No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, *ET AL.*
Petitioners,
v.
CITY OF CHICAGO, *ET AL.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

Brief for the Villages of Winnetka and Skokie, Illinois, the City of Evanston, Illinois, the Illinois Municipal League, and the International Municipal Lawyers Association as *Amici Curiae* in Support of Respondents

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Statement of Interest[*]

Amici Winnetka, Skokie, and Evanston are, like respondents Chicago and Oak Park, political subdivisions of the State of Illinois, endowed by the Illinois Constitution with home rule powers. *Amicus* Illinois Municipal League (IML) is a non-political association of and advocate for 1132 Illinois cities, villages, and incorporated towns. *Amicus* International Municipal Lawyers Association (IMLA), is an organization of over 3500 local government entities, as represented by their chief legal officers, municipal leagues, and individual attorneys, which serves as a resource and voice for local governments.

Although this case, like *District of Columbia* v. *Heller*, primarily involves gun regulations in a large urban jurisdiction, firearm regulation is also a concern of suburbs and their residents. The problems of violence and gang activity that plague large cities do not respect political boundaries, and other social problems associated with firearms – heightened risks of suicide and lethal domestic violence, of accidental shootings, and of crimes committed with stolen weapons – are of deep concern to suburban communities.

In noting these harms, however, *amici* do not mean to suggest unanimity that the regulatory approach challenged here is the best one for addressing them. We recognize that debates about the appropriateness

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[*]Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and that no such counsel or party, other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Counsel for all parties have filed written consents to the filing of *Amicus* briefs.

and efficacy of handgun restrictions and competing policy alternatives are occurring across the country and that their resolution depends on diverse communities' local conditions, experiences, and values.

Indeed, *amici* here exemplify this heterogeneity. For many years, Evanston and Winnetka had in place strict handgun regulations like those challenged here; Skokie and many other IML members do not (a difference due, in part, to Winnetka's experience with a tragic 1988 school shooting). Though the relevant provisions have very recently been repealed (to avoid costly litigation), there remains strong support in both communities for such a policy approach.

Amici are united, however, in agreement that decisions whether to adopt (or repeal) measures like these should be made at the local level, by citizens and their representatives. On this point, the governing law (as it currently stands) is quite clear: the Illinois State Constitution, as adopted in 1970, recognizes both an individual right to keep and bear arms *and* local authorities' historic and continuing police power authority to regulate the possession and use of firearms. That provision, which was extensively debated by the drafters and ratifying voters, has been interpreted by Illinois's highest court to allow an array of regulatory measures, including a locally-enacted ban on handgun possession like the ones at issue here.

Were petitioners' position to prevail, the efforts of the constitution-drafters four decades ago, as well as those of the ratifiers and judicial interpreters and of *amici* and others, who debated and enacted regulations at the local level, would prove to have been an idle undertaking – as would countless other instances of

serious and *bona fide* lawmaking on this subject across the Nation since 1868.

Another aspect of *amici*'s experiences should concern the Court. When Evanston and Winnetka repealed their more restrictive laws in 2008, it was not because their citizens or legislators had been persuaded by policy arguments like the ones advanced by petitioners, respondent NRA, and their *amici* – but rather because they determined that the costs of defending the laws in federal court (even of doing so successfully) were too high to have local taxpayers bear. The prospect of resolution through litigation – and threat of it – against local governments, for legislative actions taken in good faith to advance important public aims, is a further reason for rejecting the unprecedented constitutional interpretation petitioners ask the Court to impose.

Summary of Argument

Petitioners ask the Court to depart drastically from long-settled practice and constitutional understanding and recognize, for the first time in the Nation's history, a broad power in federal courts to pass substantive judgment on state and local legislation regulating the ownership and use of firearms.

These efforts should fail because petitioners do not take up, let alone discharge, the especially heavy burden of justification that the proponent of any such abrupt and far-reaching reversal must bear. As this Court has recognized and the experiences of *amici* well illustrate, the present means for resolving tensions between individual rights of self-defense and firearm ownership and public safety and welfare, through deliberation and debate at the local level, within bounds set by the constitutions and laws of the 50

States – the means the Nation has known throughout its history – exhibits the many virtues of the federal system. Indeed, this subject matter bears the hallmarks of ones the Court has recognized to be especially suited to local resolution: (1) there are large, significant differences in local conditions and (2) wide, value-laden differences of opinion about the subject among different communities across the Nation, both making a single uniform rule less satisfactory; (3) interest and awareness are high enough that laws (and constitutional provisions) can be expected to express citizens' views; (4) issues of law and policy are sufficiently intertwined with complex, technical, and unresolved empirical questions to make provisional, legislative resolution preferable to a definitive judicial one; and (5) there is no reason to believe that lawmaking activity in this area is pursued in bad faith or to disadvantage any unpopular or politically powerless subgroup.

Rather than acknowledge their burden, petitioners and *amici* largely seek to minimize it, insisting that the ruling they ask from the Court would cause little disruption of the traditional State/federal balance, treating as proof the impressive number of state constitutions that now include rights to keep and bear arms – and the large number of States and their officials signing *amicus* briefs supporting reversal.

The premises of these arguments are dubious: (1) the readiness of a significant number of States to implement or champion a right (or a particular understanding of a right) usually counsels against, not in favor of, federal judicial intervention; and (2) States and individual officials cannot consent even to intrusions on their own sovereignty, let alone on those of other States.

But they are, in any event, surely incorrect on the merits. The federalism costs of shifting the locus of decision-making on this subject from local and state legislative chambers (and state courts) to federal courts are large, even before accounting for those of a *nunc pro tunc* declaration by this Court that more than a century of state- and local-level lawmaking had been *ultra vires*. Moreover, the practical burdens of defending laws against federal court challenge would skew processes of local self-government even in cases where judicial invalidation would be unlikely, and important crime prevention strategies would be compromised.

To the extent petitioners attempt to carry their burden, they do not (and cannot) succeed. As we explain briefly below (and Chicago and *amici* do in fuller depth), the evidence that Framers of the Fourteenth Amendment intended any clause of it to "incorporate" particular provisions of the Bill of Rights (or all of them) is itself equivocal; that they contemplated, let alone favored, the particular categorical limitation on regulatory authority indicated in *Heller* is highly implausible; and we are aware of no evidence that the Amendment was widely understood by its *ratifiers*, including the State of Illinois, to have established a permanent limit, enforceable by federal judges in private lawsuits, on state and local governments' ability to adopt *bona fide* public safety measures.

In fact, the contemporaneous evidence petitioners and *amici* do put forward – statements of congressional framers and supporters – does not establish an intent to divest States and their subdivisions of authority to enact neutral, generally applicable police power

measures of the sort at issue here, but rather a strong disapproval of discriminatory "class legislation."

This distinction also highlights the flaws of the most urgently advanced reason for the historic rearrangement petitioners seek – to foster greater "consistency" between the judicially enforceable guarantees of the Second Amendment and those of other provisions of the Bill of Rights. Such arguments disregard fundamental differences between this right and ones that were held to be indispensable to ordered liberty – and incorporated against the States "jot for jot" in the twentieth century on that basis. Few of the cited decisions entailed substantive review of generally applicable police power legislation. Many arose in the field of state criminal justice, where the Fourteenth Amendment already spoke; involved matters of core judicial expertise on which majority rule has never been the norm; and responded to serious problems of racial discrimination, and even the Free Speech incorporation cases petitioners and *amici* emphasize involved matters fundamentally less suited to democratic resolution than are the ones here.

The issues presented by petitioners' claim are in fact much more like the ones canvassed last Term in *District Attorney's Office* v. *Osborne*, 129 S. Ct. 2308 (2009), than the First Amendment decisions petitioners and *amici* proffer as analogous. As in that case, recognition of a novel Fourteenth Amendment right here threatens to preempt ongoing State and local efforts; to thrust federal courts into an uncomfortable prescriptive role, on a subject matter far outside their core expertise; and claims authority from abstractly stated principles that lack solid grounding in existing constitutional doctrine.

I. The Rule Petitioners Seek Would Work A Vast And Unjustifiable Disruption of Self-Government

This Court has long recognized that questions of federal law – both statutory and constitutional – should be resolved with due regard for the States' role in our federal system and for the Constitution's historic allocation of decisionmaking authority. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 349 (1971).[1]

Petitioners and their *amici* do not deny outright, but try to minimize the significance of these principles to this case, at turns asserting that the construction of Fourteenth Amendment advanced here "[d]oes not disrupt the balance," State Legislators Br. at 9, that "incorporation of the Second Amendment presents no [federalism] concerns," Texas *et al.* Br. 23, and pointing to the large number of States (44) with constitutional provisions recognizing a right to keep and bear arms, Petr. Br. 69.

This is all exceedingly strange. By any honest reckoning, the disruption of the federal balance of "incorporating" the Second Amendment against the States would be vast. Doing so would disable State and local authorities from "experiment[ing] and

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[1] These considerations, frequently cited in interpreting federal statutes, are fully operative in constitutional adjudication, see *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); in cases involving the Fourteenth Amendment, see, *e.g., Washington* v. *Glucksberg*, 521 U.S. 702, 710 (1997); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), including ones involving its core guaranty of racial equality, *Milliken* v. *Bradley*, 418 U.S. 717, 741-42 (1974), and rights enumerated in the Bill of Rights, see *Younger* v. *Harris,* 401 U.S. 37, 44 (1971) (relying on "Our Federalism" in declining to enjoin state criminal proceedings on First Amendment grounds); *Hurtado* v. *California*, 110 U.S. 516, 535, 537-38 (1884).

exercis[ing] their own judgment," *United States* v. *Lopez*, 514 U.S 549, 583 (1995) (Kennedy, J., concurring), on a subject matter – preventing harms associated with firearms – to which they "lay claim by right of history and expertise," a pattern that "reveal[s]" the "theory and utility of our federalism," *id.* It would immediately and irreversibly transfer policymaking responsibilities from democratic majorities to federal courts. Doing so not only would shift the locus of future debates, it would entail holding (1) that important and historic regulatory powers were taken from the people "[in] 1868," Pet. App. 7a (Easterbrook, J.); (2) that this transfer was effected by the States themselves (in ratifying the Fourteenth Amendment then); and (3) that much ensuing local- and state-level lawmaking on the subject was (unbeknownst to the participants – and to the state jurists who for a century have construed and applied those enactments) *ultra vires*.

A. History and Comparative Expertise Support States' and Municipalities' Power to "Experiment[] and Exercis[e] Their Own Judgment" in this Field

1. Firearms Regulation Is a Traditional and Important Exercise of the Police Power

As the Court in *Heller* recognized, local firearms regulation pre-dated the Constitution, see 128 S Ct. at 2819-20 (noting laws in colonial Boston, Philadelphia, and New York); it continued through the early days of the Republic, when laws requiring registration and forbidding keeping of powder were enacted, into the Nineteenth Century, with adoption of measures targeted at the use of pistols and other weapons understood to heighten dangers of crime and public

disorder, into the present mass of laws and constitutional provisions (and judicial decisions). See generally Chicago Br. 28-31.

The source of authority for these regulations has been the "police power," widely described as the authority, indeed the duty, "'to protect[] the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State,'" which supports enactment of "'all kinds of restraints and burdens'" on both "'persons and property'" *Slaughter-House Cases*, 83 U.S. 36, 62, (1872) (quoting *Thorpe* v. *Rutland & B.R. Co.*, 27 Vt. 149 (1855)); *Brown* v. *Maryland*, 25 U.S. 419, 422 (1827). See generally W. Novak, THE PEOPLE'S WELFARE (1996). The interests sought to be protected by past and present firearms regulations – combating crime and preventing lethal domestic violence, suicide, and accidental death and injury – are likewise at the heart of States' responsibilities. See, *e.g.*, *United States* v. *Morrison*, 529 U.S. 598, 618 (2000) (combating violent crime); *Castle Rock* v. *Gonzales*, 545 U.S. 748, 780-787 (2005) (Stevens, J., dissenting) (countering domestic violence); *Glucksberg*, 521 U.S. at 710-716 (prevention of suicide); *Lopez*, 514 U.S. at 582 (Kennedy, J., concurring) (protecting schoolchildren from guns).

Moreover, local and state regulation of firearms has been, for most of the Nation's history, nearly exclusive. There were few federal laws on the subject of any kind until well into the twentieth century, and no precedent whatsoever for federal *judicial* superintendence of State and local laws. See *Morrison*, 529 U.S. at 618 ("we can think of no better example of the police power, which the Founders denied the National Government

and reposed in the States, than the suppression of violent crime and vindication of its victims").

In Illinois and elsewhere, the police power repeatedly has been exercised to enact local firearms restrictions, and the State Supreme Court has settled that "a reasonable prohibition of handguns" is compatible with the State Constitution's "right of the individual citizen to keep and bear arms," "[s]ubject * * * to the police power." Ill. Const. Art. I., § 22. *Kalodimos* v. *Morton Grove,* 470 N.E.2d 266, 273 (1984); accord *Quilici* v. *Morton Grove*, 695 F.2d 261, 267-269 (7th Cir. 1982).

Describing it as "long recognized that the police power comprehends laws restraining or prohibiting anything harmful to the welfare of the people," *id.* at 272 (citation omitted), the Illinois Supreme Court explained that the State Constitution had been worded to recognize that "'arms pose an extraordinary threat to the safety and good order of society,'" and their possession therefore "'is subject to an extraordinary degree of control under the police power,'"*id.* at 269 (quoting Constitutional Convention Maj. Rep.), noting that members of the 1970 Convention had expressly affirmed the permissibility of "a total prohibition of 'the sale of some weapons in some circumstances' * * * citing a * * * Texas case, *Caswell & Smith* v. *State*, 148 S.W. 1159 (Tex. Civ. App.1912), [involving] pistols," *id.*, as well as the government's "'*authority * * * to forbid all hand guns." id.* at 271 (quoting Convention Delegate presenting majority report) (emphasis supplied by *Kalodimos*).

The court also rejected a claim that such measures were not an appropriate subject for local legislation. After canvassing local communities' "obvious"

legitimate "interest[s] * * * in reducing premeditated crime within their boundaries["]; "in minimizing the effects of domestic violence or spontaneous quarrels[; and] in reducing the possibility of serious accidents resulting from the accessibility to children of attractive but dangerous instrumentalities such as handguns," the court explained (470 N.E.2d at 274):

> Home rule * * * is predicated on the assumption that problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs, free from veto by voters and elected representatives of other parts of the State who might disagree with the particular approach advanced by the representatives of the locality involved or fail to appreciate the local perception of the problem.

Numerous state constitutional provisions recognizing a right to keep and bear arms (including a number adopted soon after the Fourteenth Amendment was ratified) include express reservations of regulatory power, Petr. Br. 24 n.13, and ones without explicit references have been construed as leaving intact police powers. See Petr. Br. 25 (noting that courts in 36 States have not invalidated any restriction in past fifty years) (citing Winkler, *Scrutinizing the Second Amendment,* 105 MICH. L. REV. 683 (2007)).

Illinois municipalities have considered and experimented with firearms policy at the local level. Rural jurisdictions have enacted relatively few measures; Chicago, the State's largest city, with endemic problems of gang-related gun violence, has pursued multiple, aggressive strategies. Smaller cities and suburbs have taken a range of approaches, with

some, including *amici* Winnetka and Evanston, adopting restrictive handgun laws. In part such measures have been adopted to prevent urban crime from crossing borders – and provide local police tools to effectively curb gang activity; but they also express values of tranquility and family safety particular to such communities. Cf. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974) ("The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people").

And as elsewhere, particular approaches not only reflect diverse conditions, but also express communities' distinct experiences. *Amicus* Winnetka's decision to ban handguns resulted from a searing 1988 tragedy, in which a mentally ill individual, wielding three legally-purchased handguns, invaded a Winnetka elementary school, murdering an eight-year-old boy and shooting five other children, before fleeing to a nearby house, taking its residents hostage, and finally fatally shooting herself. In a nonbinding referendum, Winnetka residents voted 2125 to 1407 in favor of broadly restricting handguns, and soon after that vote, the Village Council unanimously enacted an ordinance implementing that policy choice. Ordinance Amending Section 45.02 * * * of the Winnetka Village Code (approved April 11, 1989).

2. Experience Under Current Arrangements Reveals the Benefits of Leaving Intact States' Traditional Power to Regulate Firearms

This Court has frequently pointed to the benefits "citizens * * * derive from the diffusion of sovereign

power," *New York* v. *United States*, 505 U.S. 144, 181 (1992) (internal quotation and citation omitted). Our "federalist structure"

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. *Ashcroft*, 501 U.S. 452, 458 (1991).

Preempting a diversity of approaches to firearms regulation – in favor of the Second Amendment's "common use" limitation – would come at a high social cost, because "no national consensus has yet emerged on the best solution for this difficult and sensitive problem," *Cruzan* v. *Director, Missouri Dept. Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring), and because the undeniably high costs of poorly designed policies in this area.

As Justice Brandeis's famous "laboratory" metaphor reflects, judicially-mandated uniformity forecloses policy experimentation that might, through experience, persuade others to reconsider strongly held views and assumptions. *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Gregory*, 501 U.S. at 458. The efficacy of gun regulation, and the degree to which the ready availability of guns impairs or serves vital public interests in protecting life and limb, are actively disputed throughout the Nation. "[T]here is no reason to suppose that [federal courts'] answers to these questions would be any better than

those of state courts and legislatures, and good reason to suspect the opposite." *Osborne*, 129 S. Ct. at 2323.

Moreover, the "considerable disagreement," *Lopez*, 514 U.S. at 581 (Kennedy, J.), surrounding gun regulation is not merely empirical. Communities differ markedly in ways that bear on gun policy – in population density, problems of crime, traditions and preferences respecting guns (or types of guns), and views about the role of government. As *Heller* and this Court's many prior decisions recognize, on matters where such great heterogeneity exists, nationally uniform rules are, by definition, less likely to conform to citizen preferences than ones adopted at lower levels of government. See, e.g., *Gregory* , 501 U.S. at 458; McConnell, *Federalism: Evaluating the Founders' Design,* 54 U. CHI. L. REV. 1484, 1493-1494 (1987).

And just as the federal rule petitioners seek would deny other States the benefit of *amici* 's experience, it also would deny localities with more restrictive rules the opportunity to decide *on their own* that current approaches are overly restrictive or ineffectual. See *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U.S. 1, 49-50 (1973) (highlighting "the opportunity [local control] offers for participation in the decisionmaking process"); cf. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting)) (democratic resolution provides "all participants, even the losers, the satisfaction of a fair hearing and an honest fight").

Equally problematic is the large, unprecedented and uncomfortable responsibility that such a rule would confer on federal courts. Petitioners' rule would "enlist the Federal Judiciary in creating a new constitutional code of rules for [firearm regulation]," *Osborne*, 129 S. Ct. at 2322, requiring resolution of

complex factual issues far outside the judicial ken. See *id.* at 2323 (noting "questions" that would soon arise and that "it is hard to imagine what tools federal courts would use to answer them").[2]

Indeed, the number of measures that would ultimately be invalidated were petitioners to prevail is only part of the federalism calculus. In practice, a far larger array of laws regulating firearms could be subject to federal court *challenge*; while only the successful ones would carry attorney's fee awards, see 42 U.S.C. § 1988, and potentially damages, see *Monell* v. *New York City Dept. Social Servs.*, 436 U.S. 658, 701 (1978), even those distinctly *unlikely* to succeed impose significant litigation costs, ones small communities are unable or understandably disinclined to bear. Cf. *Leatherman* v. *Tarrant County NICU*, 507 U.S. 163, 166 (1993) (municipal governments have no § 1983 suit immunity).

These concerns are not hypothetical. *Amici* Winnetka and Evanston repealed longstanding handgun laws to avoid costly litigation brought by respondent NRA and others, *NRA* v. *Village of Winnetka*, No. 08-cv-5439 (N.D. Ill.); *NRA* v. *City of Evanston*, No. 08-cv-3693 (N.D. Ill.). Winnetka

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[2]As Judge Wilkinson explains, the guidance in *Heller* does not anticipate even a small fraction of the questions lurking in the complex array of firearms regulation across the United States. For example, a court's resolution of challenge to a ban on semi-automatic weapons (or a conviction for possessing a particular one) would entail deciding "how many shots a gun must be able to fire without manual reloading before it is too uncommon, and therefore, no longer protected by the Second Amendment."*Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 285 (2009).

officials described the repeal as reflecting the Village Council's responsibility to "balance * * * community prudence" against "community values." Minutes, Winnetka Village Council, Regular Meeting at 2 (Nov. 18, 2008) (quoting Trustee Ken Behles). Second Amendment claims have exploded since *Heller*, see Chicago Br. 20 n.11, and the sheer number of state and local laws that regulate weapons, the strong incentives that those dissatisfied with current law have to plead their case in federal court, and the lack of meaningful disincentives to doing so, strongly suggest floodgates would be opened.

That dicta in *Heller* described certain categories of laws as "presumptively lawful," 128 S. Ct. at 2816, does not dispose of these concerns. As the cases already pending make clear, that declaration will not preclude litigants from challenging – or courts from invalidating – laws within these categories. See, *e.g.*, *United States* v. *Skoien*, 587 F.3d 803, 805 (7th Cir. 2009) ("*Heller*'s language about certain 'presumptively lawful' gun regulations—notably, felon dispossession laws * * * cannot be read to relieve the government of its burden of justifying laws that restrict Second Amendment rights"). And as *amici* can attest, even claims understood to be extremely difficult to establish on the merits can be prohibitively costly for government defendants, especially when (as here) the applicable legal standards are undeveloped, see, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000) (per curiam) ("class of one" Equal Protection); cf. *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion) (lamenting "[e]ighteen years of essentially pointless [partisan gerrymandering] litigation").

A federal rule limiting state and local governments' power to regulate firearms – particularly handguns – would also have serious consequences for local governments' crime control strategies. As Chicago and its *amici* explain, courts have held that local laws restricting the possession and/or carrying of firearms affect Fourth Amendment "reasonableness" determinations, strengthening the power of police to disrupt the criminal activities of members of street gangs, who account for a vast share of violence and drug trafficking crime in many communities. See Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URBAN LAWYER 1, 37-48 (2009) (discussing importance of legal restrictions on handgun possession to constitutionality under Fourth Amendment of "stop-and-frisk" practices that have proven important to crime control in New York and elsewhere).

B. **Neither The Representations Nor The Actual Experiences of Petitioners' *Amici* Support Abandoning The Historic Allocation of Authority**

That many States are actively engaged on these issues and sympathetic to petitioners' interests is an argument against, not in favor, of this Court's intervention. See *Osborne*, 129 S. Ct at 2322 (explaining that "sudden[] constitutionalizat[ion] would short-circuit * * * responses * * * [in] 44 States"); *Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment) ("[J]udicial imposition of a categorical remedy * * * might pretermit other responsible solutions being considered in Congress and state legislatures"). And state officials who are opposed to stringent legislation are, for obvious

reasons, not reliable fiduciaries for the "federalism concerns," Texas Br. 21, of those who in fact have actively exercised regulatory powers.

Even were it true, as these arguments imply, that most or many state constitutional provisions impose limitations coextensive with *Heller*'s, the novel federal rule would hardly be costless. It would deny the people of those States the power to reconsider for themselves the judgments embodied in their constitutions, based on their own or other jurisdictions' experiences. And far from supplying "[i]nterpretive guidance" for ostensibly parallel state provisions, Texas Br. at 2, a ruling would relegate these – and state courts – to the sidelines. Questions of the permissibility of local legislation, long the subject of state constitutional litigation in state courts, see *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 104-106 (1984), would migrate to federal district courts, where attorneys fee awards (and in the case of municipal defendants, damages) are available to prevailing parties. See *Osborne*, 129 S. Ct. at 2322 n.4 ("thrust[ing] the Federal Judiciary into an area previously left to state courts and legislatures").

But as Chicago demonstrates, see Br. 23-31, it is simply not the case that the States have provisions in place that approximate *Heller*'s categorical "common use" rule, and measures that have survived scrutiny under state constitutions (and the state provisions themselves) would be would "'cast * * * into constitutional doubt," 129 S. Ct. at 2322, under *Heller*. See also Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1458 (2009).

That some officials of those States represent that they would "welcome" such a development, State Legislators Br. 9, is not a sign that the federalism concerns are insubstantial. See *New York*, 505 U.S. at 182 (a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials"). Nothing in current law denies state legislators the "opportunity to review and conform [their] laws," State Legislators Br. 9, to a more demanding standard. If limitations on police power are less stringent than individual officials would like – if they do not believe their own laws and jurisprudence represent "responsible solutions," *Murray*, 492 U.S. at 14 (Kennedy, J., concurring in judgment) – the obstacle to stronger ones is not this Court's *Cruikshank* or *Presser* precedents, but rather their own state constitutions and laws (and own courts' interpretation of them) – and ultimately the views of their States' citizens. Federal courts do not and should not sit to relieve those who are successful in the political process – but not entirely so – of obligation to avail themselves of the competitive rigors of democratic argument. See *Johnson* v. *De Grandy*, 512 U.S. 997, 1020 (1994) (describing the obligation of minority groups "to pull, haul, and trade").

II. Petitioners and *Amici* Have Adduced No Compelling Reason for the Court, 142 Years After the Fourteenth Amendment's Ratification, to Recognize Novel Limitations on Police Powers

There is no claim that intervention is necessary here in the sense that it often has been in this Court's Fourteenth Amendment jurisprudence – to counter the effects of an exclusionary system or protect the rights of an unpopular or disenfranchised minority. See *United States* v. *Carolene Prods.*, 304 U.S. 144, 152-153

& n.4 (1938). Although petitioners' and the NRA's briefs recur repeatedly to instances of racially-motivated disarmament of African-Americans after the Civil War, no novel reading of the Fourteenth Amendment is required to declare those unconstitutional, see *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) ("The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws"), and contemporary examples of the race-based (or otherwise selective) disarmament are nonexistent (or at least vanishingly rare). See *Boerne*, 521 U.S. at 430 (noting lack of "examples of modern instances of * * * [religious] persecution in this country"). Indeed, modern "Second Amendment" litigants have included the KKK. See *Vietnamese Fishermen's Ass'n* v. *Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982).

There is no claim in this case that Chicago or Oak Park actually has deprived plaintiffs of the ability to defend themselves – or do so with arms, though they may not use their first-choice weapon. Neither Illinois nor to our knowledge any other State has abolished self-defense in criminal law.

Petitioners do not contend that factual circumstances have changed, in a direction that supports the Court's intervention. Indeed, *Heller* acknowledged as "[p]erhaps debatable" whether the right it recognized "is outmoded in a society in which our standing army is the pride of the Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem." 128 S. Ct. at 2822, but concluded (over vigorous dissent) that the Court was constrained to enforce what the majority understood to be a clear constitutional mandate.

Nor is there any suggestion that the present arrangement is, in any relevant sense, unworkable. See *Garcia* v. *San Antonio Metro. Trans.* Auth. 469 U.S. 528, 539-547 (1985) (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), principally on that basis). Questions pertaining to firearm regulations have been settled at the State and local levels, according to well defined and developed state constitutional rules, for generations.

Instead, petitioners maintain that, however substantial the costs of doing so may be, this Court must now interpret the Fourteenth Amendment as "incorporating" the limits on State and local police powers associated with the Second Amendment, (1) to implement the true meaning of the Fourteenth Amendment or (2) as a matter of "consistency," *i.e.*, to avoid the "embarrassment" of a regime in which State and local government actions are subject to First, Fourth, Fifth, Sixth and Eighth Amendment limitations, but not those of the Second.

Neither submission is correct.

A. The Adoption of the Fourteenth Amendment Did Not Embody Any Agreement to Subject Duly Enacted Local Police Power Regulations To Federal Court Superintendence

As is detailed in the briefs of other *amici*, contentions that the language of the Fourteenth Amendment was widely understood by those in ratifying States as incorporating the First Eight Amendments *in toto*, the right to keep or bear arms, in particular, or the version of that right described in this Court's 2008 *Heller* decision encounter multiple difficulties. Whatever limitations can be read into this Court's post-1868 decisions refusing to apply the

Second Amendment to the States, Petr. Br. 7-8, the record of the ratification debates is eerily quiet on the subject of incorporation, and circumstantial evidence – contemporaneous adoption by ratifying States of laws and constitutional provisions irreconcilable (or in palpable tension) with the understanding petitioners ascribe – also weighs heavily against that claim.[3]

Under the standard that *Heller* indicates should be determinative, *i.e.*, "public understanding," 128 S. Ct. at 2805, this evidence is conclusive, whatever the historical record might indicate about the individual intentions of legislators who helped draft and secure congressional passage of the Fourteenth Amendment. But even on this point, the evidence that petitioners and *amici* do muster – almost exclusively floor statements by members of the 39th Congress supportive of a right to bear arms – does not support the interpretation they seek to impose.

First, nearly every reference occurred in the context of discussing *discriminatory* measures: although various members of Congress inveighed against contemporaneous efforts to disarm African Americans and attacks on unarmed Freedmen, there were few, if any, comparable denunciations of generally applicable, legislatively enacted firearms restrictions or of well-known nineteenth century judicial decisions

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[3] Just as multiple States dispensed with grand jury indictments soon after ratifying the Fourteenth Amendment, numerous post-1868 state constitutions adopt right-to-bear-arms provisions that, like Illinois's 1970 one, featured express reservations for police power regulation. See Volokh, *State Constitutional Rights to Keep and Bear Arms,* 11 TEX. REV. L. & POL. 191, 211-15 (2006) (chronological listing of provisions).

that had sustained their validity under the police power. See Chicago Br. 27-29.

This is especially significant because the 1866 Civil Rights Act (the reinforcement of which was the Fourteenth Amendment's original motivation), Article IV of the Constitution (from which the"privileges or immunities" language was derived), and the Freedmen's Bureau Act (which, unlike these, included an explicit reference to arms-bearing) were all concerned with impermissible *discrimination*, see 14 Stat. 173, 176–77 § 14 (1866). In addition, nineteenth-century lawyers and constitutionalists attached central importance to the distinction between *general* laws – a description that applies to most antebellum firearms regulations and to the ones at issue here – and suspect "class legislation." See T. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 391-392 (7th ed. 1903) ("[E]very one has a right to demand that he be governed by general rules"); *Hayes* v. *Missouri*, 120 U.S. 68, 71-72 (1887) ("The fourteenth amendment * * * requires that all persons subjected to * * * legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed"); Nourse & Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 963 (2009) ("One of the more important post-Civil War arguments against the Black Codes was that they * * * violated the rule against class legislation"). Indeed, this distinction is no nineteenth-century relic. See *Employment Div.* v. *Smith*, 494 U.S. 872, 878-880 (1990) (declining to strictly scrutinize religious burdens incidental to "neutral laws of general application"); *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring) (emphasizing importance of Equal Protection Clause "requir[ement

that] the democratic majority * * * accept for themselves and their loved ones what they impose on you and me").

Moreover, these references occurred against the backdrop of a long tradition of understanding firearms regulation as a fit subject of the "police power" and the right to bear arms as one subject to that power. See 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) at 139 (describing the "right of the subject * * * of having arms for their own defence, suitable to their condition and degree, and *such as are allowed by law*") (emphasis added). Likewise, the description of "privileges and immunities" from *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), celebrated by petitioners as the "most-influential early definition," Br. 16, not only placed "protection *by the government*" first, but made clear that rights to pursue individual "liberty [and] * * * safety" were ones "*subject * * * to such restraints as the Government may justly prescribe for the general good of the whole*." *Id.* at 551-552 (emphasis added).

And special respect was accorded police power *legislation.* Thus, the *Slaughter-House* Court faulted plaintiffs for failing to appreciate the distinction between "monopolies established by the monarch," which "arise out of transactions *in which the people were unrepresented, and their interests uncared for*" and those established in laws enacted by bodies in which "the people [are] represented." 83 U.S. at 65 (emphasis added).[4] See also *Hurtado*, 110 U.S. at 534-535 ("Due

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[4] The *Slaughter-House* plaintiffs - who were represented by former Justice John Campbell, Assistant Secretary of War in the Confederacy and an ardent opponent of Reconstruction – urged

process of law in the [Fourteenth Amendment] refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure").

Indeed, as this Court explained in *Boerne*, the Fourteenth Amendment was carefully re-drafted to dispel concerns that it would displace States' authority to regulate in their "traditional areas of responsibility," and to preserve "the federal design central to the Constitution," 521 U.S. at 521. Thus, consistently with Senator Bingham's assurance to Ohio voters that "[t]he Constitutional Amendment," "takes from no

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that the challenged statute was unworthy of respect because it had been enacted by a legislature that included African Americans and signed by a Republican Governor. See R. LABBÉ & J. LURIE, THE SLAUGHTERHOUSE CASES 72-73 (2003) ("race was an inseparable element in the opposition").

Thus, while petitioners' *amici* identify "governments in the *post*-Civil War era," Tex. Br. at 5, assert that as "[t]he source of the threat to liberty," many of those were ones in which African-American citizens were for the first time represented. And claims that members of the 39th Congress sought to promote the keeping of firearms as a means of overthrowing a corrupt or oppressive government, see, *e.g., id.* at 3, seem even more doubtful. Whatever resonance such ideas had for the Founders in 1789, fresh from casting off a monarch and his notoriously repressive standing army, it is incredible that those who had prosecuted a bloody war to defeat an armed (and elaborately self-justifying) rebellion – and had recently witnessed the fatal shooting of a President, by an assassin denouncing "tyranny" – would have any sympathy for them.

State any right which hitherto pertained to the several States of the United States," *Cincinnati Commercial*, Aug. 27, 1866, at 1, post-1868 treatises affirmed continuing state authority to regulate classes of weapons "employed in quarrels, brawls, and fights between maddened individuals," J. BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES (1873) at 497-498. See W. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES at 698 (1904) ("[t]he police power was reserved by the states at the time the original constitution was adopted, and the Fourteenth Amendment was not designed to interfere in the least with the exercise of that power").

B. Claims of Inconsistency with Treatment of Other Rights Are Unfounded

Arguments that this Court's decisions reading the Fourteenth Amendment as incorporating certain provisions of the Bill of Rights and, in particular, ones taking a "jot for jot," approach, *Duncan* v. *Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting), somehow require imposing a Second Amendment limitation on the States fail as a matter of law, logic, and history.

At the outset, this is no ground for shifting the burden from those urging an interpretation that disrupts the historic balance to those resisting it. It is not the law that because a right is "important enough" to have been enumerated in the first Eight Amendments, it is perforce important enough to incorporate. On the contrary, States may continue to experiment, as they did immediately after the Fourteenth Amendment's ratification, with diminishing grand jury indictments, cf. U.S. Const. Amend. V, or modifying civil jury rights, Amend. VII;

and they are subject to substantive limitations on interference with individual freedom to marry and rear children that do not appear explicitly in the Bill of Rights. See *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

Moreover, claims of present uniformity are themselves overstated. To a significant degree, central Fourteenth Amendment terms – "Liberty" and "Property," vary State-by-State. See, *e.g*., *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 164 (1998); *Greenholtz* v. *Inmates Neb. Penal & Correctional Complex*, 442 U.S. 1, 11 (1979) (recognizing state-created "liberty interest").

That said, the premise of inconsistency between the rule of *Presser* and *Miller* and later incorporation decisions ignores central, constitutionally fundamental differences. As explained above, incorporating the Second Amendment, as interpreted in *Heller*, would create a freestanding right to obtain substantive review of general, neutral police power laws duly enacted after substantial debate by an engaged citizenry.

In contrast, many of the Court's landmark "incorporation" decisions were rendered in the course of deciding individual cases that already raised a question under the Fourteenth Amendment: whether a State had deprived a criminal defendant of liberty without "Due Process." In concluding that that term should be read to "incorporate" particular rules the Bill of Rights establishes for federal criminal trials, the Court was acting in an area, fair criminal trials, where the judiciary has plain expertise, and adopting a rule that, in important respects, limited judicial policy-making discretion.

Likewise, petitioners and *amici* mistake the history and significance of this Court's eventual embrace of "jot for jot" incorporation. First, that development was itself gradual, the Court's having first tried less rigid approaches. See, *e.g.*, *Palko* v. *Connecticut*, 302 U.S. 319 (1937); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Brown* v. *Mississippi*, 297 U.S. 278 (1936). And the practical realities of federal jurisdiction in this field – vindication of federal constitutional rights entails overturning a final state court judgment of conviction, see *Younger,* 401 U.S. at 47-52, often years later by federal *district* courts exercising habeas corpus powers – provides strong reason for familiar and widely understood rules. Cf. *Dickerson* v. *United States*, 530 U.S. 428, 444 (2000) (noting experience that *Miranda* rule has proved less "difficult * * * for law enforcement officers to conform to, and for courts to apply in a consistent manner" than totality-of-circumstances test).

In that realm, moreover, the ordinary rule that requirements of neutrality and general application provide sufficient protection does not hold. Although the substance of state criminal laws is a proper subject of democratic decision, see *Ewing* v. *California*, 538 U.S. 11, 24 (2003), questions of fairness to the accused – whether coerced confessions should be admissible or convictions should require proof of guilt beyond a reasonable doubt – are ones that historically have not been subject to resolution by majority vote.

And a full account of the Court's twentieth-century incorporation cases requires reference to the problems that led to adoption of the Fourteenth Amendment in the first place: racial discrimination and inequality. The Court's decisions were rendered at a time when

judges, juries, and prosecutors in many States did not afford African-American defendants equal respect, see, *e.g.*, *Powell*, 287 U.S. at 72; *Moore* v. *Dempsey*, 261 U.S. 86, 89-90 (1923). Under those circumstances, strong, detailed mandates were necessary to assure that state trials provided a minimum of fairness (and reliability), and general rules enabled the Court to correct (or at least counteract) entrenched discrimination without pointing an accusing finger at particular judges, courts, or States.

To be sure, this Court's incorporation jurisprudence has not been limited to the administration of criminal justice and, as petitioners repeatedly note, has held the right of Free Speech and other guarantees of the First Amendment to be within the "liberty" the Fourteenth Amendment protects. But there are important limits to such analogies: because of its role in self-government and commerce, speech (and "more speech") is viewed as an affirmative constitutional good, see *Whitney* v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), and the core of the guarantee – freedom of opinion and belief – has not been thought a proper subject of the police power, see *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) ("freedom to believe * * * is absolute"); *Simon & Schuster, Inc.* v. *New York State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in judgment).

Equally important, core violations of First Amendment rights are denials of equality. See *Rosenberger* v. *Rector and Visitors Univ. Va.*, 515 U.S. 819, 828 (1995). Unlike with laws regulating weapons, modern instances of impermissible discrimination are commonplace, *id.*; *R.A.V.* v. *St. Paul*, 505 U.S. 377, 391 (1992), and enforcement of that norm requires close scrutiny of laws neutral on their face. See *United*

States v. *Eichman*, 496 U.S. 310, 315 (1990); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 534 (1993); cf. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring in judgment) ("discrimination against any group finds a more ready expression at the state and local * * * level").[5]

Finally, when claims risk impinging on traditional police powers, First Amendment doctrine has in fact shown respect for federalism and community standards. See *Miller* v. *California*, 413 U.S. 15, 32-33 (1973) ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City"); *Cantwell,* 310 U.S. at 304 (religiously motivated "[c]onduct remains subject to regulation for the protection of society"); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) ("citi[es] must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems").

The domain in which the Second Amendment would operate is fundamentally different. There is no claim of modern-day discriminatory or selective disarmament; the measures that would be placed before federal courts are ones that apply generally and neutrally; there is no reason to expect that those favoring less government restriction cannot participate equally in state and local legislative processes – indeed experience teaches they are highly effective there.

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[5]And in this field, too, *racial* discrimination played a distinctive role in doctrinal developments. See H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

The Fourteenth Amendment claim petitioners press is much more like the one rejected in *Osborne*. As here, the right the Court was asked to recognize in that case was one already acknowledged, in some form, by large majority of States. And as in *Osborne*, the claim here depends on extensions from general principles that, while resonant, have not been deeply rooted or particularized in constitutional doctrine. While recognizing that "the central purpose of [the] system of criminal justice is to convict the guilty and free the innocent," *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993), the Court has been cautious about reducing that abstract principle to a freestanding right enforceable in federal court, *id.* at 402-409, and therefore more reluctant to recognize a right to DNA testing, let alone (as Osborne sought) pass judgment on particular state standards governing the availability of tests.

Here, similarly, while there is a long tradition of recognizing the legitimacy of self-defense, there is scant doctrinal support for a constitutional mandate, see *Martin* v. *Ohio*, 480 U.S. 228, 236 (1987) (State may place burden of raising, and proving, self-defense on the accused); cf. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2000) (necessity); *Clark* v. *Arizona*, 548 U.S. 735 (2006) (insanity), let alone for extending a right to arm oneself for that purpose (as opposed to supplying a defense to criminal prosecution), or to an individual choice of a particular weapon.

And this case echoes *Osborne* in a third way: "Establishing a freestanding right * * * would force [federal courts] to act as policymakers," 129 S. Ct. at 2323. There, the Court recognized that sustaining the

plaintiff's Due Process right would soon require the judiciary

> to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. * * * If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?

Id.; see *id.* ("These questions would be before us in short order, and it is hard to imagine what tools federal courts would use to answer them").

Indeed, as the author of the judicial opinion the Court cited as authority on this point, see *id.* (citing *Harvey* v. *Horan*, 285 F.3d 298, 300-301 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing)), has explained, the list of questions that will be "before federal courts in short order" were the Court to take the step sought here is no less confounding:

> If the Second Amendment only protects a right to bear arms for the purpose of self-defense, what type of proof suffices that someone sought the weapon for some other purpose? What classes of persons may be presumed to possess a weapon for other than self-defensive purposes and what classes of weapons may be presumed non self-protective? Can a municipality that wants strict gun control regulations simply ban the possession of weapons outside the home – for example, in the car? Does the right to bear arms protect the possession of weapons for purposes other than purely self-defense – for recreational pursuits, for the protection of property, or for the protection of others?

95 VA. L. REV. at 259; *id.* ("it behooves the judiciary to be cautious in creating for itself new substantive –

hence prescriptive – power that the Constitution did not clearly envision").

* * * *

There is nothing "embarrassing," cf. Levinson, 99 YALE L. J. 637 (1989) about a construction of the Fourteenth Amendment that, among other things, forbids States from enacting discriminatory firearms laws, secures the free speech and equal representation rights of those with petitioners' policy views, and recognizes the potential of firearms regulations (and other measures) to burden self-defense, but that otherwise reserves questions of which public safety measures are necessary or appropriate – and which sorts, if any, to place beyond authority of legislative prescription – "to the States respectively, or to the people," U.S. Const. Amend. X, rather than rules formulated by district court judges.

Nor does the assault petitioners and *amici* direct at Justice Miller's opinion for the Court in the *Slaughter-House Cases* seem warranted. Although there is room to disagree about dicta in that opinion, both the holding and its two central premises were correct. In rejecting plaintiffs' plea for judicial invalidation of Louisiana legislation regulating the slaughtering of animals in New Orleans, in the name of the Constitution, the Court emphasized both that the Fourteenth Amendment's primary concern is denials of equality, especially but not exclusively, to African Americans, see 83 U.S. at 67-68, and the absence of intent to set federal courts up as "censors" on the exercise of States' and localities' historic police powers, *id.* at 78.

This Court's later Fourteenth Amendment decisions attest to the value of heeding these admonitions. See

West Coast Hotel v. *Parrish*, 300 U.S. 379 (1937) (overruling *Lochner* v. *New York*, 198 U.S. 45 (1905)); *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy* v. *Ferguson*, 163 U.S. 537 (1896)).[6]

Conclusion

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[6]As Justice Miller's opinion makes vivid, the conclusions petitioners ask the Court to cast aside, were hardly off-hand observations:

> We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us.

83 U.S. at 67.

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