

No. 25-238

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IN THE  
**Supreme Court of the United States**

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CUTBERTO VIRAMONTES, ET AL.,  
*Petitioners,*  
*v.*

COOK COUNTY, ILLINOIS, ET AL.,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**BRIEF OF AMICUS CURIAE  
PROFESSOR AKHIL REED AMAR,  
STERLING PROFESSOR OF LAW AND  
POLITICAL SCIENCE, YALE UNIVERSITY  
AND YALE UNIVERSITY SCHOOL OF LAW,  
IN SUPPORT OF NEITHER PARTY**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

Akhil Reed Amar is a constitutional scholar and historian who seeks to aid this Court in its efforts to practice principled constitutional decision-making and faithful originalism. In previous briefs to this Court, he has advanced, and today he once again advances, positions that he has taken as an academic long before any partisan or narrowly political implications could have been known.

## SUMMARY OF ARGUMENT

This case presents this Court a perfect opportunity to improve the basic framework for how judges and justices going forward should decide gun and gun-adjacent cases.

The improved doctrinal framework that amicus proposes today aims to harmonize all this Court's major cases involving guns/weapons/arms. Amicus believes that each of these cases—*Heller*, *McDonald*, *Bruen*, *Rahimi*, *Hemani*, *Wolford*<sup>2</sup>—was rightly decided on its facts. But amicus respectfully suggests that the cases have not explained their results in a way that best tracks the Constitution's text, history, and structure. Nor will the Court's emerging

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<sup>1</sup> No party or party's counsel authored or financially supported any of this brief.

<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022); *United States v. Rahimi*, 602 U.S. 680 (2024); *United States v. Hemani*, 146 S. Ct. 1677 (2026); *Wolford v. Lopez*, 146 S. Ct. 2032 (2026).

framework of analysis as articulated in *Heller*, *Wolford*, and other recent cases best guide gun law in key cases currently on the edge of, or just over, the judicial horizon.

*An improved framework going forward would distinguish between citizens seeking to possess and use guns for legitimate self-protection and those seeking to possess and use guns for other lawful purposes, such as sport.*

First: Presumptively law-abiding and nonthreatening adult citizens—Black and White, male and female—seeking weapons for legitimate self-protection deserve strong judicial solicitude because their rights-claim lies close to a core historical purpose that animated the architects of the Fourteenth Amendment in the mid-1860s.

This self-protection rights-claim does not, however, lie especially close to the core historical purposes that animated the architects of the Second Amendment in the 1780s and 1790s. True, this Court in *Heller* tried to root the self-protection right solely in the Second Amendment, while all but ignoring the Fourteenth Amendment. This was a mistake. More recent rulings by this Court have properly stressed the Fourteenth Amendment. Even so, these rulings have not gone far enough in centering analysis on this key Reconstruction Amendment.

Second: Weapons for sport are constitutionally different than weapons for self-defense. Sports weapons deserve strong judicial protection only when laws restricting such weapons are *outlier* laws in

modern America—laws that flunk the unenumerated-rights state-counting test of *Washington v. Glucksberg*, 521 U.S. 702 (1997), a test notably anticipated by Justice Harlan’s separate opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and Justice Washington’s Circuit Court opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (1823).

Under the improved doctrinal framework proposed and elaborated *infra*, the decision below should be reversed.

First: AR-15 platform weapons are facially proper weapons for lawful self-defense by presumptively law-abiding and nonthreatening adults, and as such fall within the core gun right, the paradigm case, as envisioned by the architects of the Fourteenth Amendment in the 1860s.

Second: Roughly four-fifths of America’s states, encompassing roughly two-thirds of America’s current population, impose no serious impediments on AR-15s. Even if AR-15s in these states are used mainly for sporting purposes, the combined weight of these states provides a distinct basis, beyond self-defense, for deeming AR-15 possession and use a fundamental right in modern America, under *Glucksberg*’s *state-counting* and *outlier-focused* approach to unenumerated rights.

Finally, amicus urges this Court to reserve decision on whether laws that restrict large-capacity magazines (LCMs) as such, as distinct from AR-15 platform weapons that are merely capable of accepting magazines of various sizes, likewise violate

the Constitution. LCMs are not ordinarily needed for self-defense by presumptively law-abiding adults. Thus, any strong judicial protection for LCMs would need to rest entirely on a *Glucksberg-Griswold* analysis. Such analysis should carefully credit the substantial number of states—thirteen at last count, including many high-population states, and all of them “blue” states—that currently seek to limit LCMs to protect the public from mass shootings. A proper *Glucksberg-Griswold* approach should also factor in the possibly significant number of additional states, many also likely to be “blue,” that might seek to join this magazine-restricting club in the near future, if left free to do so by this Court.

## ARGUMENT

### **I. One Big Idea: The Fourteenth Amendment Was Written and Ratified to Protect an Individual Right to Weapons for Self-Protection**

In response to this Court’s vigorous protection of gun rights in recent years, scholarly and journalistic critics—mainly political liberals—have demurred. The Second Amendment, say critics, is all about state militias: “*A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.*” (Emphasis added.) How do these words support private gun possession in homes or civilian gun-toting in public places? How, indeed, do these words support gun-possession and gun-toting by adult women, who were no part of the organized *Minutemen* of the 1770s? Wasn’t the history underlying this

amendment all about virtuous local militias repelling tyrannical British redcoats—Lexington, Concord, Bunker Hill, and all that? Yet that story, say critics, has almost nothing to do with private gun possession and nonmilitary gun usage, especially by adult women. Plus, the very text and structural syntax of the Second Amendment essentially equate the key word, “militia,” of the first clause with the key word, “people,” of the second clause. Without such a keyword interlock between the two clauses, the amendment’s overall grammatical structure would come close to featuring an awkwardly dangling modifier. As one leading Founder explained in the late 1780s, “[a] *militia*, when properly formed, are in fact *the people themselves* . . . and include . . . *all men* [sic] capable of bearing arms.”<sup>3</sup>

The Court’s critics make powerful originalist points and ask great originalist questions. But this Court and its academic defenders (including amicus) in fact have compelling originalist answers to these questions. The best answers, however, require going far beyond the Bunker Hill story and indeed far beyond the Second Amendment’s words. The best arguments for gun rights come not from the Revolutionary War era, but rather from the Civil War era. The key Amendment is not the Second, as drafted by James Madison and others in the First Congress in 1789, but the Fourteenth, as crafted by John Bingham, Jacob Howard, and others in the Thirty-Ninth Congress in 1866.

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<sup>3</sup> “XVIII Letters from The Federal Farmer” in 2 *The Complete Anti-Federalist* 341 (Herbert J. Storing ed., 1981) (emphasis added).

A. The Fourteenth Amendment's Text Was Plainly Designed to Apply the Bill of Rights' Guarantees Against the States

Our story begins in the run-up to the Civil War.<sup>4</sup>

Slaveholding states, especially states in the Deep South, violated virtually every fundamental American right and freedom. These states suppressed anti-slavery speakers and writers; imprisoned clergymen who preached that chattel slavery was sinful; outlawed teaching Blacks how to read the Bible; prohibited free Blacks from keeping guns at home for self-protection; conducted dragnet searches and seizures of suspected offenders; subjected alleged fugitive slaves to rigged and juryless trials; and routinely imposed barbaric punishments not practiced outside the Deep South. In some southern jurisdictions, mere membership in the fledgling Republican Party and vocal support of its 1860 presidential nominee, Abraham Lincoln, was a capital offense. Despite this, Lincoln was duly elected, thanks to northern votes. And the war came.

After Lincoln's assassination in early 1865, his Congressional allies aimed to ensure that state and local officials would never again be allowed to trample the rights itemized in the federal Bill of Rights.

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<sup>4</sup> The remainder of Part I borrows heavily from Akhil Reed Amar, *Born Equal: Remaking America's Constitution, 1840-1920* (2025).

New constitutional language was needed to accomplish this aim. As Chief Justice Marshall had explained in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the various provisions of the first eight amendments to the U.S. Constitution—guaranteeing free-expression rights, religious-liberty rights, just-compensation rights, fair-trial rights, and more—protected Americans against only the federal government. In response, the second sentence of the Fourteenth Amendment declared that “No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” (Emphasis added.) The main architect of this crucial language was Ohio Congressman Bingham, ably aided by Michigan Senator Howard.

Like his model and mentor Lincoln, Bingham was a midwestern lawyer with abiding reverence for the written Constitution and for America’s Founding Fathers. In modern parlance, both Lincoln and Bingham were liberal *originalists*. Thus, Lincoln unforgettably began his 1863 Gettysburg Address with a pious invocation of the Founding Fathers: “Four score and seven years ago [that is, in 1776], our fathers brought forth on this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal.” In similar fashion, Bingham’s congressional speeches overflowed with odes to “the sacred cause of the Constitution” and its Bill of Rights, which he viewed as “essential provisions of your Constitution, divine in their justice, sublime in their humanity” encompassing “all the sacred rights of person . . . of which the fathers of the

Republic spoke, after God had given them the victory.”<sup>5</sup>

A simple glance at Bingham’s key Fourteenth Amendment passage confirms this reverence. Lincoln’s protégé wove no fewer than four distinct intratextual references to the Founders’ Constitution into this twenty-one-word passage alone. “No state shall” borrowed verbatim from Article I, section 10. Other words reworked the First Amendment: “Congress *shall make no law . . . abridging*” became “No state *shall make . . . any law* which shall *abridge*.” (Emphasis added.) Similarly, the in-state “privileges or immunities of citizens” that Bingham sought to protect reworked Article IV’s language guaranteeing interstate “privileges and immunities of citizens.” And with his focus on “citizens of the United States,” Bingham paraphrased the Preamble’s “People of the United States.”

The next clause of the Fourteenth Amendment’s second sentence opened as follows: “Nor shall any State deprive any person of life, liberty, or property, without due process of law.” Here was yet another intratextual reference to the Founders’ Constitution—Bingham’s fifth in a grand total of thirty-eight consecutive words. This time, Bingham’s ur-text was the Fifth Amendment: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”

In Congressional speeches showcased by America’s top newspapers, Bingham explained that

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<sup>5</sup> Cong. Globe, 39th Cong., 1st Sess. 1090-94 (Feb. 28, 1866).

his proposed amendment would, among other things, reverse *Barron's* rule and apply the Bill of Rights against state and local governments. The phrase “Bill of Rights” appeared more than a dozen times in one Bingham floor speech, and six times on another occasion.<sup>6</sup> In the 1866 election, Bingham published one of his most important floor speeches as a campaign pamphlet whose title said it all: “One Country, One Constitution, and One People: Speech of Hon. John A. Bingham of Ohio, in the House of Representatives, Feb. 28, 1866, in *Support of the Proposed Amendment to Enforce the Bill of Rights*.”<sup>7</sup>

In the Senate, Michigan's Howard took the lead in elaborating the proposed amendment to his colleagues and to journalists and ordinary citizens listening in. Speaking before a packed gallery on May 23, 1866, Howard explained that Section One's “privileges and immunities of citizens” included “the personal rights guaranteed and secured by the first eight amendments of the Constitution.”<sup>8</sup> He proceeded to itemize these rights, explicitly enumerating “freedom of speech and of the press,” “the right to keep and bear arms,” the “right to be tried by an impartial jury,” and virtually every other key right affirmed in these eight amendments. “*The*

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<sup>6</sup> *Id.* at 1088-94, 1291-93 (Feb. 28 and March 9, 1866).

<sup>7</sup> Emphasis added. Some have wondered why Bingham's text specifically mentioned due process—a guarantee explicit in the Fifth Amendment and thus already covered by Bingham's general language of “privileges” and “immunities.” Bingham's Due Process Clause aimed to ensure that aliens—“persons” who were not “citizens” and thus not covered under the Amendment's earlier Privileges or Immunities Clause—would get fair courtroom procedures in states.

<sup>8</sup> Cong. Globe, 39th Cong., 1st Sess. 2765-66.

*great object of the first section of the amendment,”* he explained, was to compel states “*at all times to respect these great fundamental guarantees*”—these basic “immunities, privileges, rights” that under *Barron* did not yet operate to “restrain[] State legislation.”<sup>9</sup> The very next day, America’s biggest newspaper, the *New York Herald*, reprinted in full Howard’s detailed exposition and gave it high-profile coverage. So did the *New York Times*. So did many other leading newspapers.<sup>10</sup>

B. Reconstruction-Era Americans Understood  
the Right to Keep and Bear Arms as an  
Individual Civil Right of Self-Protection

Bingham and his fellow 1860s Republicans aimed to apply rights in a different way than the eighteenth-century Founders had applied rights. Even as Bingham revered the Founders and their Founding texts, he was revising—*amending*—these texts so as to make sense in his own era.

The case of weapons and the rights to use and possess them offers a vivid illustration of the differences between the Founding vision of rights and the Reconstruction vision of rights.

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<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> See, e.g., N.Y. Trib., May 24, 1866; Daily Nat’l Intelligencer, May 24, 1866; Daily Morning Chron., May 24, 1866; Wash. Chron., May 24, 1866; Nat’l Republican, May 24, 1866; Phila. Inquirer, May 24, 1866; The Daily Age, May 24, 1866. Weeks later, other newspapers continued to highlight Howard’s speech, see, e.g., Hillsdale Daily News, June 5, 1866.

Many Founders loved local militias. After all, the Founders had recently fought a war of liberation against a tyrannical central government headquartered in far-off London. *Liberty and localism tightly intertwined both in the Revolutionary War itself and in the textual codification of the lessons of that war in the Second Amendment.*

But the Civil War generated a different liberty-localism pattern, and thus Bingham's effort to textually codify the lessons of that war required a different approach. Southern state militias had recently misbehaved, having taken up arms against a duly elected and rights-respecting central government. Organized state militias were no longer the undoubted heroes that they had been for many Founders.

A new Bill of Rights needed most of all to apply against local misconduct. The Founders had featured an amendment saying that "*Congress* shall make no law" of a certain sort; Bingham and company were now crafting an amendment saying that "*No state* shall make . . . any law" of a certain sort. (Emphasis added.) The Founders had ended their first set of amendments with a Tenth Amendment affirming *states'* rights. Bingham and company were crafting an amendment defining *national* citizenship and protecting these national citizens *against* misbehaving states.

Still, the words of the Second Amendment were sacred to Republicans such as Bingham, even as these Republicans read those words through the powerfully refracting prism of recent events. *On their reading,*

*the core weapons-related right was not a collective state right but a private individual right—a “privilege”—namely, a right to have a gun in one’s home and at times on one’s person for self-protection.*

Black citizens especially needed this right. They could not always count on a local White constabulary to protect them when White terrorists came to raid their homes or threaten their persons when they ventured outdoors.

A companion federal statute to the Fourteenth Amendment known as the Freedmen’s Bureau Act of 1866 nicely clarified this shift from a Founding-era *political* right of *militias* to a Reconstruction-era *civil* right of *all citizens*, even nonmilitary women. “Laws . . . concerning *personal* liberty [and] *personal* security, . . . *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the *citizens*”—males and females alike.<sup>11</sup>

The best illustration of how Bingham was both building on and breaking with the Founders—a process that amicus and others have labeled “refined incorporation” of the Bill of Rights<sup>12</sup>—came from *Harper’s Weekly*. And this illustration, published on July 25, 1868, came not in the form of a legal essay but rather in the form of a literal . . . illustration.

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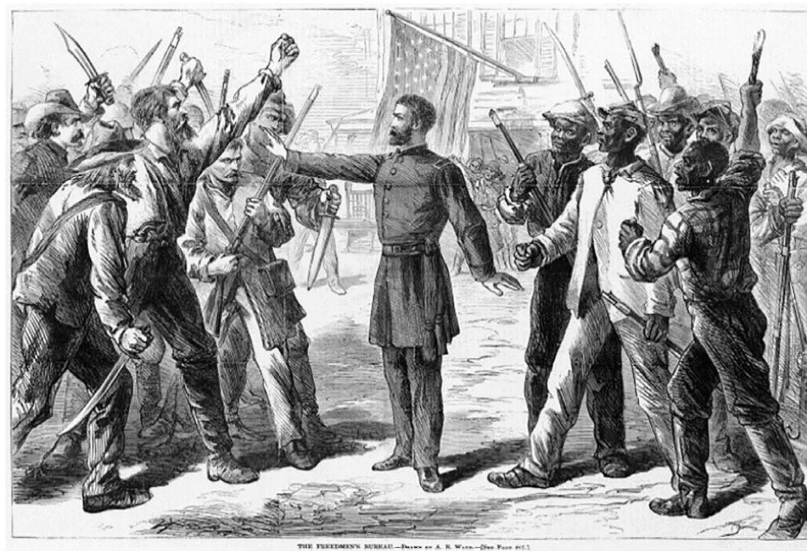
<sup>11</sup> Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77 (emphasis added).

<sup>12</sup> See generally Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* xiv-xv, 215-30 (1998) (coining the phrase and elaborating the concept).

One of several brilliant illustrators on the *Weekly* staff, Alfred R. Waud took as his template the single best-known and most widely reprinted depiction of Revolutionary War combat, John Trumbull's *Death of General Warren at the Battle of Bunker's Hill*. In portraying the recently created federal Freedmen's Bureau and the landmark 1866 Freedmen's Bureau Act underlying the Bureau, Waud in 1868 borrowed four key elements from Trumbull's 1780s masterpiece. In both illustrations:

- (1) On the viewer's left, a forceful localist with a muscular left arm confronts a central officer.
- (2) A uniformed officer of the central government, right, arm outstretched, occupies the center foreground.
- (3) A flag of the central government wafts behind center stage.
- (4) A Black man with a vertical weapon stands on the viewer's far right.

These four common elements—highly specific kindred images in virtually identical positions—are hardly random. No careful reader of *Harper's* in 1868 could miss Waud's profuse and pointed allusions to Trumbull.





(1)

(2)

(3)

(4)



But even as Waud invoked Trumbull, he also inverted Trumbull. For Trumbull, the central government's Union Jack brings with it chaos and turbulence—dark clouds and death. For Waud, the central government's Union flag represents order and calm—uniformed military law, perhaps, but law nonetheless, and a hope for future peace. Trumbull's poignant and virtuous localist minuteman cradling the martyred Revolutionary General Joseph Warren has transformed into Waud's powerful and vicious former rebel raising a clenched fist. Trumbull's solitary Black figure at the viewer's extreme right edge has become Waud's crowd of Black folk approaching center stage.

Waud thus dramatizes that Blacks are paradigmatic, not peripheral, to the Civil War and to its textual codification in the Civil War Amendments and companion statutes. And not just paradigmatic but heroic. At least one of Waud's Blacks wears a Union Army cap and at least one other Black retains his army bayonet.

That said, Waud is not depicting a military confrontation, as was Trumbull. Waud is portraying a paradigmatic civil right. He is showing his viewers the need for individual Blacks to keep guns in their homes and, at certain times and in certain places, on their persons to protect themselves from fierce ex-Confederate Whites with menace in their eyes and, perhaps, hatred in their hearts.

Even though Waud's remarkable illustration was relentlessly male, Bingham's Section One, its companion statutes (the 1866 Civil Rights Act and

1866 Freedmen's Bureau Act), and Attorney General Edward Bates's precursor 1862 exposition of citizenship and civil rights emphatically included women on equal terms.<sup>13</sup> For many constitutionalists in the 1860s, the unmarried White woman epitomized the (mere) citizen, as such.<sup>14</sup> She was the classic example, the paradigm case, of someone who could claim a vast range of civil rights—rights to sue and be sued, to own property, to speak her mind, to author books and articles, to petition government, to practice religion freely and equally, to keep and carry a gun for self-protection, to receive just compensation when government took her property for public use, and so on—but who lacked the core civic-republican political rights to vote, hold office, or serve in juries or the military. In effect, the Fourteenth Amendment promised to henceforth treat Black men rather similarly to how the law had long treated unmarried White women.

Bingham's key 1866 language closely tracked verbiage that Elizabeth Cady Stanton had published in a December 1865 essay calling for a Fourteenth Amendment in which "the women as well as the men shall be secured in all the rights, privileges, and immunities of citizens."<sup>15</sup> That language, in turn, built on her 1848 Seneca Falls Convention Declaration, in which she and many other convention participants, led by Lucretia Mott and Frederick

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<sup>13</sup> On Bates, see *Citizenship*, 10 Op. of Att'y Gen on Citizenship 382 (Nov. 29, 1862).

<sup>14</sup> Amar, *The Bill of Rights*, *supra* note 12, at 260-61 n\*.

<sup>15</sup> 2 *History of Woman Suffrage*, 94 n\* (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881); Amar, *The Bill of Rights*, *supra* note 12, at 260-61 & n\*.

Douglass, had demanded for women “all the rights and privileges which belong to them as citizens of these United States.” Cady Stanton and her allies thus cheered Section One’s pointedly inclusive civil rights/citizenship/birth-equality language.

If this Court looks solely to the world that birthed the Second Amendment, as did *Heller*, it is not easy to deduce a robust right of women to have guns for self-protection. True, the masculine Minutemen of Lexington and Concord kept their militia weapons in their private homes; but women in the Revolutionary War formed no part of these organized militias. Yet women as such, in female-led households—widows, divorcées, and never-married single women (*femmes soles*, as they were called)—surely needed weapons at home for self-protection just as much as menfolk did.

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To recap: *Arms-bearing* for Trumbull and James Madison’s original Second Amendment was at its core *military, collective, localist, and political*. It was the residue of the Revolutionary War. By contrast, *gun-toting* and *gun-keeping* for Waud, Bingham, Howard, and the Fourteenth Amendment was at its core *civilian, individualist, nationalistic, and civil*. This reconceptualized right was the residue of the Civil War. On this new—refined—vision, the national government, the national flag, and the national Constitution would henceforth protect the civil right of law-abiding adult Black citizens—and all other law-abiding adult citizens, of course—to keep guns in their homes and on their persons for self-defense.

## **II. A Second Big Idea: The Fourteenth Amendment Also Aimed to Prohibit Outlier Laws Infringing on Customary Individual Freedoms as Evidenced by the Actual Practices of Americans in the Several States**

Had the Fourteenth Amendment aimed to hold states only to the various individual civil rights, freedoms, privileges, and immunities nested within the Constitution's first eight amendments, better language could easily have been found to express this aim. For example: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States *as encompassed in the first eight amendments to this Constitution.*" Bingham, Howard, and their Congressional allies studiously avoided language like this. These statesmen surely meant to overrule *Barron*, but they just as surely aimed to do more than that, by requiring states to honor other fundamental rights not explicitly mentioned in Amendments One through Eight, or anywhere else in the U.S. Constitution, for that matter.

In the same packed-gallery speech in which he specifically named almost all the rights enumerated in the Constitution's early amendments, Senator Howard also invoked an influential 1823 circuit court opinion by "a very learned and excellent judge," Justice Bushrod Washington, in the case of *Corfield*

*v. Coryell*.<sup>16</sup> In that opinion, Justice Washington had elaborated on the “privileges” and “immunities” of American “citizens” in the context of Article IV—one of the sources of what would later become the intratextually cognate language of the proposed Fourteenth Amendment. These “privileges and immunities,” declared Justice Washington in 1823, in words that Senator Howard repeated verbatim to a packed gallery in 1866, encompassed rights and freedoms that “are, in their nature, fundamental . . . and which have, at all times, been enjoyed by the citizens of the several states which compose this Union.” 6 F. Cas. at 551.

Faithful to the vision of Bingham and Howard, this Court and its members have repeatedly recognized unenumerated fundamental rights going well beyond the rights, privileges, immunities, and freedoms—the four words were essentially synonymous—specifically itemized in Amendments One through Eight. In so doing, this Court and its members have often pointed to a strong consensus of state practice as evidence that these federally unenumerated rights are indeed fundamental.

Thus in *Griswold v. Connecticut*, the second Justice Harlan voted to strike down a Connecticut law that sought to ban use of contraceptives in the home, even in a marital home. “[C]onclusive, in my view,” he explained in a concurring opinion, “is the utter novelty of [Connecticut’s] enactment. Although the Federal Government and many States have at one

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<sup>16</sup> Cong. Globe, 39th Cong., 1st Sess., 2765 (May 23, 1866); *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

time or other had on their books statutes forbidding or regulating the *distribution* of contraceptives, *none, so far as I can find, has made the use of contraceptives a crime.*<sup>17</sup>

By contrast, in *Washington v. Glucksberg*, this Court pointedly declined to constitutionally cognize an asserted unenumerated right to assisted suicide, and declined in large part because this supposed right was not remotely a right that—to borrow from *Corfield* and Howard—had either traditionally or in recent years been very widely exercised “by the citizens of the several states which compose this Union.”

In its most notable recent non-gun case implicating an asserted unenumerated right, this Court in *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022), reaffirmed an approach that—in keeping with the approach of Justice Harlan in *Griswold* and the majority opinion in *Glucksberg*—gave considerable weight to actual rights-practice in the several states. In all, members of the *Dobbs* Court cited *Glucksberg* 17 times, and Justice Alito’s majority opinion featured this important statement: “[O]ur review of this Nation’s tradition extends well past [the Founding and Reconstruction eras] . . . . [F]or more than a century after 1868—including ‘another half-century’ after women gained the constitutional right to vote in 1920, it was firmly established that laws prohibiting abortion like the

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<sup>17</sup> *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting) (emphasis added). In *Griswold*, Justice Harlan incorporated by reference his *Poe* opinion. See *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment).

Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule *Roe* and *Casey*.” *Dobbs*, 597 U.S. at 261 (internal citations omitted).

### **III. The Fourteenth Amendment’s Aforementioned Big Ideas Best Explain the Bottom-Line Results of this Court’s Recent Gun-Rulings**

On the key facts underlying this Court’s recent weapons cases, each case was correctly decided, given the two big Fourteenth Amendment ideas elaborated *supra*.

#### *A. Heller*

*Heller* involved a law that flatly banned the possession of an ordinary weapon for self-protection in the home of an otherwise law-abiding adult American citizen who posed no special threat to anyone. Such a law violated a core privilege of American citizenship as understood by those who crafted the Fourteenth Amendment and its companion Freedmen’s Bureau Bill, which emphatically affirmed the core right of self-defense, along with many other core rights, such as free expression and free religious exercise.

True, the Amendment expressly specified that *states* must henceforth honor such rights, freedoms, privileges, and immunities. It was necessary in 1866 to specify the word *states*, given the clear interpretive rule laid down in 1833 by *Barron v. Baltimore*, that

general language in a *federal* Constitution would ordinarily not apply against *states*. But the Amendment's opening sentence *itself*, without more, obliged federal officialdom to respect fundamental civil rights. That opening sentence made clear that all American-born persons were "citizens of the United States." For the Reconstruction Republicans who drafted and ratified this amendment, what it meant to be a citizen was, *ipso facto*, to have certain basic rights, freedoms, privileges, and immunities.<sup>18</sup> These Reconstruction Amenders plainly understood that citizenship *itself* was the "right to have rights." Cf. *Trump v. Barbara*, 146 S. Ct. 2438, 2458 (2026).

In a famous Biblical episode that the Fourteenth Amendment's supporters repeatedly invoked, Saint Paul, né Saul of Tarsus, had insisted on his basic rights in the Roman world simply because he was a Roman citizen, full stop. *Civis Romanus sum!*<sup>19</sup> While specific language—"No state shall"—was needed to make clear, post-*Barron*, that *state* abuses would thenceforth be prevented by the *federal* Constitution, basic rights vis-à-vis the *federal* government simply went without saying. Long before the Civil War, Chief Justice Marshall's *McCulloch* opinion had made clear that Congress had no power

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<sup>18</sup> See *Citizenship*, 10 Op. of Att'y Gen on Citizenship 382 (Nov. 29, 1862); Civil Rights Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (citizenship itself necessarily entails a broad panoply of civil rights). See generally Amar, *Born Equal*, *supra* note 4, at 519-20.

<sup>19</sup> See sources cited *supra* note 18.

to do *improper* things.<sup>20</sup> Indeed, in 1857 the *Dred Scott* Court had proclaimed that Black Americans could never be citizens because if a given Black man were indeed a citizen, it would follow that he would have a right to “keep and carry arms wherever [he] went.” *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

### B. *McDonald*

*McDonald* on its facts was even more straightforward than *Heller*. Like *Heller*, *McDonald* involved a flat ban on gun possession for self-defense in the home of an otherwise law-abiding and presumptively nonthreatening adult American. Here, too, the government violated a core privilege of American citizenship as understood by those who crafted the Fourteenth Amendment and its companion Freedmen’s Bureau Bill. Because the Chicago government that violated this core privilege was an arm of a state (Illinois), the plain “No state shall . . .” language of the Amendment directly applied, without any complicating need to rely on the companion Citizenship Clause in the Amendment’s first sentence.

Also, and independently, the Chicago ordinance was a draconian outlier that flunked the *Glucksberg* state-counting test. The ordinance intruded upon a traditional freedom recognized by the

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<sup>20</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); see also Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* 27-29 (2012).

vast majority of “the several states which compose this Union.” 6 F. Cas. at 551.

### *C. Bruen*

*Bruen* involved gun possession for self-defense in ordinary places outside the home by an otherwise law-abiding and presumptively nonthreatening adult American. Here, too, the government violated a core privilege of American citizenship as understood by those who crafted the Fourteenth Amendment and its companion Freedmen’s Bureau Bill. Reconstruction Republicans plainly understood the need to protect the rights of Americans outside their home; they knew that in the *Dred Scott* case, Chief Justice Taney’s opinion had referred to “liberty of speech,” the right “to hold public meetings upon political affairs,” and the freedom to “keep and *carry* arms” as core “privileges and immunities of citizens.” 60 U.S. at 417 (emphasis added). Though Reconstruction Republicans emphatically rejected Taney’s definition of *who* was a citizen, they largely agreed with Taney about *what* citizenship meant: American citizenship entitled a person to a broad set of “privileges and immunities”—including a right to carry weapons for self-defense in various ordinary public places outside the home. Waud of course powerfully depicted precisely such a right in his iconic *Harper’s Weekly* illustration.

Also, and independently, the New York law at issue in *Bruen* was a draconian outlier that flunked the *Glucksberg* state-counting test. The *Bruen* law intruded more aggressively upon a traditional freedom than did the laws of at least forty-three other

states.<sup>21</sup> This key state-counting number—forty-three—appeared prominently in the second paragraph of the Court’s opinion, and twice more later in that opinion. 597 U.S. at 11, 13. It also appeared four times (!) in a very short (three-page) but crucial concurring opinion by Justice Kavanaugh, joined by Chief Justice Roberts. *Id.* at 79-80.

#### D. *Rahimi*

The *Rahimi* Court ruled against the gun-right claim at issue, and rightly so. Guns in the wrong hands are obviously dangerous—perhaps fatal—to innocent parties, and the gun-claimant in *Rahimi* had been personally adjudicated to be a special threat to others. Such a fact pattern lay very far from the core gun-right as articulated and envisioned by Reconstruction Republicans—regardless of how many or how few laws on the books in 1868 were exact dead ringers for the more modern law at issue in *Rahimi*.

The *Rahimi* law was also very far from being a modern *outlier* under the *Glucksberg* test. Not only had Congress rejected the gun-claim at issue; so too had 48 modern States and Territories. Restrictions of a *Rahimi* sort were thus “commonplace throughout the United States.” *Rahimi* Pet.Br. of U.S. at 34-35; *Rahimi*, 602 U.S. at 703 (Sotomayor, J., concurring).

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<sup>21</sup> Possibly forty-four. The *Rahimi* opinions appear to have overlooked Vermont.

E. *Hemani*

*Hemani* pushed back against a law that also flatly banned weapons for self-protection even in the home of a generally law-abiding and presumptively nonthreatening adult citizen.

True, the law targeted only gun-possessors who simultaneously possessed illegal drugs. But according to the government's sweeping interpretation of the statute in question, home gun possession for self-protection was seriously criminalized even in a case involving "a husband who regularly takes his wife's prescription Ambien to sleep and a college student who routinely uses a friend's Adderall to cram for exams." 146 S. Ct. at 1689. As interpreted by federal executive officers, such a draconian law threatened the self-protection rights of millions of ordinarily law-abiding and presumptively nonthreatening adult Americans and also, perhaps, the *Glucksberg* right of Americans to be free from draconian criminal sanctions for modest pharmacological infractions.

F. *Wolford*

Like *Bruen*, *Wolford* struck down a state law that restricted gun-carrying for self-defense outside the home by an otherwise law-abiding and presumptively nonthreatening adult American. And like *Bruen*, the law at issue was an *outlier* law.

True, the *Wolford* anti-gun law was much less sweeping than the *Bruen* anti-gun law; the Hawaii government prohibited gun-carrying only in certain privately owned spaces (absent affirmative consent by

the property owner). Still, as the *Wolford* Court pointedly noted, only five states had laws on the books akin to Hawaii's. The *Wolford* Court further noted—twice!—that all five of these outlier states had been among the rather suspect six outlier states (along with the District of Columbia) in *Bruen*. *Wolford*, 146 S. Ct. at 2045 & n.7.

#### **IV. The Specific *Bruen* Framework, Bolstered by *Heller* and *Wolford* Dicta, Is not the Best Way Forward**

##### **A. Looking Back**

In any new doctrinal field, there are bound to be some early missteps as jurists confront large questions of first principle that have not routinely and repeatedly come before this Court until recently. As various twenty-first-century gun-rights cases now begin to knit together and form a distinct body of gun law, today's Court should thoughtfully consider proposed midcourse corrections, lest some of the lapses and mistakes of the Court's earliest pronouncements now harden into rigid doctrinal frameworks that: (1) fail to best align with what the Constitution does say and does not say; (2) fail to best align with doctrines governing adjudications of other rights; and (3) misdirect future jurists and litigants away from the real issues that should sensibly matter in modern gun-law.

Let's start with *Heller*.<sup>22</sup> This was actually a rather easy case on its facts, but the feisty majority opinion made it seem harder than it was.

This opinion played strained word games, trying to sever the Second Amendment's opening words from its closing clause, rather than acknowledging that the Amendment plainly meant to link these clauses together. In the 1780s and 1790s the Amendment's interlocking words "militia" and "people" were two ways of saying essentially the same thing in the context of what was basically a military amendment that had only an indirect connection to gun-possession for personal self-defense.

*Heller* read "people" to mean the same thing in the Second Amendment that it meant in the Fourth. 554 U.S. at 580-81. This was a clever intratextualist move. But it overlooked a couple of things.

First, leading intratextualists have always stressed that certain "chameleon words" sometimes mean different things in different clauses even within the same document.<sup>23</sup> For example, corporations are "persons" for Fifth Amendment due-process-clause purposes, but not for Fifth Amendment self-incrimination-clause purposes or for census-clause purposes. Similarly, "Congress" in the Constitution sometimes means the lawmakers on Capitol Hill—the House and the Senate—and sometimes instead

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<sup>22</sup> For much more analysis, see Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 Harv. L. Rev. 145 (2008).

<sup>23</sup> See generally Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 775 (1999) (introducing and elaborating the category of "chameleon words").

means the lawmaking process that includes the House, the Senate, and, via presentment, the President.<sup>24</sup> So perhaps “the people” should mean the exact same thing in the Second and Fourth Amendments, but perhaps not. The fact that thirteen-year olds enjoy legitimate privacy rights under the Fourth Amendment protection should not automatically mean that these very same thirteen-year olds should enjoy gun-rights under the Second Amendment.

More fundamentally, a more historically and structurally satisfying intratextual analysis would focus less on an asserted Second Amendment-Fourth Amendment dyad and more on a grand intratextual pattern holding the entire Constitution together—a grand civic-republican pattern in which the two clauses of the Second Amendment not only interlocked with each other but also interlocked with several key clauses of the original Constitution.<sup>25</sup> In this grand pattern, “the people,” the “militia,” *and* the electors/voters are all interconnected. In several high-visibility constitutional clauses, beginning with the Preamble, the words, “the People,” in the original Constitution plainly referred to *voters* first and

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<sup>24</sup> Vikram David Amar, *(Yet) Another Reason ISL Theory is Wrong About the Meaning of the Term State “Legislature”: The Constitution’s References to the Federal Counterpart—“Congress”*, Justia (June 30, 2022). Cf. *Moore v. Harper*, 600 U.S. 1, 24 (2023) (state “legislature” sometimes refers to a body distinct from the state executive and sometimes instead refers to a lawmaking process involving the governor).

<sup>25</sup> For much more on this grand pattern, and also much more on the complexities of the word “people” in the Fourth Amendment, see Amar, *The Bill of Rights*, *supra* note 12, at 46-50 & n\*, 64-76; Amar, *Heller*, *supra* note 22 at 166-70.

foremost. In the Preamble, *voters* “ordain[ed] and establish[ed]” the Constitution. A sentence later, Article I, section 2, opened as follows: “The House of Representatives shall be composed of Members chosen every second Year by *the People*”—that is, the *voters*—“of the several States.” (Emphasis added.)

At the time of the Second Amendment’s adoption, *voters* were of course almost entirely *adult men*—and so were the fighting *militias* of that era, who were essentially voters with guns in their hands, acting collectively, in keeping with a centuries’-old civic-republican tradition with roots in classic writings of James Harrington and Niccolò Machiavelli. Thus, Trumbull’s *Bunker Hill* obviously linked arms-bearing with all-male and all-adult militias, not with Fourth Amendment privacy rights of men, women, and children alike.

*If, as Heller claimed, the Second Amendment was truly about individual weapons for private self-defense, what about adult women?* Surely they needed such weapons; but just as surely, they were not Founding-era *voters* or Founding-era *militiamen*, as a rule. *Heller* had very little to say about women, because *Heller* wrongly ignored the later Fourteenth Amendment, which *was* in fact at its core about self-protection, and was also, thanks especially to Elizabeth Cady Stanton, at its core about women as well as men.

Happily, *McDonald* recentered gun-rights doctrine on the Fourteenth Amendment. But *McDonald* hesitated to highlight the Amendment’s key clause. Bingham, Howard, and their allies

insisted that gun rights—and many other substantive rights, such as free expression and free religious exercise—were core *privileges* and *immunities* of *citizens*. *McDonald*'s hesitation made it harder for ungenerous observers to see the obvious and impressive originalism that undergirded the *McDonald* Court's correct holding.

The Court's hesitation also made it harder for observers to see the two main pillars underlying the key clause: first, a refined-incorporationist pillar (with intratextual echoes of the First Amendment words “no,” “shall,” “make,” “law,” and “abridge”), and second, a *Corfield* pillar (based on an intratextualist cluster of the Article IV words “privileges,” “immunities,” and “citizens” that anticipated the outlier/state-counting approach of modern cases like *Glucksberg*).

*Bruen* rightly applied the core gun-right beyond the home, but failed to insist that the key right was a Fourteenth Amendment right, and thus that the key time period to examine was *obviously* the 1860s and not the 1790s. (The *Bruen* majority simply posed the question and then sidestepped it, 597 U.S. at 37-38, as did the later *Hemani* majority, 146 S. Ct. at 1687.)

*Bruen*'s biggest lapse was its overemphasis on statutes on the books at the time various gun rights were placed in the Constitution. True, the Court did not insist that every modern gun-restricting law must have dead-ringer statutes from long ago. Still, the *Bruen* Court placed great weight on whether a given modern law has ancient precursors.

This is not how First Amendment free-exercise doctrine, First Amendment free-expression doctrine, or Fourth Amendment reasonableness doctrine generally works. In these doctrinal domains and many others, modern courts do not simply hunt for precursors.

Such a hunt is particularly problematic when it comes to immensely powerful and rapid-firing weapons, like, say, AR-15s. Today's guns and gun-adjacent components are qualitatively different from the flintlocks, derringers, ramrods, and Minie balls of the 1790s and the 1860s. No single madman in 1791 or 1868 could, with a standard gun in those years, kill dozens in seconds. No precursor law from these older eras may have regulated, say, the size of large-capacity magazines for the simple reason that such magazines did not then exist.

*Rahimi* was therefore wise to boost the level of generality at which to recognize an ancient precursor to a given modern gun-restriction, and to do so even over the objection of the author of *Bruen*. But given the inherent manipulability of this *Rahimi* precursor-statute game, a better and more candid approach would openly emphasize that precursor-statute analysis is not the be-all and end-all.

Instead, *Rahimi* correctly intuited that the core gun right—the paradigm case—for Reconstruction Republicans was obviously a right of *self-protection* for *law-abiding and presumptively nonthreatening* adults who posed no unusual threat of grave and illegal violence to their peaceful neighbors and loved ones. That core right lay miles away from the gun-

right asserted in *Rahimi*, which involved an unusual person who did indeed pose a grave threat to breach the peace.

Whereas *Rahimi* was sound, one particular line in the Court's most recent gun case was not. Citing *Bruen*, *Wolford* declared that if "a challenged law falls within the plain text of the Second Amendment, it is presumptively unconstitutional." 146 S. Ct. at 2044.

*Textually*, on the facts of *Wolford* this was a big swing and a miss. The *Second* Amendment's "plain text" says absolutely nothing—nothing!—about the law at issue in *Wolford*. (Ditto for the law at issue in *Bruen*.) The *Wolford* law (like the *Bruen* law) was a *state* law, and the "Second Amendment's plain text" addresses the *federal* government and only the *federal* government. *Barron*. Period.

Here we see the real and ongoing damage done by *Heller*'s overreading of the Second Amendment and simultaneous inattention to the Fourteenth. The constitutional text at issue in *Wolford*—and in *McDonald* and *Bruen* and *Rahimi* and most of the gun cases now on the horizon—is the Fourteenth Amendment's language about "privileges or immunities" of citizens. And this *plain text* says nothing particularly *explicit* about *guns* or *arms* as such.<sup>26</sup>

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<sup>26</sup> As discussed *supra* p. 12, the 1866 Freedmen's Bureau Act did mention the phrase "bear arms."

## B. Looking Down

Under the improved doctrinal framework outlined *supra*, the circuit-court decision below should be reversed.

First: AR-15 platform weapons are facially proper weapons for legitimate self-defense and as such fall within the core gun right as envisioned by the architects of the Fourteenth Amendment in the 1860s.

Second and independently: Almost four-fifths of America's states, which collectively encompass roughly two-thirds of America's current population, impose no serious impediments on possession and use of AR-15s. Pet.Br.10n.3. These facts make a strong case for protecting AR-15 possession and use under a *Glucksberg* approach that in turn echoes *Corfield*.

*Corfield*, it should be remembered, stands as one of the two main pillars (alongside refined incorporation) of the Fourteenth Amendment's majestic guarantee of fundamental privileges and immunities to all citizens against all American governments—federal, state, and local.

## C. Looking Ahead

AR-15 platform weapons are capable of accepting magazines of various sizes. They are thus inherently weapons that may be used solely for self-defense, when carrying a moderate-size magazine, containing, say, 10 rounds.

But a state might well choose to limit—and many states of late have in fact chosen to limit—large-capacity magazines (LCMs) as such. For the reasons outlined above, the decisive question in a future case that will soon come before this Court should not be whether these modern laws have old statutory precursors.

Rather, under the doctrinal framework proposed in this brief, the key questions should be two-fold.

First: Are LCMs ordinarily needed for ordinary self-defense as envisioned by the 1860s architects of the Fourteenth Amendment? The answer here would seem to be no. An ordinary citizen does not need, say, a 30-round magazine for ordinary self-protection.

Second: Do LCMs nevertheless deserve protection under *Corfield* and *Glucksberg*?

At present, thirteen states, including many high-population states, currently seek to limit such magazines: California, New York, Illinois, New Jersey, Washington, Massachusetts, Maryland, Colorado, Connecticut, Hawaii, Rhode Island, Delaware, and Vermont. To this list we should also add the District of Columbia.

Several more states, and large ones at that, might well join this magazine-restricting club in the near future, if allowed to do so by this Court. Proper *Glucksberg* analysis must avoid premature judicial “lock-in” that nips reform movements in the bud and

then refuses to revisit the matter when new states seek to join the early reform states.<sup>27</sup>

Also, there is this structural fact: All the states currently in the LCM-limiting group are presidentially “blue.” Although *Glucksberg* analysis has typically not paid sustained attention to the precise distribution of states, perhaps it should.

At issue is the core meaning of an Amendment that was clearly designed in the 1860s to affirm fundamental rights of all Americans in every state and territory, but was also clearly designed to hold America together after a brutal Civil War.

America today is deeply polarized—as was America in the 1850s and 1860s. One of the many vices of this Court’s ill-fated decision in *Roe v. Wade*, 410 U.S. 113 (1973), was that, in the name of this unifying Amendment, and with no strong support in the Amendment’s text or history, this Court prohibited abortion bans everywhere—bans that were popular in “red” states above all. And, to borrow from Lincoln, the Culture War came.

Soon, gun-rights advocates will be inviting this Court to prohibit LCM bans everywhere—bans that are popular in “blue” states above all. This Court should think twice before accepting this doubly dangerous invitation—dangerous both to the victims of gun violence and to the structural harmony of, to

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<sup>27</sup> For discussion of how to avoid improper lock-in, see Amar, *America’s Unwritten Constitution*, *supra* note 20, at 137-38.

borrow yet again from *Corfield*, “the several states which compose this Union.”

## CONCLUSION

Amicus recommends that this Court reverse the judgment below and gently tweak its framework for resolving gun-related cases going forward.

Respectfully submitted,

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