

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OTIS MCDONALD, ET AL., :

4 Petitioners :

5 v. : No. 08-1521

6 CITY OF CHICAGO, ILLINOIS, ET AL. :

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8 Washington, D.C.

9 Tuesday, March 2, 2010

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:13 a.m.

14 APPEARANCES:

15 ALAN GURA, ESQ., Alexandria, Virginia; on behalf of
16 Petitioners.

17 PAUL D. CLEMENT, ESQ., Washington, D.C.; for Respondents
18 National Rifle Association, Inc., et al., in support
19 of Petitioners.

20 JAMES A. FELDMAN, ESQ., Special Assistant Corporation
21 Counsel; on behalf of Respondents.

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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 08-1521, McDonald v.
5 The City of Chicago.

6 Mr. Gura.

7 ORAL ARGUMENT OF ALAN GURA

8 ON BEHALF OF THE PETITIONERS

9 MR. GURA: Mr. Chief Justice, and may it
10 please the Court:

11 Although Chicago's ordinances cannot survive
12 the faithful application of due process doctrines, there
13 is an even simpler, more essential reason for reversing
14 the lower court's judgment. The Constitution's plain
15 text, as understood by the people that ratified it,
16 mandates this result.

17 In 1868, our nation made a promise to the
18 McDonald family; they and their descendants would
19 henceforth be American citizens, and with American
20 citizenship came the guarantee enshrined in our
21 Constitution that no State could make or enforce any law
22 which shall abridge the privileges or immunities of
23 American citizenship.

24 The rights so guaranteed were not trivial.
25 The Civil War was not fought because States were

1 attacking people on the high seas or blocking access to
2 the Bureau of Engraving and Printing. The rights
3 secured by the Fourteenth Amendment were understood to
4 include the fundamental rights honored by any free
5 government and the personal guarantees of the --

6 CHIEF JUSTICE ROBERTS: Of course, this
7 argument is contrary to the Slaughter-House Cases, which
8 have been the law for 140 years. It might be simpler,
9 but it's a big -- it's a heavy burden for you to carry
10 to suggest that we ought to overrule that decision.

11 MR. GURA: Your Honor, the Slaughter-House
12 Cases should not have any stare decisis effect before
13 the Court. The Court has always found that when a case
14 is extremely wrong, when there is a great consensus that
15 it was simply not decided correctly, especially in a
16 constitutional matter, it has less force.

17 JUSTICE SOTOMAYOR: What injustice has --
18 has been caused by it that we have to remedy? Meaning
19 States have relied on having no grand juries; States
20 have relied on not having civil trials in certain money
21 cases; they have relied on regulating the use of
22 firearms based on us, the Court, not incorporating the
23 Privileges and Immunities Clause in the way that you
24 identify it.

25 MR. GURA: State --

1 JUSTICE SOTOMAYOR: What -- in which ways
2 has ordered liberty been badly affected?

3 MR. GURA: Justice Sotomayor, States may
4 have grown accustomed to violating the rights of
5 American citizens, but that does not bootstrap those
6 violations into something that is constitutional.

7 JUSTICE GINSBURG: Are you saying that the
8 rights -- if you could clarify your conception of
9 privileges and immunities. Am I right in thinking that
10 to keep and bear arms would be included even if we had
11 no Second Amendment, as you envision privileges and
12 immunities?

13 MR. GURA: Justice Ginsburg, that is
14 correct. The framers and the public understood the
15 term --

16 JUSTICE GINSBURG: But -- just tell us the
17 dimensions of what it is. I mean, we have the eight
18 amendments, so I know you say that's included. Keep and
19 bear arms would be included even absent the Second
20 Amendment. What unenumerated rights would we be
21 declaring privileges and immunities under your
22 conception of it?

23 MR. GURA: Although it's impossible to give
24 a full list of all the unenumerated rights that might be
25 protected by the Privileges and Immunities Clause, just

1 as it's impossible to do so under the Due Process
2 Clause, at least with respect to the Privileges and
3 Immunities Clause we have wonderful historical
4 guideposts. There are --

5 JUSTICE SCALIA: Mr. Gura, do you think it's
6 at all easier to bring the Second Amendment under the
7 Privileges and Immunities Clause than it is to bring it
8 under our established law of substantive due process?

9 MR. GURA: It's --

10 JUSTICE SCALIA: Is it easier to do it under
11 privileges and immunities than it is under substantive
12 due process?

13 MR. GURA: It's easier in terms, perhaps,
14 of -- of the text and history, the original public
15 understanding of --

16 JUSTICE SCALIA: No, no. I'm not talking
17 about whether -- whether the Slaughter-House Cases were
18 right or wrong. I'm saying, assuming we give, you know,
19 the Privileges and Immunities Clause your definition,
20 does that make it any easier to get the Second Amendment
21 adopted with respect to the States?

22 MR. GURA: Justice Scalia, I suppose the
23 answer to that would be no, because --

24 JUSTICE SCALIA: And if the answer is no,
25 why are you asking us to overrule 150, 140 years of

1 prior law, when -- when you can reach your result under
2 substantive due -- I mean, you know, unless you're
3 bucking for a -- a place on some law school faculty --

4 (Laughter.)

5 MR. GURA: No. No. I have left law school
6 some time ago, and this is not an attempt to -- to
7 return.

8 JUSTICE SCALIA: Well, I mean, what you
9 argue is the darling of the professoriate, for sure,
10 but it's also contrary to 140 years of our jurisprudence.
11 Why do you want to undertake that burden instead of just
12 arguing substantive due process? Which, as much as I
13 think it's wrong, I have -- even I have acquiesced in it.

14 (Laughter.)

15 MR. GURA: Justice Scalia, we would be
16 extremely happy if the Court reverses the lower court
17 based on the substantive due process theory that we
18 argued in the Seventh Circuit. And, indeed, had the
19 Seventh Circuit accepted our substantive due process
20 theory, which was our primary theory in the court below,
21 we might not be here, or perhaps we would be here in a
22 different posture.

23 JUSTICE GINSBURG: But that -- that court
24 does not have the prerogative to overturn any of this
25 Court's decisions, and I think it said -- said as much.

1 So it was kind of a pass-through in the court of
2 appeals.

3 But I really would like you to answer the
4 question that you didn't have an opportunity to finish
5 answering, and that is: What other enumerated rights?
6 What does the privileges and immunities of United States
7 citizenship embrace?

8 MR. GURA: Of the unenumerated rights,
9 Justice Ginsburg?

10 JUSTICE GINSBURG: Yes.

11 MR. GURA: Well, the framers clearly used
12 language that to them meant rights beyond those
13 guaranteed in the first eight amendments. And whenever
14 they spoke about those unenumerated rights, they gave
15 some concrete examples. So I think that there might be
16 two categories of unenumerated rights if a claim were
17 before the court under that provision.

18 If a right is, for example, the sort of
19 right that was mentioned in the Civil Rights Act of
20 1866, the piece of legislation enacted by a
21 supermajority of Congress, where the Congress said, over
22 President Johnson's veto, here are the rights of
23 American citizenship, and they are -- they listed: To
24 make and enforce contracts; to sue, be parties, and give
25 evidence; to inherit, purchase, lease, sell, hold, and

1 convey real and personal property. That's the sort of
2 right that would be easy to find because there is a
3 contemporaneous source for telling us --

4 JUSTICE GINSBURG: Even though -- even
5 though a large portion of the population at that time
6 didn't have those rights?

7 MR. GURA: The large -- the population at
8 the time that did not have those rights needed their
9 protection, primarily in the South, which is why the
10 Civil Rights Act --

11 JUSTICE GINSBURG: No, throughout --
12 throughout the nation at the time.

13 MR. GURA: I'm sorry.

14 JUSTICE GINSBURG: Did married women at that
15 time across the nation have the right to contract, to
16 hold property, to sue and be sued?

17 MR. GURA: Married women were considered
18 citizens of the United States, just like children were
19 considered citizens. However, the law did not always
20 protect people fully, and we've made great strides in
21 this country giving a greater level of protection to --
22 to certain rights. We understand certain rights better
23 today than we did 140 years ago, and the fact that First
24 Amendment rights weren't fully respected, Second
25 Amendment rights weren't always respected, Fourth

1 Amendment rights were not always understood well --

2 JUSTICE GINSBURG: Does it work just one
3 way? I mean, if the notion is that these are principles
4 that any free society would adopt, well, a lot of free
5 societies have rejected the right to keep and bear arms.

6 MR. GURA: As we mentioned -- as we
7 mentioned in our brief, this Court in *Benton v. Maryland*
8 decided that henceforth American history and tradition
9 are important to consider what rights are protected in
10 this country. It's true that our friends overseas who
11 have more or less civilized, free societies don't
12 respect rights to the same level that we do. For
13 example, England, which is a free society, has a
14 monarchy. They have hereditary lords in parliament.
15 They don't have First Amendment protection.

16 JUSTICE GINSBURG: But this -- then it's not
17 one expression of this unenumerated rights, natural rights,
18 or the rights that any free society -- basic to a free
19 society. So you -- you have to trim your definition.
20 It's not basic to any free society.

21 MR. GURA: As understood by the people who
22 ratified the Fourteenth Amendment. It's not a
23 free-flowing license, necessarily, for judges to
24 announce unenumerated rights. However, to the extent
25 that we have unenumerated rights which the framers and

1 ratifiers didn't literally understand, they nonetheless
2 left us guideposts that we can --

3 JUSTICE SCALIA: Well, what about rights
4 rooted in the traditions and conscience of our people?
5 Would -- would that do the job?

6 MR. GURA: Yes.

7 JUSTICE SCALIA: That happens to be the test
8 we have used under substantive due process.

9 MR. GURA: That's correct and, as Judge
10 O'Scannlain --

11 JUSTICE SCALIA: Yes.

12 MR. GURA: -- in the Ninth Circuit observed
13 in the Nordyke decision, the Slaughter-House dissenters
14 seemed to arrive at the same point, perhaps, that this
15 Court did in the Glucksberg case.

16 JUSTICE STEVENS: Mr. Gura, can I ask you
17 the same question Justice Ginsburg asked about: What if
18 there were no Second Amendment? You say the right would
19 still be protected under the Privileges and Immunities
20 Clause. What about -- would it also be protected under
21 substantive due process if there were no Second
22 Amendment?

23 MR. GURA: It would be, Your Honor. The
24 fact --

25 JUSTICE STEVENS: Because of the -- the

1 importance of the right to protection -- and would that
2 apply to the entire scope of the Second Amendment or just
3 the right to keep the gun, a homeowner's right to keep a
4 gun for self-protection against intruders into the home,
5 under the -- without the Second Amendment, just the
6 Liberty Clause?

7 MR. GURA: The Second Amendment is not so
8 limited and neither is the right to arms, even outside
9 the Second --

10 JUSTICE STEVENS: I'm assuming we don't have
11 a Second Amendment for purposes of the substantive due
12 process analysis. I'm asking you what is the scope of
13 the right to own a gun that is protected by the Liberty
14 Clause of the Fourteenth Amendment? Is it just the
15 right to have it at -- at home, or is the right to
16 parade around the streets with guns?

17 MR. GURA: An unenumerated right to arms in
18 the absence of the Second Amendment would be, perhaps --
19 probably identical to that secured by the Second
20 Amendment, because the Second Amendment codified the
21 understanding of that right that people have
22 historically had in the country. So there would not be
23 a difference between the right to arms if it were a part
24 of the Second Amendment or --

25 JUSTICE ALITO: Well, I thought your --

1 CHIEF JUSTICE ROBERTS: In -- in that
2 context, is your position that the rights that are
3 incorporated as essential to the concept of ordered
4 liberty, do they bring all of our decisions with them?
5 When you say the First Amendment is covered, does that
6 mean New York Times v. Sullivan is incorporated as well?
7 Or is it only some lesser version of the incorporated
8 right?

9 MR. GURA: With respect to the substantive
10 due process argument that we're making?

11 CHIEF JUSTICE ROBERTS: Yes.

12 MR. GURA: We are not challenging -- we are
13 not the party that's before the Court that is
14 challenging anything that has gone on before in terms of
15 substantive due process. We believe that those cases
16 were by and large decided appropriately, and if the
17 Court wishes to reconsider any of them for some reason,
18 it -- that has really nothing to do --

19 JUSTICE KENNEDY: No, I understood the Chief
20 Justice's question -- maybe I misunderstood it, but my
21 understanding of the question as important is this:
22 Under incorporation by reference, the States are bound
23 by the rights in all -- with all of the refinements and
24 sophistication with which we interpret them for the
25 Federal Government. It's the same. You don't just

1 apply the core of the right. You apply all of the right
2 as it is elaborated by the cases.

3 Is -- is that same consequence -- does that
4 same consequence follow if we adopt the privileges and
5 immunities interpretation that you are urging upon us?

6 MR. GURA: Yes, Your Honor, because --

7 JUSTICE BREYER: Okay. How does that work?
8 I think that would be useful for either you or
9 Mr. Clement, if you've thought this through. Is this
10 right different from others?

11 MR. GURA: Well --

12 JUSTICE BREYER: There are two ways. One is
13 that -- look at -- all you have to do is look at the
14 briefs. Look at the statistics. You know, one side
15 says a million people killed by guns. Chicago says that
16 their -- their gun law has saved hundreds, including --
17 and they have statistics -- including lots of women in
18 domestic cases. And the other side disputes it. This
19 is a highly statistical matter. Without incorporation,
20 it's decided by State legislatures; with, it's decided
21 by Federal judges.

22 Now, think of this, too: That when you have
23 the First Amendment, or some of the other amendments,
24 there's always a big area where it's free speech versus
25 a whole lot of things, but not often free speech versus

1 life. When it's free speech versus life, we very often
2 decide in favor of life. Here every case will be on one
3 side guns, on the other side human life. Statistics,
4 balancing life versus guns. How are Federal judges in
5 your opinion, rather than legislatures in the States in
6 a Federal system -- how are Federal judges supposed to
7 carry this out? I want to see where we're going.

8 MR. GURA: Federal judges should carry this
9 out in the same way that was announced in this Court's
10 decision in Heller. So --

11 JUSTICE BREYER: Heller, I didn't think,
12 explained that with great -- I was dissenting,
13 though. I didn't think it explained it with total
14 clarity, but that's a dissenter's view.

15 (Laughter.)

16 MR. GURA: Heller stood for the proposition
17 that some activities are within the core boundaries of a
18 right, and so long as people wish to do something that
19 is literally understood to be a part of the boundaries of
20 the right, it is to be protected, and --

21 JUSTICE BREYER: Let me be specific, suppose
22 Chicago says, look, by banning handguns not in the
23 hills, not hunting, nothing like that, nothing outside
24 the city -- in the city, we save several hundred human
25 lives every year. And the other side says, we don't

1 think it is several hundred, and, moreover, that doesn't
2 matter. How do you decide the case?

3 MR. GURA: We decide that by looking, not to
4 which side has the better statistics, but rather to what
5 the framers said in the Constitution, because that
6 policy choice was made for us in the Constitution.
7 They --

8 JUSTICE BREYER: You're saying they can
9 have -- no matter what, that the City just can't have
10 guns even if they're saving hundreds of lives -- they
11 can't ban them.

12 MR. GURA: The City cannot ban guns that are
13 within the common use as protected by the right to arms.

14 JUSTICE SCALIA: There's a lot of
15 statistical disagreement on whether the Miranda rule
16 saves lives or not, whether it results in the release of
17 dangerous people who have confessed to their crime, but
18 the confession can't be used. We don't -- we don't
19 resolve questions like that on the basis of statistics,
20 do we?

21 MR. GURA: That's correct, Justice Scalia,
22 and as your opinion --

23 JUSTICE SCALIA: Well, why would this one be
24 resolved on the basis of statistics? If there's a
25 constitutional right, we find what the minimum

1 constitutional right is, and everything above that is up
2 to the States.

3 MR. GURA: That --

4 JUSTICE SCALIA: If they want to have, you
5 know -- I think we mentioned in Heller concealed carry
6 laws. I mean, those are -- those are matters that we
7 didn't decide in Heller. And you may have a great deal
8 of divergence from State to State. And on that, I suppose,
9 you would do statistics, wouldn't you? Or the legislature
10 would.

11 MR. GURA: Well, Your Honor, we do agree
12 that statistics are not important to determine whether
13 or not a right --

14 JUSTICE SCALIA: For the judges. For the
15 judges.

16 MR. GURA: That's right.

17 JUSTICE SCALIA: But they would be for the
18 legislatures.

19 MR. GURA: A legislature should respect the
20 fact that there is a constitutional right at issue, and
21 this Court in footnote 27 in Heller explained that under
22 the Carolene Products paradigm, footnote 4, rights
23 enumerated in the Constitution are entitled to a greater
24 measure of respect.

25 And if I may reserve the remainder of my time

1 for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.
3 Mr. Clement.

4 ORAL ARGUMENT OF PAUL D. CLEMENT
5 ON BEHALF OF RESPONDENTS NATIONAL RIFLE
6 ASSOCIATION, INC., ET AL.,
7 IN SUPPORT OF THE PETITIONERS

8 MR. CLEMENT: Mr. Chief Justice, and may it
9 please the Court:

10 Under this court's existing jurisprudence,
11 the case for incorporating the Second Amendment through
12 the Due Process Clause is remarkably straightforward.
13 The Second Amendment, like the First and the Fourth,
14 protects a fundamental preexisting right that is
15 guaranteed to the people -- -

16 JUSTICE STEVENS: Mr. Clement, would you
17 comment on Justice Kennedy's question about whether that
18 necessarily incorporates every jot and tittle of the
19 Federal right into the Federal, keeping in mind that
20 with regard to trial by jury in criminal cases, there's
21 a difference. It's nonunanimous juries. Why does this
22 incorporation have to be every bit as broad as the
23 Second Amendment itself?

24 MR. CLEMENT: Well, Justice Stevens, I think
25 in that respect the Sixth Amendment is a bit of an

1 outlier. For most of the provisions and as far as I
2 know all of the substantive provisions of the Bill of
3 Rights that have been incorporated against the States,
4 this Court has incorporated basically all the
5 jurisprudence that comes with that.

6 JUSTICE STEVENS: Well, what is the last
7 case in which we incorporated a substantive provision?

8 MR. CLEMENT: Well, I guess maybe it's Mapp,
9 is one way of thinking about it. I mean --

10 JUSTICE STEVENS: Mapp was a procedural
11 case.

12 MR. CLEMENT: -- I could quibble about that --

13 JUSTICE STEVENS: Mapp was a Fourth Amendment
14 case. I'm asking you cases involving incorporation of
15 substantive rights, as opposed to procedural rights.

16 MR. CLEMENT: Well --

17 JUSTICE STEVENS: The procedural cases come
18 in under the due process language, but the substantive
19 cases comes under the word "liberty," and "liberty"
20 picks up the First Amendment and so forth. And I take
21 it it's the word "liberty" that picks up the Second
22 Amendment. And if it does, why does it have to be
23 precisely the same scope as the Second Amendment?

24 MR. CLEMENT: Well, sure. We could quibble
25 whether -- I think of the Fourth Amendment as more of a

1 substantive guarantee. But in any event, with respect
2 to certainly like the First Amendment guarantees that
3 this Court has incorporated through the liberty -- the
4 liberty subclause, if you will, of the Due Process
5 Clause, there too I think this Court -- certainly I
6 understand this Court's jurisprudence as incorporating
7 all of the cases that go along with that.

8 So New York Times v. Sullivan is the law of
9 all 50 States, et cetera, et cetera. And I think that
10 in a sense the virtue of that approach is probably even
11 more apparent with the Second Amendment than it might be
12 with some other jurisprudence --

13 JUSTICE SCALIA: I guess we -- I guess we
14 have applied substantive due process with regard to the
15 necessity of permitting homosexual conduct and with
16 respect to the necessity of permitting abortion on
17 demand. We have not adopted a more rigid rule for the
18 Federal Government than we have adopted for the States
19 in either of those instances, have we?

20 MR. CLEMENT: That's also right, Your Honor,
21 though I guess I would stress that I think that,
22 whatever the debate's about substantive due process when
23 it comes to unenumerated rights, I think the gist of
24 this Court's incorporation doctrine is that the textual
25 provisions of the Bill of Rights stand in a favored

1 position with respect to incorporation. And so Glucksberg
2 has its discussion about the standard for unenumerated
3 rights, but it starts that off by saying of course the
4 Bill of Rights are different. And, of course, the Bill
5 of Rights, I think, as I read this Court's selective --

6 JUSTICE STEVENS: They stand in a favored
7 position, but we've never said had to be literally
8 all the way down the line, or we couldn't have done
9 the criminal jury -- nonunanimous criminal jury case.

10 MR. CLEMENT: Again, though, it's
11 interesting that the one place that I -- that I see where
12 the Court has not effectively translated all the case law
13 is one of the procedural rights, the Sixth Amendment
14 criminal jury right. And I think with respect to the
15 substantive rights -- and I think the alliance here or
16 the similarity between the First and the Second
17 Amendments are very stark in this respect -- this Court
18 has incorporated essentially not just the amendment and
19 not just the right, but all of the jurisprudence as
20 well.

21 And, you know, I would -- just to dwell for
22 a moment if I'd could on the -- on the First and the Second
23 Amendment, I think it's striking, very striking, that if
24 this Court's not going to reconsider its Privileges or
25 Immunities Clause jurisprudence, the Cruikshank case

1 actually stands as very good precedent for incorporating
2 the Second Amendment, just as it was the precedent this
3 Court relied on in incorporating the assembly and petition
4 rights of the First Amendment in the De Jonge case. And
5 the reason is Cruikshank -- the whole reason that
6 Cruikshank said the First and Second Amendments aren't
7 privileges of national citizenship is because they were
8 preexisting rights that didn't depend on the
9 Constitution for their existence.

10 That seems to me to be a pretty good working
11 definition of what a fundamental right is, one that is
12 so fundamental and basic that it preexisted our very
13 Constitution. And so it's not surprising that De Jonge
14 cited Cruikshank as favorable precedent for
15 incorporation.

16 I think the exact same logic would apply to
17 the Second Amendment here, and, as I say, I do think the
18 consequence of that, certainly the most logical
19 consequence, would be to carry over the jurisprudence
20 under the Second Amendment. Now, right now, that's not
21 carrying over a lot, right? That's carrying over the
22 Heller case.

23 But I think in a way that points up to the
24 fact that one of the virtues of incorporation is that,
25 because the Miller decision of this Court sowed

1 confusion, we don't have substantial Second Amendment
2 jurisprudence. And I would think that it's going to be
3 difficult enough to develop the Second Amendment
4 jurisprudence that you wouldn't want to make it more
5 difficult by having to develop a Federal Second
6 Amendment jurisprudence and then some sort of shadow
7 version of that jurisprudence for the States.

8 And I think in the more recent incorporation
9 cases, this Court was quite candid that it wasn't going
10 to adopt sort of a shadow version of the Federal
11 guarantee or some watered-down version of the Federal
12 guarantee, but it really saw the virtue of incorporating
13 not just the right but the jurisprudence that came with
14 that right.

15 And so I do think that's in a sense
16 something that counts in favor of incorporating the
17 Second Amendment and doing so through the Due Process
18 Clause, the same way this Court has dealt with the other
19 substantive guarantees of the Bill of Rights. And I
20 think if you apply that jurisprudence, the case really
21 is very straightforward. In fact, I think if you
22 compare the First Amendment and the Fourth Amendment to
23 the Second Amendment, they have the same textual
24 guarantee to the people, they trace their origins to
25 preexisting rights back to the English Bill of Rights,

1 back to even earlier constitutional history.

2 JUSTICE STEVENS: That's true of the
3 criminal jury trial right, too, all of those things?
4 And yet we don't -- it's not exactly the same. I just
5 don't see why it has to be exactly the same. I can
6 understand your argument that it should be substantially
7 the same, but I don't see that there's anything in the
8 text of the Fourteenth Amendment that would justify
9 saying it must be precisely the same, or of any of our
10 cases.

11 MR. CLEMENT: Well -- and, again, Justice
12 Stevens, you know, since I think that -- that the
13 incorporation clause is -- I mean, the incorporation
14 jurisprudence is, to put it lightly, a gloss on the text
15 of the Due Process Clause --

16 JUSTICE STEVENS: Incorporation
17 jurisprudence is -- we haven't had an incorporation case
18 for 30 years or more.

19 MR. CLEMENT: That's right. That's right,
20 Justice Stevens. But I guess I would say is that,
21 putting the Sixth Amendment to one side, which I think
22 is a bit of an outlier in the jurisprudence here, I
23 think the trend of all of this Court's incorporation
24 jurisprudence has been more towards complete
25 incorporation of the right and the jurisprudence. So --

1 I mean, Mapp is a perfect illustration.

2 CHIEF JUSTICE ROBERTS: That still allows
3 scope, once you determine that the right is
4 incorporated, for recognizing that the States might have
5 broader interests that the Federal Government doesn't
6 have. But I would suppose that would come up in the
7 application of the right, rather than in an effort to
8 determine whether parts of it are incorporated or not.

9 MR. CLEMENT: That's right,
10 Mr. Chief Justice, and I think the same thing can be
11 said for any other one of the other incorporated
12 amendments. So I think the same thing might be true in
13 the First Amendment. There are certainly going to be
14 situations that the Federal government confronts that
15 the State governments won't confront the exact analogue
16 situation and vice versa.

17 Now, you know, there may be unique issues
18 about national parks that the States aren't going to
19 have to confront, and the jurisprudence can take that
20 into account. But I think that's far different from
21 saying that we really are going to have this shadow
22 jurisprudence for one of the provisions.

23 And I think, again, to go back to Mapp just
24 as an illustration, when this Court first incorporated
25 the Fourth Amendment and said, well, we'll talk about

1 the exclusionary rule later; maybe we won't incorporate
2 the Fourth -- the exclusionary rule. We'll just
3 incorporate the Fourth Amendment's basic guarantee. And
4 the trend of later cases was to say, no, kind of in for
5 a penny, in for a pound --

6 JUSTICE STEVENS: You're -- you're dead right --

7 MR. CLEMENT: -- let's bring the
8 jurisprudence with --

9 JUSTICE STEVENS: -- about the majority of
10 the Court, but it's interesting that during this whole
11 period, Justice Harlan staked out a separate position on
12 whether it should be just the substance of the right or
13 the -- every detail. And we have followed Justice Harlan,
14 rather than the majority in a number of cases in -- in
15 the recent years.

16 MR. CLEMENT: Well --

17 JUSTICE STEVENS: He is very much against you,
18 and he's a very important member of our -- of our history.

19 MR. CLEMENT: Justice Harlan was a terrific
20 justice. Justice Black was a terrific justice in --

21 JUSTICE ALITO: Maybe we should go back --

22 MR. CLEMENT: -- in his total
23 incorporation --

24 JUSTICE ALITO: Well, Mr. Clement, why
25 shouldn't we go back completely to Justice Harlan's view

1 about the way in which the Bill of Rights applies to the
2 States?

3 MR. CLEMENT: Well, I think if we are going
4 to go back, maybe we should go back to the first Justice
5 Harlan, who actually had an -- an approach, I think,
6 that would be much more similar to the approach --

7 JUSTICE BREYER: But there is a difference.

8 MR. CLEMENT: -- that we take in this case
9 and that Mr. Gura takes in this case.

10 JUSTICE BREYER: There is a difference here
11 with the other amendments. There is a difference, and the
12 other amendments -- you have the First Amendment's,
13 the First Amendment expression.

14 Here we have right in the amendment written
15 a militia-related clause. And the way that -- the
16 way -- the way that the right might be incorporated in
17 respect to that is light years different from the way
18 it might be interpreted if you think what it is, is the
19 right to have a gun to shoot a burglar. They're just
20 two separate things.

21 And as to the first, it's pretty hard for me
22 to see why you'd incorporate it, for reasons I won't
23 go into. As to the second, I understand it. So we're
24 starting with a difference in purposes at the least.
25 And shouldn't that make a difference in how you

1 incorporate?

2 MR. CLEMENT: Well, I mean, I guess what
3 I -- what I don't understand is why, given the way that
4 this Court wrestled in the Heller decision with how to
5 basically apply the operative clause in light of the
6 prefatory clause, why one would want to come to a
7 different conclusion --

8 JUSTICE BREYER: Because the -- one of the
9 reasons --

10 MR. CLEMENT: -- with respect to the States.

11 JUSTICE BREYER: -- at least, is that --
12 you've read, I'm sure, that all the law professors
13 at Harvard, Yale, Princeton, London, et cetera, that say
14 even Blackstone in the 17th century thought that this is
15 primarily a right to raise an army through Parliament
16 to -- well, I can't go on here. I'm just saying think
17 of that brief, and you'll see the differences, even
18 accepting Heller.

19 CHIEF JUSTICE ROBERTS: You can respond if
20 you want, briefly.

21 MR. CLEMENT: Thank you, Mr. Chief Justice.

22 I mean, obviously this Court was focused
23 very much on Blackstone's writings in the Heller
24 decision, and I think the majority read Blackstone
25 actually as being primarily concerned with the

1 self-defense right, which goes a long way to understand
2 why the Heller decision came out the way that it came
3 out.

4 And I would simply finish by noting that the
5 one thing that I think we can come to a conclusion about
6 Blackstone is the very fact that Blackstone dwelled on
7 the right is good evidence that it's a fundamental right
8 that should apply to the States.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Clement.

11 Mr. Feldman.

12 ORAL ARGUMENT OF JAMES A. FELDMAN

13 ON BEHALF OF THE RESPONDENTS

14 MR. FELDMAN: Mr. Chief Justice, and may it
15 please the Court:

16 The Second Amendment should not be
17 incorporated and applied to the States because the right
18 it protects is not implicit in the concept of ordered
19 liberty. States and local governments have been the
20 primary locus of firearms regulation in this country for
21 the last 220 years.

22 Firearms, unlike anything else that is the
23 subject of a provision of the Bill of Rights, are
24 designed to injure and kill. And the very same features
25 that make firearms valuable for self-defense as the

1 Court noted in Heller also --

2 JUSTICE SCALIA: When is the last time an
3 opinion of ours made that the test, implicit in the
4 concept of ordered liberty? It sounds very nice. But
5 when is the last time we used it? I think it was 1937.

6 MR. FELDMAN: I don't believe it was, Your
7 Honor. The --

8 JUSTICE SCALIA: Has it been the basis of
9 our decision in any case since Palko?

10 MR. FELDMAN: I think the -- the Court
11 has -- the Court has used the term in a number of cases.
12 Since then, it has used it in -- not in corporation cases
13 as recently as the Glucksberg case. It used it in Mapp.
14 It has used it in other cases, but I think --

15 JUSTICE KENNEDY: And it was also the Harlan
16 view, although a separate opinion in the Griswold case
17 and in Poe v. Ullman.

18 Do you think that it best describes the
19 approach that the Court has used over the years?

20 MR. FELDMAN: Yes, I do.

21 JUSTICE KENNEDY: I was going to ask
22 Mr. Clement what test he thought the Court used. If
23 you looked at all the cases, you think implicit in
24 the concept of ordered liberty?

25 MR. FELDMAN: Yes, I do, and here's the

1 reason why. In 1833, this Court has held in Barron v.
2 Baltimore, in a -- in a ruling that Chief Justice
3 Marshall said was not a difficult one, although
4 important, that the Bill of Rights did not apply to the
5 States.

6 As far as I know, no justice has ever
7 disagreed with that -- with that ruling or suggested he
8 was wrong in so ruling. From -- it was -- the only
9 reason -- and when the Fourteenth Amendment was passed
10 and ratified in the late 1860s, again, the -- the
11 framers did not directly apply the Bill of Rights to the
12 States. They gave us some generalities.

13 And the Court has always understood that
14 when it's applying the Due Process Clause, what it asks
15 is not just is something in the Constitution, but is
16 this something that's so fundamental it's a necessary
17 condition --

18 JUSTICE SCALIA: Is the right to trial by
19 jury implicit in the concept of ordered liberty?

20 MR. FELDMAN: I --

21 JUSTICE SCALIA: My goodness --

22 MR. FELDMAN: I think that it --

23 JUSTICE SCALIA: -- there are a lot of
24 countries that don't give the right to trial by jury,
25 even England does not give it in all criminal cases.

1 MR. FELDMAN: I think it is in the following
2 sense: When you're talking about a procedural right
3 that's embedded in a particular procedural system, you
4 have to look at how that system operates and how the --
5 the right works within that particular system.

6 CHIEF JUSTICE ROBERTS: Well, I think that's
7 exactly -- that's exactly right. And that is what the
8 Court elaborated on in Duncan. I do think the focus is
9 our system of ordered liberty, not any abstract system
10 of ordered liberty. You can say Japan is a free
11 country, but it doesn't have the right to trial by -- by
12 jury.

13 The -- the concept only makes sense,
14 I think, if you limit it to our system. Under our
15 system, as you said, the -- the right to a jury is
16 essential.

17 MR. FELDMAN: I -- I agree -- I -- I
18 think that's right. I was just distinguishing
19 between --

20 CHIEF JUSTICE ROBERTS: Well, if you think
21 that's right, why wouldn't you think, for all the
22 reasons given in Heller, that the Second Amendment right
23 is essential to our system, whatever it may be with
24 respect to France or England or anywhere else?

25 MR. FELDMAN: The question that the Court

1 was addressing in Heller was not -- again, was not how
2 important the Second Amendment right was, or how
3 implicit it is in our system; it was what did it say and
4 what did the -- what restrictions did the framers of the
5 Second Amendment impose on the Federal Government.

6 JUSTICE KENNEDY: But I thought its
7 rationale was that because of its fundamental character,
8 the right to bear arms must be understood as separate
9 from the qualifying phrase of the militia clause, all
10 people, most people in the United States. The public
11 meaning of the Second Amendment was that there was an
12 individual right to bear arms, and that's because it was
13 fundamental. If it's not fundamental, then Heller is
14 wrong, it seems to me.

15 MR. FELDMAN: No, I -- I -- I don't think
16 that that's right. The question is what right -- what
17 did they impose upon the -- as restrictions upon the
18 government when the Second Amendment was ratified. And
19 as to that, it's not a question of whether it's
20 fundamental any more than with the Grand Jury Clause or
21 with the civil jury trial right --

22 CHIEF JUSTICE ROBERTS: I don't see how you
23 can read --

24 MR. FELDMAN: -- under the Seventh Amendment.

25 CHIEF JUSTICE ROBERTS: I don't see how you can

1 read Heller and not take away from it the notion that the
2 Second Amendment, whether you'd want to label it
3 fundamental or not, was extremely important to the framers
4 in their view of what liberty meant.

5 MR. FELDMAN: I -- it was important, but
6 actually what Heller says is this: The Second Amendment
7 preexisted the -- its inclusion -- or the right that's
8 in the Second Amendment preexisted its inclusion in the
9 Bill of Rights. But the reason it was codified, the
10 reason it -- the reason it was put into the Bill of Rights
11 was because the framers were concerned about the Federal
12 Government disarming the militia.

13 The right of self-defense, which had been
14 previously recognized and highly valued, I would agree,
15 was -- had -- according to Heller, quote, "had little to
16 do with its codification" --

17 JUSTICE SCALIA: That may be --

18 MR. FELDMAN: -- with its inclusion in the
19 Constitution.

20 JUSTICE SCALIA: That may be the reason it
21 was put there. But it was put there.

22 MR. FELDMAN: That's --

23 JUSTICE SCALIA: And that's the crucial fact.
24 It is either there or it is not there.

25 And if it's there, it doesn't seem to me to

1 make any difference why they chose to put that one there
2 as opposed to other ones that they didn't put there.
3 It's either there or not.

4 MR. FELDMAN: That -- I agree as far as the
5 Federal Government goes. But now there's a different
6 question being asked, and the Second Amendment in this
7 respect is unlike any of the other amendments that have
8 been incorporated.

9 The same -- very same reason why the
10 First -- the various rights in the First Amendment were
11 put there in 1791 is exactly the reason why it was
12 held -- why it was incorporated and applied to the
13 States under the Fourteenth amendment.

14 JUSTICE BREYER: So do we read the -- the
15 clause at the beginning -- the militia clause -- we're
16 supposed to read the words of the Constitution, aren't we?
17 I guess --

18 MR. FELDMAN: Yes.

19 JUSTICE BREYER: -- the answer to that's yes.
20 (Laughter.)

21 JUSTICE SCALIA: Yes.

22 MR. FELDMAN: Yes.

23 JUSTICE BREYER: Thank you. Very well, and
24 doesn't that suggest what the purpose of putting the right
25 there is even under Heller or at least one purpose --

1 MR. FELDMAN: Well, that -- that --

2 JUSTICE BREYER: And does that not give us a
3 clue as to what they thought that --

4 MR. FELDMAN: That's what --

5 JUSTICE BREYER: -- the ordered liberty
6 was? That's your point?

7 MR. FELDMAN: That's what -- and that's what
8 Heller said. And here's the difference -- is, it is it
9 is now urged that this right is fundamental because of
10 its importance, the importance of firearms in
11 self-defense. That was true also in 1791, but it
12 wouldn't have been in the Constitution for that. That
13 had little to do with putting it in the Constitution.
14 This is a right that has always been subject to the
15 political process and --

16 CHIEF JUSTICE ROBERTS: Well, sure, and it's
17 still going to be subject to the political process if
18 the Court determines that it's incorporated in the Due
19 Process Clause. All the arguments you make against
20 incorporation, it seems to me, are arguments you should
21 make in favor of regulation under the Second Amendment.
22 We haven't said anything about what the content of the
23 Second Amendment is beyond what was said in Heller.

24 MR. FELDMAN: That's -- that's --

25 CHIEF JUSTICE ROBERTS: And so the argument

1 you make is, well, given this context, you should not be
2 able to have concealed carry. Well, maybe that's
3 right, but that doesn't mean you don't incorporate the
4 Second Amendment to allow you to enforce that type of
5 regulation.

6 MR. FELDMAN: No, I don't think so. I think
7 -- the argument that I'm making is that States and local
8 governments under the political process, which as far as
9 we know, if the only issue had been self-defense, the
10 framers would have been satisfied to leave this to the
11 States and to leave this to the political process, and not
12 to put it in the Constitution -- that -- that -- that as
13 far as the right to self-defense goes, that's something
14 that has always been effectively regulated through the
15 political process and especially at the State and local
16 level. And through our history, as technology has
17 changed, State and local regulation has altered to draw
18 the balance that has to be drawn.

19 JUSTICE ALITO: And your position is that a
20 -- a State or local government could completely ban all
21 firearms?

22 MR. FELDMAN: If the State and local
23 government did that, I think would it raise two
24 questions. One question would be, there is always
25 review under the Due Process Clause and under the Equal

1 Protection Clause for provisions that are arbitrary.

2 And I'd want to know why a State had done that. It's

3 certainly relevant that in the last 220 years, no

4 State has done that or even come close, and, in fact, as

5 the briefs on the other side of the case from some of

6 the States show, they are quite in the opposite direction.

7 But the second point would be --

8 JUSTICE SCALIA: I -- I don't understand.

9 JUSTICE KENNEDY: What is the due process
10 liberty --

11 JUSTICE SCALIA: What basis would there be
12 to -- to deny that?

13 MR. FELDMAN: Well, there's always --

14 JUSTICE SCALIA: Firearms kill people is
15 what the States say, and -- and we ban it.

16 MR. FELDMAN: Right, and that has --

17 JUSTICE SCALIA: Other countries have done
18 that.

19 MR. FELDMAN: It has not led to States doing
20 it in -- in this country. The second question --

21 JUSTICE SCALIA: But if they did do it, I
22 think you'd have to say it's perfectly okay.

23 MR. FELDMAN: No, the second -- there would
24 be two questions actually. One would be was this arbitrary,
25 or is that actually based on a reason that's --

1 a sound reason?

2 JUSTICE SCALIA: Yes. The reason is guns are
3 dangerous.

4 MR. FELDMAN: The second argument would be,
5 the Court at that point, if in the very unlikely event a
6 that a State or local government tried to do that, then
7 the Court might have to wrestle at that point with the
8 question of the relationship between self-defense and
9 the right to keep and bear arms. In other words, this
10 Court has never said --

11 JUSTICE KENNEDY: But would self-defense be
12 part of liberty under the Due -- substantive meaning of
13 the Due Process Clause?

14 MR. FELDMAN: I mean, if by that is, do you
15 have a substantive right to self-defense, the Court
16 actually has never answered that question, but I'm
17 willing to accept that there is such a right for --

18 JUSTICE KENNEDY: And you've given -- you
19 said there were two reasons. So you have given us both
20 in your answer to Justice Alito's question?

21 MR. FELDMAN: Yes, and -- and what I'd say
22 about the right to self-defense is, if -- if the
23 challenge -- if a State or local government banned all
24 firearms it might raise the question of, given that
25 there -- if there is a constitutional right to

1 self-defense, has the State prohibited you from
2 reasonable means of exercising that right? But that --

3 JUSTICE KENNEDY: Without repeating that and
4 just so I understand your position, how could some
5 member of the Court write the -- this opinion to say
6 that this right is not fundamental, but that Heller was
7 correct?

8 MR. FELDMAN: I -- the Court would just say
9 that what Heller held was if you look at the meanings
10 that the words in the Second Amendment had, the common
11 meaning -- as the Court said in the Heller opinion --
12 the common meanings that the word had in 1791, it
13 imposed limitation on the state. It took a preexisting
14 right that had not been -- it was not codified in the
15 Constitution, and it said, this self-defense right we
16 need in the Constitution in order -- in order to protect
17 the militia against being disarmed by the Federal
18 Government.

19 CHIEF JUSTICE ROBERTS: That sounds an awful
20 lot to me like the argument we heard in Heller on the
21 losing side.

22 MR. FELDMAN: Well, it's actually what the
23 Court said in its opinion. What the Court said in its
24 opinion is the reason it was codified was the concern
25 that the framers had with the -- that the Federal

1 Government might disarm the militia. Not self-defense.
2 Self-defense according to the Court in Heller, quote,
3 "had little to do with the codification of the right."

4 JUSTICE SCALIA: They said that is the
5 reason it was codified. They did not say that that is
6 the function of what was codified. The function of what
7 was codified was to enforce the traditional right of the
8 people to bear arms.

9 MR. FELDMAN: And that -- that --

10 JUSTICE SCALIA: And to say that that wasn't
11 the reason it was codified doesn't say anything about
12 what it consists of.

13 MR. FELDMAN: That -- that's correct, and
14 I'm not arguing today about what it consists of, but the
15 point being that this was a right that had been -- that
16 the framers as far as we know would have been satisfied to
17 leave to the political process if it was just a question
18 of the feature of it. But today --

19 JUSTICE ALITO: Let me see if I understand
20 your argument. I thought you said a minute ago that if
21 a State or local government were to ban firearms
22 completely, this Court might hold that that violates
23 substantive due process because the right to use a
24 firearm for self-defense is -- might be held to be
25 implicit in the concept of ordered liberty; is that

1 right?

2 MR. FELDMAN: That's correct.

3 JUSTICE ALITO: And -- but I thought you
4 began by saying that the right to keep and bear arms is
5 not implicit in the concept of ordered liberty.

6 MR. FELDMAN: The right to keep and bear
7 arms that was recognized -- I don't think actually the
8 right to keep and bear arms itself is. Perhaps the
9 right to self-defense is, and then like other rights,
10 similar rights, if the Court were to hold that that is
11 constitutionally protected, the question would be is the
12 State now giving you sufficient means to exercise that
13 right? Not whatever means you want, but sufficient means
14 so that you reasonably can exercise that right. I
15 would think that would be the only way that that kind of
16 analysis could go, if you start off from self-defense.

17 JUSTICE BREYER: But --

18 JUSTICE SCALIA: Mr. Feldman, let me take
19 your argument at -- at its face value. Let's assume
20 that the only reason it is there and the only purpose it
21 serves is the militia purpose. Isn't that militia
22 purpose just as much defeated by allowing the States to
23 take away the militia's arms as it would be by allowing
24 the Federal Government to take away the militia's arms?

25 MR. FELDMAN: Yes, but I -- that --

1 JUSTICE SCALIA: Then so --

2 MR. FELDMAN: But that --

3 JUSTICE SCALIA: -- even if you assume that
4 the whole thing turns around the militia prologue, that
5 prologue is just as -- just as important with respect to
6 the State's depriving the people of arms.

7 MR. FELDMAN: Yes, but I don't think the
8 argument -- the primary argument that's being made today,
9 that this is implicit in the concept of ordered liberty or
10 sufficiently fundamental or whichever other formulas --

11 JUSTICE SCALIA: You're switching horses
12 now.

13 MR. FELDMAN: No, I'm not. No --

14 JUSTICE SCALIA: Let's just focus on your
15 argument that -- that -- that deals with the prologue.
16 You say this is different because of that prologue. But
17 that prologue has just as much force if the States take
18 away the militia's arms as if the Federal Government
19 does.

20 MR. FELDMAN: I -- I think that few people
21 today would say -- and in fact few people in 1868 would
22 say that the concern to protect the State militias is
23 something that's so fundamental or essential to a
24 concept of ordered liberty or central to our system that
25 it has to be --

1 JUSTICE BREYER: Well, suppose it is.

2 MR. FELDMAN: -- protected --

3 JUSTICE BREYER: -- Suppose it is. Assume for
4 argument's sake that it is. Still, I take from what
5 you are saying that -- let's make up an imaginary
6 importance of ordered liberty chart, and we give it to
7 James Madison and the other framers. And he would say,
8 insofar as that right to bear arms is important for
9 the purpose of maintaining the militia, it's high on
10 the ordered liberty chart. Insofar as the right to bear
11 arms is there to shoot burglars, it's low on the ordered
12 liberty chart.

13 And if that's what they'd say, it's
14 conceivable that part of this amendment would go through
15 and be incorporated; namely, that part which would
16 prevent a law that would disarm people to the extent
17 they couldn't form militias. But that part which would
18 disarm people to the extent that they couldn't shoot
19 burglars, that would not be incorporated.

20 MR. FELDMAN: It -- that would be -- that
21 would be possible, but another -- another way to look at
22 it is that the question that the Court had -- the Court
23 has never answered the question, is this implicit in the
24 concept of ordered liberty or should this be
25 incorporated under any other test?

1 JUSTICE ALITO: But if we took the
2 approach that --

3 MR. FELDMAN: By just --

4 JUSTICE ALITO: If we took the approach
5 that Justice Breyer outlined, would -- why would we not do
6 the same thing with respect to all the applications of all
7 of the amendments that up to this point have been regarded
8 as being completely incorporated, along with all of our
9 decisions? So why would we not look at all of our
10 decisions under the First Amendment and the Fourth
11 Amendment and the Fifth Amendment and the Sixth
12 Amendment, and rank all of those interpretations on some
13 scale of ordered liberty?

14 MR. FELDMAN: I -- I don't think -- I don't
15 think the Court would. And what I was really responding
16 to Justice Breyer was, we understand that the Second
17 Amendment is in the Constitution and binds the Federal
18 Government, but it has always been understood, from 1868
19 on, that before an amendment applies to the States, you
20 need something more than just finding that it's in the
21 Constitution, and --

22 CHIEF JUSTICE ROBERTS: Well, to get back to
23 Justice Breyer's point, which I'm not sure you answered,
24 is your theory that you simply -- it's not a question of
25 is it in or is it out? But you're saying, well, what is

1 in and what is out, are you?

2 MR. FELDMAN: No, I -- actually my -- excuse
3 me. My answer to the question would be it's -- I think
4 it's out, because all that shows is the framers certainly
5 had --

6 CHIEF JUSTICE ROBERTS: So you think it's in
7 or out, right?

8 MR. FELDMAN: I think that -- I think the
9 best argument is that it's out, for this reason:
10 When the framers --

11 CHIEF JUSTICE ROBERTS: No, I -- I know your
12 reasons.

13 MR. FELDMAN: Okay.

14 CHIEF JUSTICE ROBERTS: I'm trying to get
15 you to take a position on whether or not you want us to
16 not only pick and choose among which amendments are part
17 of our abstract notion of ordered liberty, or if you
18 want us also to take amendments that might be in and
19 refine them and shave them off a little bit and say,
20 well, this part of the amendment is in, and this part
21 isn't.

22 MR. FELDMAN: No, that's not the argument
23 that we're making.

24 CHIEF JUSTICE ROBERTS: Okay. So your
25 argument is all in or all out.

1 MR. FELDMAN: The argument that we're making --
2 yes.

3 CHIEF JUSTICE ROBERTS: Okay.

4 MR. FELDMAN: The argument that we're --

5 JUSTICE BREYER: Step one -- step one is
6 make my chart. Step two is look at what's high. Step
7 three is, even though that high part, even that high part,
8 nobody could think was incorporated.

9 MR. FELDMAN: I -- in our view, the things
10 that the framers -- the framers had their reasons for
11 putting --

12 CHIEF JUSTICE ROBERTS: That's how you think
13 Madison went about his job?

14 (Laughter.)

15 MR. FELDMAN: No. No, I think that --

16 JUSTICE BREYER: He did, actually.
17 He did. That's how he went about it.

18 CHIEF JUSTICE ROBERTS: I'm asking counsel.
19 Do you think that's how Madison went about
20 his job?

21 MR. FELDMAN: I think the framers had
22 reasons to put everything in the Constitution that they
23 put in it. But the question about whether it should be
24 incorporated against the States is a different question
25 than whether they put it in the Constitution.

1 And what you have in the Second Amendment
2 -- and it's right clear on the face of it from the
3 prologue; it's clear -- it's clear from the opinion in
4 Heller -- is the reason they put it in the Constitution is
5 not the primary reason why people today are arguing that
6 this is a right that -- that is so fundamental that it
7 has to be applied against the States.

8 JUSTICE SOTOMAYOR: Mr. Feldman, our
9 selective incorporation doctrine under the Due Process
10 Clause does suggest that there are some rights that were
11 fundamental enough to be incorporated and some that are
12 fundamental, but not fundamental enough to be
13 incorporated. We've drawn a line.

14 Is it the ordered liberty concept alone in
15 our jurisprudence that you are relying upon, or is it
16 any other articulation of our incorporation doctrine
17 that supports your view?

18 MR. FELDMAN: I think that's the underlying
19 standard, but the Court has certainly looked at our
20 history and our traditions in answering this question,
21 and I think they are relevant in this area, as they were
22 --

23 JUSTICE SOTOMAYOR: The Chief says: Yes, if
24 we look at it, we have to look at it in the context of
25 our history, our structure. So address his question as

1 to why --

2 MR. FELDMAN: I would say that --

3 JUSTICE SOTOMAYOR: -- in our structure or
4 our history, it's not fundamental enough --

5 MR. FELDMAN: Yes.

6 JUSTICE SOTOMAYOR: -- to incorporate.

7 MR. FELDMAN: Yes, and I think it's -- I
8 think it's not. We have discussed already 1791, and the
9 reasons why -- the reasons even that the framers thought
10 that -- well, I've already discussed that. I don't want
11 to go into it again.

12 The --

13 JUSTICE SCALIA: Eleven of the colonies had
14 a guarantee at the time the Constitution was
15 adopted, and I believe something like 44 States
16 currently have in their constitutions protection of the
17 right to bear arms.

18 MR. FELDMAN: I -- I --

19 JUSTICE SCALIA: Does that suggest anything
20 about -- about how fundamental it is generally?

21 MR. FELDMAN: I -- what the Court actually said
22 in Heller was that there were two States at the time, in
23 1791, that had a firearms right, and with -- there were
24 possibly two more where the evidence was a little bit
25 more ambiguous.

1 As far as today, it is true that 44 States
2 have some kind of recognition of a right to keep and
3 bear arms. Now, some of those States -- a couple of
4 them, at least, two to four -- recognize that only in
5 connection with the militia, and it's really quite
6 different from the right that this Court recognized in
7 Heller. Many other of the rights that are recognized in
8 State constitutions include provisions that really would
9 be unheard of, and that actually point to the reasons
10 why this is not fundamental, like, say, freedom of
11 speech or freedom of religion. They have provisions
12 that say: Subject to such regulation as the legislature
13 may prescribe, or the like.

14 And that points out the other difference.
15 Because firearms are -- the same features that make them
16 useful for self-defense make them also useful as
17 instruments of violent crime, suicide, and accidental
18 death. Their -- regulation of these items has -- is a
19 part of our tradition and --

20 JUSTICE SCALIA: "Subject to such
21 regulation" certainly excludes banning them entirely,
22 which is what you assert can be done.

23 MR. FELDMAN: No, I think that --

24 JUSTICE SCALIA: What's the purpose of a
25 State constitutional guarantee which has at the end of

1 it "subject to such regulation as the legislature may
2 proscribe," if that regulation includes banning it
3 entirely? That --

4 MR. FELDMAN: With that --

5 JUSTICE SCALIA: -- would make a nullity
6 of the constitutional requirement.

7 MR. FELDMAN: The overwhelming consensus
8 among the State courts in interpreting the wide variety
9 of different types of provisions that they have is that
10 it imposes a reasonable regulation standard that is not
11 violated by banning a particular weapon or a particular
12 class of weapons, as long as you are allowing some kind
13 of firearm, and that is not the right that this Court --

14 JUSTICE SCALIA: And is that what you're
15 asserting here --

16 MR. FELDMAN: -- recognized in Heller.

17 JUSTICE SCALIA: -- that the States have
18 to allow firearms?

19 MR. FELDMAN: No.

20 JUSTICE SCALIA: Is that --

21 MR. FELDMAN: I -- I didn't think I was.

22 JUSTICE SCALIA: I didn't think so, either,
23 so --

24 MR. FELDMAN: No. What I'm --

25 JUSTICE SCALIA: -- why does your last argument

1 make any sense?

2 MR. FELDMAN: No, what I'm saying -- I'm
3 sorry. What I'm saying is that the right that is
4 embodied in the wide variety of different State
5 constitutions -- the overwhelming consensus is that what
6 the States have determined as a result of their own
7 processes and in light of their own conditions is that
8 you can't ban all kinds of firearms, but you can ban
9 some kinds of firearms.

10 JUSTICE SCALIA: That's fine.

11 MR. FELDMAN: And that is -- and the kinds
12 of firearms that have traditionally been banned --

13 JUSTICE SCALIA: We said as much in Heller.

14 MR. FELDMAN: Right. Well -- and the
15 kinds of firearms that have traditionally been banned by
16 the States and that actually the period around the time
17 of the Fourteenth Amendment is a good period to look.
18 At or around that time, there are numerous States that
19 had regulations barring the carrying and even that go up
20 to the point of possession of pistols and Bowie knives,
21 which are not firearms, but are also arms under the
22 Second Amendment, and so on.

23 CHIEF JUSTICE ROBERTS: Well, all those
24 may be perfectly valid today, or -- if the Court
25 incorporates the Second Amendment. Incorporation

1 doesn't say anything by itself about whether those types
2 of regulations, which you think are reasonable and your
3 friends think may not be reasonable, are valid or not.

4 MR. FELDMAN: I think the Court in Heller
5 did hold that a ban on -- a ban on handguns is invalid.
6 That was the holding of the case. And these are --
7 these were laws that were passed that are very close to
8 that. In the 1860s and the 1870s, in Texas, in
9 Wyoming, places that -- not necessarily for the whole
10 State --

11 JUSTICE SCALIA: Handguns in the home?

12 MR. FELDMAN: They --

13 JUSTICE SCALIA: Handguns in the home?
14 That's what Heller addressed.

15 MR. FELDMAN: They banned -- I -- well,
16 not -- I can't say that they banned handguns in the home
17 per --

18 JUSTICE SCALIA: No, you can't, because they
19 didn't.

20 MR. FELDMAN: But if you look at the
21 decision -- no, if you look at -- actually, if you
22 look at the decisions, some of them banned the sale;
23 they banned carrying them anywhere in the jurisdiction,
24 and in such a way that -- and some of the judicial
25 decisions even say: This was intended to eliminate

1 these weapons from our jurisdiction. And they were
2 generally upheld at that time.

3 Now, those were responding to local
4 conditions at the time, and generally, the history of
5 firearms regulation, because of the risk that firearms
6 pose, has been that in this country, it has been widely
7 recognized that in many places it's appropriate to carry
8 firearms. And many jurisdictions have found, and
9 reasonably found, that allowing broad use, carriage, and
10 whatever of firearms is appropriate, but there are some
11 jurisdictions that have found that's not to be the case,
12 throughout our history.

13 And that has been a State and local decision
14 that has worked through the political process in those
15 jurisdictions. And that political process here is
16 another distinction between the Second Amendment and
17 some of the other amendments that have been
18 incorporated -- is that one basis, I think, for
19 incorporating the other amendments and for applying them
20 against the States has been that there is a concern
21 about a discrete minority or a highly unpopular view
22 that's not going to get a fair shake in the political
23 process. I don't think that has ever been the case
24 here. And as far as I know, the framers didn't think
25 that was the case with respect to the right to keep and

1 bear arms.

2 It's a right that gets controlled in
3 accordance with local conditions, with local cultures,
4 and with local views about the necessarily difficult
5 questions about how best to protect public safety. That
6 is -- that has been a part of our -- of our history
7 since 1860, since --

8 JUSTICE KENNEDY: But there -- but there are
9 provisions of the Constitution, of the Bill of Rights,
10 that have been incorporated against the States, where
11 the States have substantial latitude and ample authority
12 to impose reasonable regulations, rights respecting --
13 rights respecting property, the Cruel and Unusual
14 Punishment Clause. We look to see what the political
15 process does. We look to see -- why can't we do the
16 same thing with firearms?

17 MR. FELDMAN: Well, it's just that the end
18 -- I have really two points I'd like to make about that.
19 One is the analysis the Court used in Heller. In
20 Heller, what the Court said is: This is not the time to
21 balance things; you cannot ban handguns.

22 Now, there may be local -- there have been
23 local jurisdictions before and there are now ones where
24 they feel allowing some firearms, but banning handguns,
25 is the best way to achieve public safety and to increase

1 the zone of ordered liberty for their people. And those
2 things would be apparently impermissible under Heller.

3 But even more than that, Heller construed
4 the Second Amendment's "bear" -- the word "bear," "to
5 keep and bear arms" -- to mean the same thing as "carry"
6 in this Court's case in *Muscarello*, much later. And to
7 carry -- generally to carry.

8 Many -- there's a long history of
9 regulation of not just concealed carry, as the Court did
10 recognize in *Heller*, but of banning open carry
11 in a variety of jurisdictions. Again, generally, it's
12 someplace that is -- it has a particular problem; it's a
13 city or something like that.

14 JUSTICE KENNEDY: Do you think there is
15 existing authority with reference to other provisions of
16 the Bill of Rights that would allow us to incorporate
17 just the core of *Heller* with respect to the States?
18 Just the core of the Second Amendment with respect to
19 the States, along the lines to this question Justice
20 Stevens was asking earlier?

21 MR. FELDMAN: Well, I think that there would
22 be --

23 JUSTICE KENNEDY: And if so, what's -- what
24 case do we look to for that proposition?

25 MR. FELDMAN: I think really this -- I

1 cannot offhand think of a case that would lead you to
2 that -- would lead to that.

3 JUSTICE STEVENS: If you look to Justice
4 Harlan's dissent in Griswold, where he says the
5 Fourteenth Amendment stands on its own bottom and it can
6 be either more or less than the provisions of the Bill of
7 Rights, and there's no reason in the world why this
8 Court could not adopt the same position here and say:
9 Insofar it's incorporated, it applies only within the
10 home. The Court had ample precedent for that.

11 MR. FELDMAN: And actually the other point I
12 make is if you approach it from the other point of view,
13 the case has not been made here -- it hasn't even been
14 brought -- that the City of Chicago is denying people
15 the -- the right to have any kind of firearm or the
16 right to have any kind of reasonable means of
17 self-defense.

18 CHIEF JUSTICE ROBERTS: I'm sorry. Is it
19 the position of the City of Chicago that we should rely
20 on Justice Harlan's dissent in Griswold?

21 MR. FELDMAN: No.

22 CHIEF JUSTICE ROBERTS: Well, then your
23 answer to Justice Stevens is no, you're not going to
24 follow that approach, right?

25 MR. FELDMAN: No, what I would say is that

1 -- what I would say is that if the Court -- what I was
2 saying is that if the Court approaches it from the
3 standpoint of perhaps if there is -- if the Court
4 chooses in an appropriate case to recognize a
5 fundamental right to self-defense, it would then raise
6 those kinds of questions. And someone could make the
7 case that they are being denied any right to
8 self-defense or any reasonable right to exercise
9 self-defense because of a jurisdiction's firearms
10 regulations; the Court could address that. That's not a
11 claim that has been made in this case; that's not a
12 claim that could be made in this case because --

13 JUSTICE SCALIA: See, the right to keep and
14 bear arms is right there. It's right there in the Bill
15 of Rights. Where do you find the right to self-defense?

16 MR. FELDMAN: Well, I --

17 JUSTICE SCALIA: You -- you want us to
18 impose that one on the States but not -- not the
19 explicit guarantee of the right to keep and bear arms.
20 That seems very strange.

21 MR. FELDMAN: No, actually I -- I don't want
22 to impose that on the States. I think it's very
23 unlikely that the Court would ever be called upon to,
24 because our history for the last 200 years -- 220 years
25 had been of reasonable State and local regulation of

1 firearms that responds to local conditions, to local
2 threats of violence, and so on that occur. And I don't
3 see any reason to think that there will be a
4 jurisdiction that would try to sufficiently ban firearms
5 that people wouldn't have a reasonable means of
6 self-defense.

7 JUSTICE SCALIA: The District of Columbia
8 did. That's what Heller said.

9 MR. FELDMAN: Well, the District of Columbia
10 in any event is controlled by Second Amendment as it --
11 as it's written. That's not the question in this case.

12 JUSTICE SOTOMAYOR: Would you be happy if we
13 incorporated it and said reasonable regulation is part
14 of the incorporation? And how do we do that?

15 MR. FELDMAN: Well, there is the reasonable
16 regulation standard. There's an article by Professor
17 Winkler that we cite in our brief, that goes very
18 extensively through the ways that State courts have
19 dealt with their own rights to keep and bear arms and
20 have adopted, really by overwhelming consensus, that
21 kind of a reasonable regulation standard, which
22 generally recognizes --

23 JUSTICE GINSBURG: I thought that Heller --
24 Heller allowed for reasonable regulation.

25 MR. FELDMAN: Excuse me.

1 JUSTICE GINSBURG: I thought that the Heller
2 decision allowed for reasonable regulation, and it gave a
3 few examples, as Justice Scalia mentioned.

4 MR. FELDMAN: Right. Well, it's just our
5 view would be that what Chicago has done here, which is
6 permit you to have a -- permit you to have long guns but
7 ban handguns, is the kind of regulation that throughout
8 our history jurisdictions in their own -- that are most
9 familiar with their own particular needs, their own
10 particular problems, and in a position to balance the --
11 the need for self-defense with the risks to the use of
12 firearms -- for violence, for accidental death, and for
13 suicide -- that the City of Chicago has come up with
14 something that is well within our tradition. And --

15 JUSTICE SCALIA: What you're urging is
16 really a mixed blessing for gun control advocates. To
17 the extent we sever the Federal guarantee from what the
18 States are obliged to comport with, we encourage a
19 stricter Federal Second Amendment, one that forbids all
20 sorts of regulations that the Federal Government might
21 otherwise be allowed to do, because it doesn't matter --
22 the States can take care of it.

23 I mean, you know, if -- if you sever the
24 two, you're encouraging a broader prohibition at the
25 Federal level, and that's what -- Heller was very

1 careful not to impose such a broad prohibition
2 precisely because it realized that -- that this is a
3 national problem.

4 MR. FELDMAN: I -- I think that, if I may --
5 that the restriction that the Second Amendment imposes
6 on the Federal Government should be and is controlled by
7 what the meaning of that Second Amendment was in 1791.
8 It shouldn't vary one way or the other with whether
9 there's incorporation against the States.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Gura, you have 3 minutes remaining.

13 REBUTTAL ARGUMENT OF ALAN GURA

14 ON BEHALF OF THE PETITIONERS

15 MR. GURA: Sure.

16 JUSTICE KENNEDY: Counsel, at the -- at the
17 very outset of your argument, Justice Sotomayor asked the
18 question which, as I understood it, essentially said what
19 are examples of privileges and immunities that are being
20 denied by the States that -- which denial would be
21 remedied by following your proposal to overrule the
22 Slaughter-House case?

23 And let's leave the Second Amendment out.
24 Let's assume the Second Amendment is a wash; it's either
25 going to be incorporated or not going to be incorporated

1 the same -- to the same extent under either the Privileges
2 or Immunities Clause or the Due Process Clause. Leaving
3 the Due Process -- the Second Amendment out of it, what
4 privileges and immunities are now being denied citizens
5 of -- of the United States?

6 MR. GURA: Well, apart from the Second
7 Amendment right, which is being denied to people in the
8 United States by Chicago at least, there are other
9 rights -- other rights enumerated in the first eight
10 amendments that were thought to be the personal guarantees
11 as well as certain unenumerated rights which were
12 understood to be part of --

13 JUSTICE KENNEDY: What are examples of
14 those? The jury trial in civil cases?

15 MR. GURA: The jury trial --

16 JUSTICE KENNEDY: And grand jury. What
17 else?

18 MR. GURA: There's not much left, Your
19 Honor. Those are the only two provisions of the Bill of
20 Rights that have not been held incorporated under due
21 process, which informs us that perhaps we should have
22 the Second Amendment incorporated. There's no reason
23 to treat it any differently. With respect to the
24 unenumerated rights that perhaps are not being --

25 JUSTICE GINSBURG: So you are saying that

1 under -- under your view, every State would have to use a
2 grand jury to bring criminal charges; no more information.
3 And that every State would have to have a civil jury, if
4 any party in the case requested it. Is that --

5 MR. GURA: Yes -- well, it's not just what
6 we're saying; it's what the framers of the Constitution
7 said. And as Justice Scalia noted in Apprendi, the right
8 to a jury trial, for example, may not be efficient, but
9 it is free.

10 JUSTICE GINSBURG: That's a criminal case;
11 that's quite different.

12 MR. GURA: That's right. We're talking
13 about the Grand Jury Clause; we have 28 States right now
14 out of the 50 that allow prosecutors to pursue felony
15 charges without indictment by a grand jury, but the
16 other 22 States do require it.

17 JUSTICE KENNEDY: Well, I'm -- we're using
18 up your time. But --

19 MR. GURA: Sure.

20 JUSTICE KENNEDY: -- do you want me to leave
21 the bench thinking grand jury indictment and civil trial
22 and jury case -- that's it. There's no other -- what are
23 these other unenumerated rights?

24 MR. GURA: We can't give a full description
25 of all unenumerated rights that are going to be

1 protected by the Fourteenth Amendment. Either --

2 JUSTICE SCALIA: It doesn't trouble you.

3 MR. GURA: No, it does not, and it shouldn't
4 trouble the Court because the Court addresses due
5 process cases all the time without saying we're --

6 JUSTICE ALITO: Well, does it include the
7 right to contract?

8 MR. GURA: The right to contract --

9 JUSTICE ALITO: Isn't that an unenumerated
10 right?

11 MR. GURA: That is literally understood by
12 the framers to be an unenumerated right under the
13 privileged immunities. We know that because in the
14 Civil Rights Act of 1866, that's the very first right
15 that they mentioned as something that people in the South
16 should be enjoying, because they were not allowed to
17 pursue a livelihood.

18 CHIEF JUSTICE ROBERTS: Your approach --
19 your original approach would give judges a lot more
20 power and flexibility in determining what rights they
21 think are a good idea than they have now with the
22 constraints of the Due Process Clause.

23 MR. GURA: No, Your Honor; our approach
24 might actually provide judges with perhaps no more than
25 what they have now, perhaps even less, because our

1 approach is rooted in text and history. It's not a
2 license for judges to make up unenumerated rights that
3 they believe --

4 CHIEF JUSTICE ROBERTS: Privileges and
5 immunities give you a lot more flexibility than due
6 process, because it's not limited to procedural --
7 where you don't have to deal with the hurdle that it's
8 limited to procedural by the text.

9 MR. GURA: Sure. If I may?

10 CHIEF JUSTICE ROBERTS: Yes, you may.

11 MR. GURA: Thanks. We believe that it's
12 more limited because that -- that text had a specific
13 understanding and that there are guideposts left behind
14 in texts and history that tell us how to apply it, unlike
15 the due process. But at least we know one thing, which
16 is that, in 1868, the right to keep and bear arms was
17 understood to be a privilege or immunity of citizenship,
18 and if the Court is considering watering down the Second
19 Amendment, perhaps it should look to text and history.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MR. GURA: Thanks.

22 CHIEF JUSTICE ROBERTS: The case is
23 submitted.

24 (Whereupon, at 11:16 a.m., the case in the
25 above-entitled matter was submitted.)

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