the drug trade.”⁹⁴

Chicago objects that *Heller’s* “common use” test may include “a weapon generally in common use for lawful purposes in one locale (such as a high-powered hunting rifle with precision sighting equipment popular in rural Illinois),” thus “precluding a ban on use by Chicago gangs seeking to assassinate rivals.”⁹⁵ This illustrates Chicago’s assumption that it can demonize and ban *any* firearm. Law-abiding Chicago residents also hunt with scoped rifles, not to mention that “gangs seeking to assassinate rivals” have already violated far more serious laws.

C. *The Constitution, not English Practice, is the Supreme Law of the Land*

Chicago argues that the right to have arms is not implicit in the concept of ordered liberty because countries such as England have firearm prohibitions that would be impermissible under the Second Amendment.⁹⁶ However, that very distinction led to the creation of the United States – the Crown’s attempts to disarm the colonists during 1768-1775 was a significant cause of the American Revolution.⁹⁷ James Madison referred to “the advantage of being armed, which the Americans possess over the people of almost every other nation,” in contrast to Europe, where “the

findings and empirical studies on which Chicago seeks to rely. *Id.* at 2854-61 (Breyer, J., dissenting).

93 Chicago Brief, *supra* note 3, at 16-17 (citing Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 *URB. LAW.* 1, 87 (2009)). “To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.” *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956).

94 Chicago Brief, *supra* note 3, at 16.

95 *Id.* at 19 n.9.

96 *Id.* at 21.

97 STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT*, chs. 1-4 (2008).

governments are afraid to trust the people with arms.”⁹⁸ In calling the right to arms “the true palladium of liberty,” St. George Tucker contrasted England, where “the people have been disarmed.”⁹⁹

Parliament recently repealed the 800-year-old guarantee against double jeopardy, allowing retrial of an acquitted person if the prosecution has “new and compelling evidence.”¹⁰⁰ Does this mean that our double jeopardy prohibition no longer “represents a fundamental ideal in our constitutional heritage”?¹⁰¹

D. *State Traditions Do Not Negate Incorporation*

Chicago argues that the way states regard the right to have arms does not support incorporation.¹⁰² Yet forty-four state constitutions with arms guarantees shows overwhelming recognition of the right. One state court said, “[d]espite the many variations in wording, the states’ constitutional provisions guaranteeing the right to bear arms share a common historical background.”¹⁰³ Chicago suggests that the state guarantees subject laws only to a toothless “reasonableness” standard,¹⁰⁴ but courts using that term often apply a rigorous test.¹⁰⁵ While the term “reasonableness” may be used loosely in many courts in regard to many rights, a higher standard is frequently applied, including in the states cited by Chicago.¹⁰⁶ Regarding a handgun-carrying ban, the Connecticut Superior Court in *Rabbitt v. Leonard* (1979) held that each citizen under

98 THE FEDERALIST NO. 46 (James Madison), reprinted in 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 492-93 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

99 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, at app. 300 (The Lawbook Exchange, Ltd. 1996) (1803).

100 Criminal Justice Act, 2003, c. 44, Part 10, § 78 (Eng.).

101 *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

102 Chicago Brief, *supra* note 3, at 23-31.

103 *State v. Kessler*, 614 P.2d 94, 95 (Or. 1980).

104 Chicago Brief, *supra* note 3, at 24.

105 *Bleiler v. Chief, Dover Police Dep’t.*, 927 A.2d 1216, 1223 (N.H. 2007), upheld the requirement of a license to carry a concealed weapon as “reasonable” because it “does not prohibit carrying weapons; it merely regulates the manner of carrying them. . . . Even without a license, individuals retain the ability to keep weapons in their homes or businesses, and to carry weapons in plain view.”

106 Chicago Brief, *supra* note 3, at 24.

the Connecticut state constitution “has a fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process.”¹⁰⁷ Invalidating a ban on possession of a firearm in a vehicle or place of business, the Colorado Supreme Court in *City of Lakewood v. Pillow* (1972) reasoned that a legitimate government purpose “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”¹⁰⁸

Chicago minimizes state decisions invalidating restrictions.¹⁰⁹ That the courts of some states have never done so only suggests that the right has been respected. Decisions upholding laws often reinforce adherence to the guarantee.¹¹⁰

Contrary to Chicago,¹¹¹ state courts followed the “common-use” test long before *Heller*. *Rinzler v. Carson* (Fla. 1972) held protected arms to be those that “are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles.”¹¹²

Chicago cites only a single state case from American history, *Kalodimos v. Village of Morton Grove* (Ill. 1984),¹¹³ which upheld a handgun ban. In an earlier epoch, that same court implied that the Second Amendment applies to the states.¹¹⁴

No other court has ever upheld a ban on possession of any of the three basic types of firearms – handguns, rifles, and shotguns. Chicago

107 *Rabbitt v. Leonard*, 413 A.2d 489, 491 (Conn. Super. Ct. 1979).

108 *City of Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972).

109 Chicago Brief, *supra* note 3, at 25. See, e.g., *Britt v. State*, 681 S.E.2d 320 (N.C. 2009); *State v. Spiers*, 79 P.3d 30 (Wash. Ct. App. 2003); *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003); *Baca v. N. M. Dep’t of Pub. Safety*, 47 P.3d 441 (N.M. 2002); *State v. Stevens*, 833 P.2d 318 (Or. Ct. App. 1992); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988).

110 See, e.g., *State v. Reid*, 1 Ala. 612, 616-17 (1840) (“A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”).

111 Chicago Brief, *supra* note 3, at 26.

112 *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972). See also *State v. Duke*, 42 Tex. 455, 458-59 (1875) (“such arms as are commonly kept, according to the customs of the people”); *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921) (“all ‘arms’ as were in common use”).

113 *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 279 (Ill. 1984).

114 *People v. Liss*, 94 N.E.2d 320, 323 (Ill. 1950).

points to the fact that only bans on narrow subsets of firearms have been upheld.¹¹⁵

The nineteenth century decisions Chicago cites on concealed weapons laws are adverse to Chicago.¹¹⁶ *Aymette v. State* (1840) supported the right to possess any arms used in “civilized warfare,” so that citizens could “repel any encroachments upon their rights”¹¹⁷ *English* upheld protection for militia arms – the musket, holster pistols, and carbine.¹¹⁸ *Andrews* held that rifles, shotgun, and repeating pistols may not be “forbidden by the Legislature.”¹¹⁹

IV. CONCLUSION

In holding that the Second Amendment applies to the states through the Fourteenth Amendment,¹²⁰ the Supreme Court in *McDonald* addressed some of the facets of Chicago’s argument, and was silent on others. *McDonald* is a blockbuster precedent on a previously neglected issue, and the perspectives of its majority, plurality, concurring, and dissenting opinions will be analyzed for some time to come. The majority opinion written by Justice Alito held that the Second Amendment applies to the states through the Fourteenth Amendment, but a plurality of only four Justices thought it did so through the Due Process Clause¹²¹ – Justice Thomas would have relied on the Privileges-or-Immunities Clause.¹²² Four Justices dissented.

Now that *Heller* has established that the Second Amendment protects individual rights and *McDonald* has established that it is incorporated against the states through the Fourteenth Amendment,

115 Chicago Brief, *supra* note 3, at 27 (citing *Robertson v. City and County of Denver*, 874 P.2d 325, 333 (Colo. 1994) (“assault weapons”); *Carson v. State*, 247 S.E.2d 68, 73 (Ga. 1978) (“sawed-off shotgun”).

116 Chicago Brief, *supra* note 3, at 28-30.

117 *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840).

118 *English v. State*, 35 Tex. 473, 476 (1872).

119 *Andrews v. State*, 50 Tenn. 165, 179 (1871). Chicago also points to a ban on the sale of handguns enacted in South Carolina in 1901. Chicago Brief, *supra* note 3, at 30 n.16. South Carolina’s criminal code in that period also enforced peonage contracts. *Ex parte Hollman*, 60 S.E. 19 (S.C. 1908).

120 *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

121 *Id.* at 3050 (plurality opinion).

122 *Id.* at 3059 (Thomas, J., concurring).

it remains to be seen how this incipient jurisprudence will develop. Challenges to state and local laws are sure to follow, as they did when other Bill of Rights guarantees were incorporated. If Reconstruction has now come to Chicago, the extent of the resistance to it, there and elsewhere, remains to be seen.