

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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P R O C E E D I N G S

(10:13 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-1521, McDonald v. The City of Chicago.

Mr. Gura.

ORAL ARGUMENT OF ALAN GURA

ON BEHALF OF THE PETITIONERS

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

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

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

The rights so guaranteed were not trivial. 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 is it that 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 is 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  
6 is 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 ?

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 is easier in terms, perhaps,  
14 of -- of the text and history of 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: Then 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 are  
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: What you argue is the  
9 darling of the professoriate, for sure, but it's also  
10 contrary to 140 years of our jurisprudence. Why do you  
11 want to undertake that burden instead of just arguing  
12 substantive due process, which as much as I think it's  
13 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: 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 v. 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 the nation  
12 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 certain rights. We understand certain rights better  
23 today than we did 140 years ago, and the fact that First  
24 Amendment rights were not fully respected, Second  
25 Amendment rights were not 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 then it's not one  
17 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'Scanlon in the Ninth Circuit observed in the Nordyke  
11 decision, the Slaughter-House dissenters seemed to  
12 arrive at the same point, perhaps, that this Court did  
13 in the Glucksberg case.

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

21 MR. GURA: It would be, Your Honor. The  
22 fact --

23 JUSTICE STEVENS: Because of the -- the  
24 importance of the right to protect -- would that apply  
25 to the entire scope of the Second Amendment or just the

1 right to keep the gun, a homeowner's right to keep a gun  
2 for self-protection against intruders into the home,  
3 under the -- without the Second Amendment, just the  
4 Liberty Clause.

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

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

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

23 CHIEF JUSTICE ROBERTS: I thought your -- in  
24 that context, is your position that the rights that are  
25 incorporated as essential to the concept of ordered

1 liberty, do they bring all of our decisions with them?  
2 When you say the First Amendment is covered, does that  
3 mean New York Times v. Sullivan is incorporated as well?  
4 Or is it only some lesser version of the incorporated  
5 right?

6 MR. GURA: With respect to the substantive  
7 due process argument that we are making?

8 CHIEF JUSTICE ROBERTS: Yes.

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

16 JUSTICE KENNEDY: I understood the Chief  
17 Justice's question -- maybe I misunderstood it, but my  
18 understanding of the question that's important is this.  
19 Under incorporation by reference, the States are bound  
20 by the rights in all -- with all of the refinements and  
21 sophistication with which we interpret them for the  
22 Federal Government. It's the same. You don't just  
23 apply the core of the right. You apply all of the right  
24 as it is elaborated by the cases.

25 Is -- is that same consequence -- does that

1 same consequence follow if we adopt the privileges and  
2 immunities interpretation that you are urging upon us?

3 MR. GURA: Yes, Your Honor.

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

8 MR. GURA: Well --

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

19 Now, think of this, too: That when you have  
20 the First Amendment, or some of the other amendments,  
21 there is always a big area where it's free speech versus  
22 a whole lot of things, but not often free speech versus  
23 life. When it's free speech versus life, we very often  
24 decide in favor of life. Here every case will be on one  
25 side guns, on the other side human life. Statistics,

1 balancing life versus guns. How are Federal judges in  
2 your opinion, rather than legislatures in the States in  
3 a Federal system, how are Federal judges supposed to  
4 carry this out? I want to see where we are going.

5 MR. GURA: Federal judges should carry this  
6 out in the same way that was announced in this Court's  
7 decision in Heller.

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

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

17 JUSTICE BREYER: To be specific, suppose  
18 Chicago says, look, by banning handguns not in the  
19 hills, not hunting, nothing like that, nothing outside  
20 the city, in the city, we save several hundred human  
21 lives every year. And the other side says, we don't  
22 think it is several hundred and, moreover, that doesn't  
23 matter. How do you decide the case?

24 MR. GURA: We decide that by looking, not to  
25 which side has the better statistics, but rather to what

1 the framers said in the Constitution, because that  
2 policy choice was made for us in the Constitution.

3 JUSTICE BREYER: You are saying they can  
4 have -- no matter what, that the city just can't have  
5 guns even if they are saving hundreds of lives, they  
6 cannot ban them?

7 MR. GURA: The city cannot ban guns that are  
8 within the common use as protected by the right to arms.

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

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

18 JUSTICE SCALIA: Well, why would this one be  
19 resolved on the basis of statistics? If there is a  
20 constitutional right, we find what the minimum  
21 constitutional right is and everything above that is up  
22 to the States. If you want to have, you know -- I think  
23 we mentioned in Heller concealed carry laws. I mean,  
24 those are -- those are matter that we didn't decide in  
25 Heller. And you may have a great deal of divergence



1 from State to State, and on that I suppose you would do  
2 statistics, wouldn't you? Or the legislature would.

3 MR. GURA: Well, Your Honor, we do agree  
4 that statistics are not important to determine whether  
5 or not a right --

6 JUSTICE SCALIA: For the judges. For the  
7 judges.

8 MR. GURA: That's right.

9 JUSTICE SCALIA: But they would be for the  
10 legislatures.

11 MR. GURA: A legislature should respect the  
12 fact that there is a constitutional right at issue, and  
13 this Court in footnote 27 in Heller explained that under  
14 the Carolene Products paradigm, footnote 4, the rights  
15 enumerated in the Constitution are entitled to a greater  
16 measure of respect.

17 If I may reserve the remainder of my time  
18 for rebuttal.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Mr. Clement.

21 ORAL ARGUMENT OF PAUL D. CLEMENT  
22 ON BEHALF OF RESPONDENTS NATIONAL RIFLE  
23 ASSOCIATION, INC., ET AL.,  
24 IN SUPPORT OF PETITIONERS

25 MR. CLEMENT: Mr. Chief Justice and may it

1 please the Court:

2 Under this court's existing jurisprudence,  
3 the case for incorporating the Second Amendment through  
4 the Due Process Clause is remarkably straightforward.  
5 The Second Amendment, like the First and the Fourth,  
6 protects a fundamental preexisting right that is  
7 guaranteed to the people -- -

8 JUSTICE STEVENS: Mr. Clement, would you  
9 comment on Justice Kennedy's question about whether it  
10 necessarily incorporates every jot and tittle of the  
11 Federal right into the Federal, keeping in mind that  
12 with regard to trial by jury in criminal cases there is  
13 a difference, non-unanimous juries. Why does this  
14 incorporation have to be every bit as broad as the  
15 Second Amendment itself?

16 MR. CLEMENT: Well, Justice Stevens, I think  
17 in that respect the Sixth Amendment is a bit of an  
18 outlier. For most of the provisions and as far as I  
19 know all of the substantive provisions of the Bill of  
20 Rights that have been incorporated against the States,  
21 this Court has incorporated basically all the  
22 jurisprudence that comes with that.

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

25 MR. CLEMENT: Well, I guess maybe it's Mapp,

1 is one way of thinking about it. I mean, we could  
2 quibble about the --

3 JUSTICE STEVENS: Mapp was a procedural  
4 case. Mapp was a Fourth Amendment case. I'm asking you  
5 cases involving incorporation of substantive rights, as  
6 opposed to procedural rights. The procedural cases come  
7 in under the due process language, but the substantive  
8 cases comes under the word "liberty," and "liberty"  
9 picks up the First Amendment and so forth. And I take  
10 it it's the word "liberty" that picks up the Second  
11 Amendment. And if it does, why does it have to be  
12 precisely the same scope as the Second Amendment?

13 MR. CLEMENT: Well, sure. We could quibble  
14 whether -- I think of the Fourth Amendment as more of a  
15 substantive guarantee. But in any event, with respect  
16 to certainly like the First Amendment guarantees that  
17 this Court has incorporated through the liberty -- the  
18 liberty subclause, if you will, of the Due Process  
19 Clause, there too I think this Court -- certainly I  
20 understand this Court's jurisprudence as incorporating  
21 all the cases that go along with that.

22 So New York times v. Sullivan is the law of  
23 all 50 States, et cetera, et cetera. And I think that  
24 in a sense the virtue of that approach is probably even  
25 more apparent with the Second Amendment than it might be

1 with some other jurisprudence.

2 JUSTICE SCALIA: I guess we -- I guess we  
3 have applied substantive due process with regard to the  
4 necessity of permitting homosexual conduct and with  
5 respect to the necessity of permitting abortion on  
6 demand. We have not adopted a more rigid rule for the  
7 Federal Government than we have adopted for the States  
8 in either of those instances, have we?

9 MR. CLEMENT: That's also right, Your Honor,  
10 though I guess I would stress that I think that,  
11 whatever the debates about substantive due process when  
12 it comes to unenumerated rights, I think the gist of  
13 this Court's incorporation doctrine is that the textual  
14 provisions of the Bill of Rights stand in a favored  
15 position with respect to incorporation. So Glucksberg  
16 has this discussion about the standard for unenumerated  
17 rights, but it starts that off by saying of course the  
18 Bill of Rights are different. And of course, the Bill  
19 of Rights I read, as I read this Court's selective --

20 JUSTICE STEVENS: They sit in a favored  
21 position, but we've never said it had to be literally  
22 had to be all the way down the line, or we couldn't have  
23 done the criminal jury, non-unanimous criminal jury  
24 case.

25 MR. CLEMENT: Again, though, it's

1 interesting that the one place that I see where the  
2 Court has not effectively translated all the case law is  
3 one of the procedural rights, the Sixth Amendment  
4 criminal jury right. And I think with respect to the  
5 substantive rights -- and I think the alliance here or  
6 the similarity between the First and the Second  
7 Amendments are very stark in this respect -- this Court  
8 has incorporated essentially not just the amendment and  
9 not just the right, but all of the jurisprudence as  
10 well.

11 Just to dwell for a moment if I'd could on  
12 the First and Second Amendment, I think it's striking,  
13 very striking, that if this Court's not going to  
14 reconsider its Privileges or Immunities Clause  
15 jurisprudence, the Cruikshank case actually stands as  
16 very good precedent for incorporating the Second  
17 Amendment, just as it was the precedent this Court  
18 relied on in incorporating the assembly and petition  
19 rights of the First Amendment in the DeJonge case. And  
20 the reason is Cruikshank -- the whole reason that  
21 Cruikshank said the First and Second Amendments aren't  
22 privileges of national citizenship is because they were  
23 preexisting rights that didn't depend on the  
24 Constitution for their existence.

25 That seems to me to be a pretty good working

1 definition of what a fundamental right is, one that is  
2 so fundamental and basic that it preexisted our very  
3 Constitution. And so it's not surprising that DeJonge  
4 cited Cruikshank as favorable precedent for  
5 incorporation.

6 I think the exact same logic would apply to  
7 the Second Amendment here and, as I say, I do think the  
8 consequence of that, certainly the most logical  
9 consequence, would be to carry over the jurisprudence  
10 under the Second Amendment. Now, right now that's not  
11 carrying over a lot, right. That's carrying over the  
12 Heller case.

13 But I think in a way that points up to the  
14 fact that one of the virtues of incorporation is that,  
15 because the Miller decision of this Court sowed  
16 confusion, we do not have substantial Second Amendment  
17 jurisprudence. And I would think that it's going to be  
18 difficult enough to develop the Second Amendment  
19 jurisprudence that you wouldn't want to make it more  
20 difficult by having to develop a Federal Second  
21 Amendment jurisprudence and then some sort of shadow  
22 version of that jurisprudence for the States.

23 And I think in the more recent incorporation  
24 cases, this Court was quite candid that it wasn't going  
25 to adopt sort of a shadow version of the Federal

1 guarantee or some watered down version of the Federal  
2 guarantee, but it really saw the virtue of incorporating  
3 not just the right but the jurisprudence that came with  
4 that right.

5           And so I do think that's in a sense  
6 something that counts in favor of incorporating the  
7 Second Amendment and doing so through the Due Process  
8 Clause, the same way this Court has dealt with the other  
9 substantive guarantees of the Bill of Rights. And I  
10 think if you apply that jurisprudence, the case really  
11 is very straightforward. In fact, I think if you  
12 compare the First Amendment and the Fourth Amendment to  
13 the Second Amendment, they have the same textual  
14 guarantee to the people, they trace their origins to  
15 preexisting rights back to the English Bill of Rights,  
16 back to even earlier constitutional history.

17           JUSTICE STEVENS: That's true of the  
18 criminal jury trial right, too, all of those things?  
19 And yet we don't -- it's not exactly the same. I just  
20 don't see why it has to be exactly the same. I can  
21 understand your argument that it should be substantially  
22 the same, but I don't see that there's anything in the  
23 text of the Fourteenth Amendment that would justify  
24 saying it must be precisely the same, or of any of our  
25 cases.

1 MR. CLEMENT: Well, and again, Justice  
2 Stevens, you know, since I think that the incorporation  
3 clause is -- I mean, the incorporation jurisprudence is,  
4 to put it lightly, a gloss on the text of the Due  
5 Process clause --

6 JUSTICE STEVENS: Incorporation  
7 jurisprudence is -- we haven't had an incorporation case  
8 for 30 years or more.

9 MR. CLEMENT: That's right. That's right,  
10 Justice Stevens. But I guess I would say is that,  
11 putting the Sixth Amendment to one side, which I think  
12 is a bit of an outlier in the jurisprudence here, I  
13 think the trend of all of this Court's incorporation  
14 jurisprudence has been more towards complete  
15 incorporation of the right and the jurisprudence. So --  
16 I mean, Mapp is a perfect illustration.

17 CHIEF JUSTICE ROBERTS: That still allows  
18 scope, once you determine that the right is  
19 incorporated, for recognizing that the States might have  
20 broader interests that the Federal Government doesn't  
21 have. But I would suppose that would come up in the  
22 application of the right, rather than in an effort to  
23 determine whether parts of it are incorporated or not.

24 MR. CLEMENT: That's right,  
25 Mr. Chief Justice, and I think the same thing can be



1 said for any other one of the other incorporated  
2 amendments. So I think the same thing might be true in  
3 the First Amendment. There are certainly going to be  
4 situations that the Federal government confronts that  
5 the State governments won't confront the exact analog  
6 situation and vice versa.

7 Now, you know, there may be unique issues  
8 about national parks that the States are not going to  
9 have to confront, and the jurisprudence can take that  
10 into account. But I think that's far different from  
11 saying that we really are going to have the shadow  
12 jurisprudence for one of the provisions.

13 And I think, again, to go back to Mapp just  
14 as an illustration, when this Court first incorporated  
15 the Fourth Amendment and said, well, we will talk about  
16 the exclusionary rule later, maybe we won't incorporate  
17 the Fourth -- the exclusionary rule. We will just  
18 incorporate the Fourth Amendment's basic guarantee. And  
19 the trend of later cases was to say, no, kind of in for  
20 a penny, in for a pound --

21 JUSTICE STEVENS: You -- you --

22 MR. CLEMENT: -- let's bring the  
23 jurisprudence with you.

24 JUSTICE STEVENS: -- the jury -- it's  
25 interesting that during this whole period, Justice

1 Harlan staked out a separate position on whether it  
2 should be just the substance of the right or the -- the  
3 every detail. And we have followed Justice Harlan  
4 rather than the majority on a number of cases in -- in  
5 the recent years. He is very much against you, and he's  
6 a very important member of our -- of our history.

7 MR. CLEMENT: Justice Harlan was a terrific  
8 justice. Justice Black was a terrific justice --

9 JUSTICE ALITO: Maybe we should go back --

10 MR. CLEMENT: -- and in his total  
11 incorporation --

12 JUSTICE ALITO: Well, Mr. Clement, why  
13 shouldn't we go back completely to Justice Harlan's view  
14 about the way in which the Bill of Rights applies to the  
15 States?

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

20 JUSTICE BREYER: But there is a difference.  
21 There is a difference -- with other amendments. There  
22 is a difference in the other amendments. You have the  
23 First Amendment, the First Amendment expression.

24 Here we have right in the amendment written  
25 a militia-related clause. And the way that -- the

1 way -- the way that the right might be incorporated in  
2 respect to that is light years different. From the way  
3 it might be interpreted if you think what it is, is the  
4 right to have a gun to shoot a burglar. They are just  
5 two separate things.

6 And as to the first, it's pretty hard for me  
7 to see why you would incorporate it, for reasons I won't  
8 go into. As to the second, I understand it. So we are  
9 starting with a difference in purposes at the least.  
10 And shouldn't that make a difference in how you  
11 incorporate?

12 MR. CLEMENT: Well, I mean, I guess what  
13 I -- what I don't understand is why, given the way that  
14 this Court wrestled in the Heller decision with how to  
15 basically apply the operative clause in light of the  
16 prefatory clause, why one would want to come to a  
17 different conclusion that --

18 JUSTICE BREYER: Because the -- one of the  
19 reasons --

20 MR. CLEMENT: -- affected the case.

21 JUSTICE BREYER: -- at least, is that -- you  
22 have read, I'm sure, that all the law -- the professors  
23 at Harvard, Yale, Princeton, London, et cetera, that say  
24 even Blackstone in the 17th century thought that this is  
25 primarily a right to raise an army through parliament

1 to -- I can't go on here. I'm just saying think of that  
2 brief, and you will see the differences even accepting  
3 Heller.

4 CHIEF JUSTICE ROBERTS: You can respond if  
5 you want, briefly.

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

7 I mean, obviously this Court was focused  
8 very much on Blackstone's writings in the Heller  
9 decision, and I think the majority read Blackstone  
10 actually as being primarily concerned with the  
11 self-defense right, which goes a long way to understand  
12 why the Heller decision came out the way that it came  
13 out.

14 And I would simply finish by noting that the  
15 one thing that I think we can come to a conclusion about  
16 Blackstone is the very fact that Blackstone dwelled on  
17 the right is good evidence that it's a fundamental right  
18 that should apply to the States.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 Mr. Clement.

21 Mr. Feldman.

22 ORAL ARGUMENT OF JAMES A. FELDMAN

23 ON BEHALF OF THE RESPONDENTS

24 MR. FELDMAN: Mr. Chief Justice, and may it  
25 please the Court:

1           The Second Amendment should not be  
2 incorporated and applied to the States because the right  
3 it protects is not implicit in the concept of ordered  
4 liberty. States and local governments have been the  
5 primary locus of firearms regulation in this country for  
6 the last 220 years.

7           Firearms unlike anything else that is the  
8 subject of a provision of the Bill of Rights are  
9 designed to injure and kill. And the very same features  
10 that make firearms valuable for self-defense as the  
11 court noted in Heller --

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

16           MR. FELDMAN: I don't believe it was, Your  
17 Honor.

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

20           MR. FELDMAN: I think the -- the Court  
21 has -- the Court has used the term in a number of cases.  
22 Since then it has used it in -- not in corporation cases  
23 as recently as the Glucksberg case. It used it in Mapp.  
24 It has used it in other cases, but I think --

25           JUSTICE KENNEDY: And it was also the Harlan

1 view, although a separate opinion in the Griswold case  
2 and in Poe v. Ullman.

3 Do you think it best describes the approach  
4 that the Court has used over the years?

5 MR. FELDMAN: Yes, I do.

6 JUSTICE KENNEDY: I was going to ask  
7 Mr. Clement what test he thought the Court used if you  
8 looked at all you think implicit in the concept of  
9 ordered liberty?

10 MR. FELDMAN: Yes, I do. And here's the  
11 reason why. In 1833, this Court has held in Barron v.  
12 Baltimore, in a -- in a ruling that Chief Justice  
13 Marshall said was not a difficult one although  
14 important, that the Bill of Rights did not apply to the  
15 States.

16 As far as I know, no justice has ever  
17 disagreed with that -- with that ruling or suggested he  
18 was wrong in so ruling. From -- it was -- the only  
19 reason -- and when the Fourteenth Amendment was passed  
20 and ratified in the late 1860's, again, the -- the  
21 framers did not directly apply the Bill of Rights to the  
22 States. They gave us some generalities.

23 And the Court has always understood that  
24 when it's applying the Due Process Clause, what it asks  
25 is not just is something in the Constitution, but is

1 this something that is so fundamental it's a necessary  
2 condition --

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

5 MR. FELDMAN: I --

6 JUSTICE SCALIA: My goodness --

7 MR. FELDMAN: I think that it --

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

11 MR. FELDMAN: I think it is in the following  
12 sense, when you are talking about a procedural right  
13 that is embedded in a particular procedural system, you  
14 have to look at how that system operates and how the --  
15 the right works within that particular system.

16 CHIEF JUSTICE ROBERTS: I think that's  
17 exactly -- that's exactly right. And that is what the  
18 Court elaborated on in Duncan. I do think the focus is  
19 our system of ordered liberty, not any abstract system  
20 of ordered liberty. You can say Japan is a free  
21 country, but it doesn't have the right to trial by -- by  
22 jury.

23 The -- the -- the concept only makes sense,  
24 I think, if you limit it to our system. Under our  
25 system, as you said, the -- the right to a jury is

1 essential.

2 MR. FELDMAN: I -- I agree -- I -- I -- I  
3 think that's right. I was just distinguishing  
4 between --

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

10 MR. FELDMAN: The question that the Court  
11 was addressing in Heller was not -- again, was not how  
12 important the Second Amendment right was, or how  
13 implicit it is in our system, it was what did it say and  
14 what did the -- what restrictions did the framers of the  
15 Second Amendment impose --

16 JUSTICE KENNEDY: But I thought its  
17 rationale was that because of its fundamental character,  
18 the right to bear arms must be understood as separate  
19 from the qualifying phrase of the militia clause, all  
20 people, most people in the United States, the public  
21 meaning of the Second Amendment was that there was an  
22 individual right to bear arms, and that's because it was  
23 fundamental. If it's not fundamental, then Heller is  
24 wrong, it seems to me.

25 MR. FELDMAN: No, I -- I -- I don't think



1 that that's right. The question is what right -- what  
2 did they impose upon the -- as restrictions upon the  
3 government when the Second Amendment was ratified. And  
4 as to that, it's not a question of whether it's  
5 fundamental any more than with the grand jury clause or  
6 with the civil jury trial right --

7 CHIEF JUSTICE ROBERTS: I don't see how you  
8 can read -- I don't see how you can read Heller and not  
9 take away from it the notion that the Second Amendment,  
10 whether you want to label it fundamental or not, was  
11 extremely important to the framers in their view of what  
12 liberty meant.

13 MR. FELDMAN: I -- it was important, but  
14 actually what Heller says is this: The Second Amendment  
15 preexisted the -- its inclusion -- or the right that's  
16 in the Second Amendment preexisted its inclusion in the  
17 Bill of Rights. But the reason it was codified, the  
18 reason it -- the reason it was put in the Bill of Rights  
19 was because the framers were concerned about the Federal  
20 government disarming the militia.

21 The right of self-defense which had been  
22 previously recognized and highly valued, I would agree,  
23 was -- had -- according to Heller, quote, had little to  
24 do with its codification --

25 JUSTICE SCALIA: That may be --

1 MR. FELDMAN: -- with its inclusion in the  
2 Constitution.

3 JUSTICE SCALIA: That may be the reason it  
4 was put there. But it was put there. And that's the  
5 crucial fact. It is either or it is not there.

6 And if it's there, it doesn't seem to me to  
7 make any difference why they chose to put that one there  
8 as opposed to other ones that they didn't put there.  
9 It's either there or not.

10 MR. FELDMAN: That -- I agree as far as the  
11 Federal government goes. But now there is a different  
12 question being asked, and the Second Amendment in this  
13 respect is unlike any of the other amendments that have  
14 been incorporated.

15 The same -- very same reason why the  
16 first -- the various rights in the First Amendment were  
17 put there in 1791 is exactly the reason why it was  
18 held -- why it was incorporated and applied to the  
19 States under the 14th amendment.

20 JUSTICE BREYER: So do we read the -- the  
21 clause -- clause at the beginning -- the militia  
22 clause -- we are supposed to read the words of the  
23 Constitution, aren't we?

24 MR. FELDMAN: Yes.

25 JUSTICE SCALIA: I guess the answer is yes.

1 (Laughter.)

2 JUSTICE SCALIA: Thank you.

3 MR. FELDMAN: Yes.

4 JUSTICE BREYER: Very well, and doesn't that  
5 suggest what the purpose of putting the right there is  
6 even under Heller or at least one purpose --

7 MR. FELDMAN: Well, that is --

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

10 MR. FELDMAN: That's what --

11 JUSTICE BREYER: -- the corner of liberty  
12 was? That's your point?

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

22 CHIEF JUSTICE ROBERTS: Well, sure, and it's  
23 still going to be subject to the political process if  
24 the Court determines that it is incorporated in the Due  
25 Process Clause. All the arguments you make against

1 incorporation it seems to me are arguments you should  
2 make in favor of regulation under the Second Amendment.  
3 We haven't said anything about what the content of the  
4 Second Amendment is beyond what was said in Heller.

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

6 CHIEF JUSTICE ROBERTS: And so the arguments  
7 you make, as well, given this context, you should not be  
8 able to have concealed carry -- well, maybe that's  
9 right. But that doesn't mean you don't incorporate the  
10 Second Amendment to allow you to enforce that type of  
11 regulation.

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

25 JUSTICE ALITO: And your position is that a

1 -- a State or local government could completely ban all  
2 firearms?

3 MR. FELDMAN: If the State and local  
4 government did that, I think would it raise two  
5 questions. One question would be, there is always  
6 review under the Due Process Clause and under the Equal  
7 Protection Clause for provisions that are arbitrary.  
8 And I would want to know why a State had done that. It  
9 is certainly relevant that in the last 220 years no  
10 State has done that or even come close, and in fact as  
11 the briefs from the other side of the case from some of  
12 the States show, they are quite the opposite direction.  
13 But the second --

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

15 JUSTICE KENNEDY: What is the due process  
16 liberty --

17 JUSTICE SCALIA: What basis would there be  
18 to -- to deny that?

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

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

22 MR. FELDMAN: Right and that has --

23 JUSTICE SCALIA: Other countries have done  
24 that.

25 MR. FELDMAN: It has not led to States doing

1 it in -- in this country.

2 JUSTICE SCALIA: But if they did do it, I  
3 think would you have to say it's perfectly okay.

4 MR. FELDMAN: No, the second -- there would  
5 be two rights questions actually. One would be was  
6 arbitrary or is that actually based on a reasoned --  
7 that -- sound --

8 JUSTICE SCALIA: The reason is guns are  
9 dangerous.

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

17 JUSTICE KENNEDY: But would self-defense be  
18 part of liberty under the due -- substantive meaning of  
19 the Due Process Clause?

20 MR. FELDMAN: I mean, if by that is, do you  
21 have a substantive right to self-defense, the Court  
22 actually has never answered that question, but I am  
23 willing to accept that there is such a right.

24 JUSTICE KENNEDY: And you have given -- you  
25 said there were two reasons. So you have given us both

1 in your answer to Justice Alito's question?

2 MR. FELDMAN: Yes, and -- and what I say  
3 about the right to self-defense is, if -- if the  
4 challenge -- if a State or local government banned all  
5 firearms it might raise the question of, given that  
6 there -- if there is a constitutional right to  
7 self-defense, has the State prohibited you from  
8 reasonable means of exercising that right?

9 JUSTICE KENNEDY: Without repeating that and  
10 just so I understand your position, how could some  
11 member of the Court write the -- this opinion to say  
12 that this right is not fundamental, but that Heller was  
13 correct?

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

25 CHIEF JUSTICE ROBERTS: That sounds an awful

1 lot to me like the argument we heard in Heller on the  
2 losing side.

3 MR. FELDMAN: Well, it's actually what the  
4 Court said in its opinion. What the Court said in its  
5 opinion is the reason it was codified was the concern  
6 that the framers had with the -- that the Federal  
7 Government might disarm the militia. Not self-defense.  
8 Self-defense according to the Court in Heller, quote,  
9 "had little to do with the codification of the right."

10 JUSTICE SCALIA: They said that is the  
11 reason it was codified. They did not say that that is  
12 the function of what was codified. The function of what  
13 was codified was to enforce the traditional right of the  
14 people to bear arms.

15 MR. FELDMAN: And that that -- --

16 JUSTICE SCALIA: And to say that that wasn't  
17 the reason it was codified doesn't say anything about  
18 what it consists of.

19 MR. FELDMAN: That -- that's correct, and  
20 I'm not arguing today about what it consists of, but the  
21 point being that this was a right that had been -- the  
22 framers as far as we know would have been satisfied to  
23 leave to the political process if it was just a question  
24 of the feature of it. Today --

25 JUSTICE ALITO: Let me see if I understand



1 your argument. I thought you said a minute ago that if  
2 a State or local government were to ban firearms  
3 completely, this Court might hold that that violates  
4 substantive due process because the right to use a  
5 firearm for self-defense is -- might be held to be  
6 implicit in the concept of ordered liberty; is that  
7 right?

8 MR. FELDMAN: That is correct.

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

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

23 JUSTICE SCALIA: Mr. Feldman, let me take  
24 your argument at -- at its face value. Let's assume  
25 that the only reason it is there and the only purpose it

1 serves is the militia purpose. Isn't that militia  
2 purpose just as much defeated by allowing the States to  
3 take away the militia's arms as it would be by allowing  
4 the Federal Government to take away the militia's arms?

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

6 JUSTICE SCALIA: Then so --

7 MR. FELDMAN: But that --

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

12 MR. FELDMAN: But I don't think the argument  
13 -- the primary argument that is being made today, that  
14 this is implicit in the concept of ordered liberty or  
15 sufficiently fundamental or whichever other formulas --

16 JUSTICE SCALIA: You are switching horses  
17 now.

18 MR. FELDMAN: No, I'm not.

19 JUSTICE SCALIA: Let's just focus on your  
20 argued that -- that -- that deals with the prologue.  
21 You say this is different because of that prologue. But  
22 that prologue has just as much force if the States take  
23 away the militia's arms as if the Federal Government  
24 does.

25 MR. FELDMAN: I -- I think that few people

1 today would say -- and in fact few people in 1868 would  
2 say that the concern to protect the State militias is  
3 something that's so fundamental or essential to a  
4 concept of ordered liberty or central to our system that  
5 it has to be protected --

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

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

23 MR. FELDMAN: It -- that would be -- that  
24 would be possible, but another -- another way to look at  
25 it is, that the question that the Court had -- the Court

1 has never answered the question, is this implicit in the  
2 concept of ordered liberty or should this be  
3 incorporated under any other test? By --

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

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

23 CHIEF JUSTICE ROBERTS: But to get back to  
24 Justice Breyer's point, which I'm not sure you answered,  
25 is your theory that you simply -- it's not a question of

1 is it in or is it out? You are saying well, what is in  
2 and what is out? Would --

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

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

8 MR. FELDMAN: I think that -- I think that  
9 the 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 are making.

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

1 MR. FELDMAN: The argument 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 that 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 JUSTICE BREYER: That's how you think  
13 Madison went about his job?

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

15 CHIEF JUSTICE ROBERTS: He did, actually.  
16 He did. That's how he went about it.

17 JUSTICE BREYER: I'm asking Counsel.

18 Do you think that's how Madison went about  
19 his job?

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

25 And what you have in the Second Amendment,

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

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

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

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

22 JUSTICE SOTOMAYOR: The Chief says: Yes, if  
23 we look at it, we have to look at it in the context of  
24 our history, our structure. So address his question as  
25 to why, in our structure, or our history, it's not

1 fundamental enough to --

2 MR. FELDMAN: Yes.

3 JUSTICE SOTOMAYOR: -- incorporate.

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

9 The --

10 JUSTICE SCALIA: Eleven of the colonies had  
11 a guarantee at the time that the Constitution was  
12 adopted, and I believe something like 44 States  
13 currently have in their constitutions protection of the  
14 right to bear arms. Does that suggest anything about --  
15 about how fundamental it is generally?

16 MR. FELDMAN: What the Court actually said  
17 in Heller was that there were two States at the time, in  
18 1791, that had a firearms right, and with -- there were  
19 possibly two more where the evidence was a little bit  
20 more ambiguous.

21 As far as today, it is true that 44 States  
22 have some kind of recognition of a right to keep and  
23 bear arms. Now, some of those States -- a couple of  
24 them, at least, two to four -- recognize that only in  
25 connection with the militia, and it's really quite



1 different than the right that this Court recognized in  
2 Heller. Many other of the rights that are recognized in  
3 State constitutions include provisions that really would  
4 be unheard of, and that actually point to the reasons  
5 why this is not fundamental, like, say, freedom of  
6 speech or freedoms of religion. They have provisions  
7 that say: Subject to such regulation as the legislature  
8 may proscribe, or the like.

9           And that points out the other difference.  
10 Because firearms are -- the same features that make them  
11 useful for self-defense make them also useful as  
12 instruments of violent crime, suicide, and accidental  
13 death. Their -- regulation of these items is a part of  
14 our tradition and --

15           JUSTICE SCALIA: "Subject to such  
16 regulation" certainly excludes banning them entirely,  
17 which is what you assert can be done.

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

19           JUSTICE SCALIA: What's the purpose of a  
20 State constitutional guarantee which has at the end of  
21 it "subject to such regulation as the legislature may  
22 proscribe," if that regulation includes banning it  
23 entirely? That -- that would make a nullity of the  
24 constitutional requirement.

25           MR. FELDMAN: The overwhelming consensus

1 among the State courts in interpreting the wide variety  
2 of different types of provisions that they have is that  
3 it imposes a reasonable regulation standard that is not  
4 violated by banning a particular weapon or a particular  
5 class of weapons, as long as you are allowing some kind  
6 of firearm, and that is not the right that this Court  
7 recognized in Heller.

8 JUSTICE SCALIA: Is that what you are  
9 asserting here, that the States have to allow firearms?

10 MR. FELDMAN: No.

11 JUSTICE SCALIA: Is that --

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

13 JUSTICE SCALIA: I didn't think so, either,  
14 so why did your last argument make any sense?

15 MR. FELDMAN: No, what I'm saying -- I'm  
16 sorry. What I'm saying is that the right that is  
17 embodied in the wide variety of different State  
18 constitutions, the overwhelming consensus is that what  
19 the States have determined as a result of their own  
20 processes and in light of their own conditions is that  
21 you can't ban all kinds of firearms, but you can ban  
22 some kinds of firearms.

23 JUSTICE SCALIA: That's fine.

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

1 JUSTICE SCALIA: We said as much in Heller.

2 MR. FELDMAN: All right. Well -- and the  
3 kinds of firearms that have traditionally been banned by  
4 the States and that actually the period around the time  
5 of the Fourteenth Amendment is a good period to look.  
6 At or around that time, there are numerous States that  
7 had regulations barring the carrying and even that go up  
8 to the point of possession of pistols and Bowie knives,  
9 which are not firearms, but are also arms under the  
10 Second Amendment, and so on.

11 CHIEF JUSTICE ROBERTS: Well, all of those  
12 may be perfectly valid today, or -- if the Court  
13 incorporates the Second Amendment. Incorporation  
14 doesn't say anything by itself about whether those types  
15 of regulations, which you think are reasonable and your  
16 friends think may not be reasonable, are valid or not.

17 MR. FELDMAN: I think the Court in Heller  
18 did hold that a ban on -- a ban on handguns is invalid.  
19 That was the holding of the case. And these are --  
20 these were laws that were passed that are very close to  
21 that. In the 1860's and the 1870's, in Texas, in  
22 Wyoming, places that -- not necessarily for the whole  
23 State --

24 JUSTICE SCALIA: Handguns in the home?  
25 Handguns in the home? That's what Heller addressed?

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

3 JUSTICE SCALIA: No, you can't, because they  
4 didn't.

5 MR. FELDMAN: But if you look at the  
6 decision -- no, if you -- actually, if you look at the  
7 decisions, some of them banned the sale, they banned  
8 carrying them anywhere in the jurisdiction, and in such  
9 a way -- and some of the judicial decisions even say:  
10 This was intended to eliminate these weapons from our  
11 jurisdiction. And they were generally upheld at that  
12 time.

13 Now, those were responding to local  
14 conditions at the time, and generally, the history of  
15 firearms regulation, because of the risk that firearms  
16 pose, has been that in this country, it has been widely  
17 recognized that in many places it's appropriate to carry  
18 firearms. And many jurisdictions have found, and  
19 reasonably found, that allowing broad use, carriage, and  
20 whatever of firearms is appropriate. But there are some  
21 jurisdictions that have found that's not to be the case  
22 throughout our history.

23 And that has been a State and local decision  
24 that has worked through the political process in those  
25 jurisdictions. And that political process here is

1 another distinction between the Second Amendment and  
2 some of the other amendments that have been  
3 incorporated, is that one basis, I think, for  
4 incorporating the other amendments and for applying them  
5 against the States has been that there is a concern  
6 about a discrete minority or a highly unpopular view  
7 that is not going to get a fair shake in the political  
8 process. I don't think that has ever been the case  
9 here. And as far as I know, the framers didn't think  
10 that was the case with respect to the right to keep and  
11 bear arms.

12 It's a right that gets controlled in  
13 accordance with local conditions, with local cultures,  
14 and with local views about the necessarily difficult  
15 questions about how best to protect public safety. That  
16 is -- that has been a part of our -- of our history  
17 since 1860, since --

18 JUSTICE KENNEDY: But there -- but there are  
19 provisions of the Constitution, of the Bill of Rights,  
20 that have been incorporated against the States, where  
21 the States have substantial latitude and ample authority  
22 to impose reasonable regulations, rights respecting --  
23 rights respecting property, the Cruel and Unusual  
24 Punishment Clause. We look to see what the political  
25 process does. We look to see -- why can't we do the

1 same thing with firearms?

2 MR. FELDMAN: Well, it's just that the end  
3 -- I have two points I would like to make about that.  
4 One is the analysis the Court used in Heller. In  
5 Heller, what the Court said is: This is not the time to  
6 balance things; you cannot ban handguns.

7 Now, there may be local -- there have been  
8 local jurisdictions before and there are now ones where  
9 they feel allowing some firearms, but banning handguns,  
10 is the best way to achieve public safety and to increase  
11 the zone of ordered liberty for their people. And those  
12 things would be apparently impermissible under Heller.

13 But even more than that, Heller construed  
14 the Second Amendment's "bear" -- the word "bear," "to  
15 keep and bear arms" -- to mean the same thing as "carry"  
16 in this Court's case in *Muscarello* much later. And to  
17 carry -- generally to carry.

18 Many -- there is a long history of  
19 regulation of not just concealed carry, as the Court did  
20 recognize in *Heller*, but of ban -- of banning open carry  
21 in a variety of jurisdictions. Again, generally, it's  
22 someplace that is -- it has a particular problem; it's a  
23 city or something like that.

24 JUSTICE KENNEDY: Do you think there is  
25 existing authority with reference to other provisions of

1 the Bill of Rights that would allow us to incorporate  
2 just the core of Heller with respect to the States?  
3 Just the core of the Second Amendment with respect to  
4 the States, along the lines to this question Justice  
5 Stevens was asking earlier?

6 MR. FELDMAN: Well, I think that there would  
7 be --

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

10 MR. FELDMAN: I think really this -- I  
11 cannot offhand think of a case that would lead you to  
12 that.

13 JUSTICE STEVENS: If you look to Justice  
14 Harlon's dissent in Griswold, where he says the  
15 Fourteenth Amendment stands on its own bottom and it can  
16 be either more or less than the provision of the Bill of  
17 Rights, and there is no reason in the world why this  
18 Court could not adopt the same position here and say:  
19 Insofar as incorporated, it applies only within the  
20 home. The Court had ample precedent for that.

21 MR. FELDMAN: And actually the other point I  
22 make is if you approach it from the other point of view,  
23 the case has not been made here -- it hasn't even been  
24 brought -- that the City of Chicago is denying people  
25 the -- the right to have any kind of firearm or the

1 right to have any kind of reasonable means of  
2 self-defense.

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

6 MR. FELDMAN: No.

7 CHIEF JUSTICE ROBERTS: Well, then your  
8 answer to Justice Stevens is no, you are not going to  
9 follow that approach, right?

10 MR. FELDMAN: No, what I'd would say is that  
11 -- what I would say is if the Court -- what I was  
12 saying is that if the Court approaches it from the  
13 standpoint of perhaps if there is -- if the Court  
14 chooses in an appropriate case to recognize a  
15 fundamental right to self-defense, it would then raise  
16 those kinds of questions. And someone could make the  
17 case that they are being denied any rights of  
18 self-defense or any reasonable right to exercise  
19 self-defense because of a jurisdiction's firearms  
20 regulations; the Court could address that. That's not a  
21 claim that has been made in this case, that's not a  
22 claim that could be made in this case.

23 JUSTICE SCALIA: See, the right to keep and  
24 bear arms is right there, it's right there in the Bill  
25 of Rights. Where do you find the right to self-defense?



1 MR. FELDMAN: Well, I --

2 JUSTICE SCALIA: You -- you want us to  
3 impose that one on the States but not -- not the  
4 explicit guarantee of the right to keep and bear arms.  
5 That seems very strange.

6 MR. FELDMAN: No, actually I -- I don't want  
7 to impose that on the States. I think it's very  
8 unlikely that the Court would ever be called upon to,  
9 because our history for the last 200 years -- 220 years  
10 had been of reasonable State and local regulation of  
11 firearms that responds to local conditions, to local  
12 threats of violence and so on that occur. And I don't  
13 see any reason to think that there will be a  
14 jurisdiction that would try to sufficiently ban firearms  
15 that people wouldn't have a reasonable means of  
16 self-defense.

17 JUSTICE SCALIA: The District of Columbia  
18 did.

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

22 JUSTICE SOTOMAYOR: Would you be happy if we  
23 incorporated it and said, reasonable regulation is part  
24 of the incorporation? And how do we do that?

25 MR. FELDMAN: Well, there is the reasonable

1 regulation standard, there is an article by Professor  
2 Winkler that we cite in our brief that goes very  
3 extensively through the ways that State courts have  
4 dealt with their own rights to keep and bear arms and  
5 have adopted, really by overwhelming consensus, that  
6 kind of a reasonable regulation standard, which  
7 generally recognizes --

8 JUSTICE GINSBURG: I thought that Heller --  
9 Heller allowed for reasonable regulation.

10 MR. FELDMAN: Excuse me.

11 JUSTICE GINSBURG: I thought that the Heller  
12 decision allowed for reasonable regulation and it gave a  
13 few examples as Justice Scalia mentioned.

14 MR. FELDMAN: Right. Well, it's just our  
15 view would be that what Chicago has done here, which is  
16 permit you to have a -- permit you to have long guns but  
17 ban handguns, is the kind of regulation that throughout  
18 our history jurisdictions in their own -- that are most  
19 familiar with their own particular needs and their own  
20 particular problems, and in a position to balance the --  
21 the need for self-defense with the risk to the use of  
22 firearms -- for violence, for accidental death and or  
23 suicide -- that the City of Chicago has come up with  
24 something that is well within our tradition. And --

25 JUSTICE SCALIA: What you were urging is

1 really a mixed blessing for gun control advocates. To  
2 the extent we sever the Federal guarantee from what the  
3 States are obliged to comport with, we encourage a  
4 stricter Federal Second Amendment, one that forbids all  
5 sorts of regulations that the Federal Government might  
6 otherwise be allowed to do, because it doesn't matter,  
7 the States can take care of it.

8 I mean, you know, if -- if you sever the  
9 two, you are encouraging a broader prohibition at the  
10 Federal level, and that's what -- Heller was very  
11 careful not to impose such a broader definition  
12 precisely because it realized that -- that this is a  
13 national problem.

14 MR. FELDMAN: I -- I think that, if I may --  
15 that the restriction that the Second Amendment imposes  
16 on the Federal Government should be and is controlled by  
17 what the meaning of that Second Amendment was in 1791.  
18 It shouldn't vary one way or the other with whether  
19 there is incorporation against the States.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Gura, you have 3 minutes remaining.

23 REBUTTAL ARGUMENT OF ALAN GURA

24 ON BEHALF OF THE PETITIONERS

25 MR. GURA: Sure.

1 JUSTICE KENNEDY: Counsel, at the -- at the  
2 very outset of your argument Justice Sotomayor asked the  
3 question which as I understood it essentially said what  
4 are examples of privileges and immunities that are being  
5 denied by the States that -- which denial would be  
6 remedied by following your proposal to overrule the  
7 Slaughter-House case?

8 And let's leave the Second Amendment out.  
9 Let's assume the Second Amendment is a wash; it's either  
10 going to be incorporated or not going to be incorporated  
11 to the same extent under either the Privileges and  
12 Immunities Clause -- the Due Process Clause. Leaving  
13 the Due Process -- the Second Amendment out of it, what  
14 privileges and immunities are now being denied citizens  
15 of -- of the United States?

16 MR. GURA: Well apart from the Second  
17 Amendment right, which is being denied to people in the  
18 United States by Chicago at least, there are other  
19 rights -- other rights enumerated in the first eight  
20 amendments that were thought to be personal guarantees  
21 as well as certain unenumerated rights which were  
22 understood to be part of --

23 JUSTICE KENNEDY: What are examples of  
24 those? The jury trial in civil cases?

25 MR. GURA: The jury trial --

1 JUSTICE KENNEDY: And grand jury. What  
2 else?

3 MR. GURA: There is not much left, Your  
4 Honor. Those are the only two provisions of the Bill of  
5 Rights that have not been held incorporated under due  
6 process, which informs us that perhaps we should have  
7 the Second Amendment incorporated. There is no reason  
8 to treat it any differently. With respect to the  
9 unenumerated rights that perhaps are not being --

10 JUSTICE GINSBURG: So you are saying that  
11 under your view, every State would have to use a grand  
12 jury to bring criminal charges, no more information.  
13 And that every State would have to have a civil jury, if  
14 any party in the case requested it. Is that --

15 MR. GURA: Yes, well it's not just what we  
16 are saying. It's what the framers of the Constitution  
17 said, and as Justice Scalia noted in Apprendi, the right  
18 to a jury trial, for example, may not be efficient but  
19 it is free.

20 JUSTICE GINSBURG: That's a criminal case;  
21 that's quite different.

22 MR. GURA: That's right. We're talking  
23 about the Grand Jury Clause; we have 28 States right now  
24 out of the 50 that allow prosecutors to pursue felony  
25 charges without indictment by a grand jury, but the

1 other 22 States do require --

2 JUSTICE KENNEDY: Well, I'm -- we are using  
3 up your time. But --

4 MR. GURA: Sure.

5 JUSTICE KENNEDY: But you want me to read  
6 the list -- grand jury indictment and civil trial and  
7 jury case, that's it. There's no other -- what are  
8 these other unenumerated rights?

9 MR. GURA: We can't give a full description  
10 of all unenumerated rights that are going to be  
11 protected by the Fourteenth Amendment.

12 JUSTICE SCALIA: That doesn't trouble you.

13 MR. GURA: No it does not and it shouldn't  
14 trouble the Court because the Court addresses due  
15 process cases all the time without saying --

16 JUSTICE ALITO: Well, doesn't it include the  
17 right to contract?

18 MR. GURA: The right to contract --

19 JUSTICE ALITO: Isn't that an unenumerated  
20 right?

21 MR. GURA: That is literally understood by  
22 the framers to be an unenumerated right under the  
23 privileged immunities. We know that because in the  
24 Civil Rights Act of 1866 that's the very first right  
25 that they mention as something that people in the South

1 should be enjoying, because they were not allowed to  
2 pursue a livelihood.

3 CHIEF JUSTICE ROBERTS: Your approach --  
4 your original approach would give judges a lot more  
5 power and flexibility in determining what rights they  
6 think a good idea than they have now with the  
7 constraints of the Due Process Clause.

8 MR. GURA: No, Your Honor; our approach  
9 might actually provide judges with perhaps no more than  
10 what they have now, perhaps even less, because our  
11 approach is rooted in text and history. It's not a  
12 license for judges to make up unenumerated rights that  
13 they believe --

14 CHIEF JUSTICE ROBERTS: Privileges and  
15 immunities give you a lot more flexibility than due  
16 process, because it is not limited to procedural --  
17 where you don't have to deal with the hurdle that it's  
18 limited to procedural by the text.

19 MR. GURA: Sure. If I may?

20 CHIEF JUSTICE ROBERTS: Yes, you may.

21 MR. GURA: We believe that it's more limited  
22 because that -- that text had a specific understanding  
23 and that there are guideposts left behind in texts and  
24 history that tell us how to apply it, unlike the due  
25 process. But at least we know one thing, which is that

1 in 1868 the right to keep and bear arms was understood  
2 to be a privilege or immunity of citizenship, and if the  
3 Court is considering watering down the Second Amendment  
4 perhaps it should look to text and history.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. GURA: Thanks.

7 CHIEF JUSTICE ROBERTS: The case is  
8 submitted.

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

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