No. 08-1521

In The
Supreme Court of the United States

OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' BRIEF

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

PARTIES TO THE PROCEEDINGS

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. and Illinois State Rifle Association initiated the proceedings below by filing a complaint against Respondent City of Chicago and its Mayor, Richard M. Daley, in the United States District Court for the Northern District of Illinois. Mayor Daley was dismissed at an early stage of the proceedings and is no longer a party in the matter.

The day after Petitioners filed their complaint in the District Court, similar cases were brought against Respondent City of Chicago and Mayor Daley; and the Village of Oak Park, Illinois and its President, David Pope, by other parties. The plaintiffs in the related Chicago case were the National Rifle Association of America, Inc., Kathryn Tyler, Anthony Burton, Van F. Welton, and Brett Benson. The plaintiffs in the related Oak Park case were the National Rifle Association of America, Inc., Robert Klein Engler, and Gene A. Reisinger.

The three cases were related, but not consolidated, in the District Court. Petitioners and the related case plaintiffs appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit, which consolidated the appeals.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in either Second Amendment Foundation, Inc. or the Illinois State Rifle Association.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, Petition Appendix ("Pet. App.") 1, is published at 567 F.3d 856. The decision of the United States District Court for the Northern District of Illinois, Pet. App. 17, is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 2009. This Court granted the Petition for Writ of Certiorari on September 30, 2009. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are printed in the Petition, at 2, and at Pet. App., at 19-33, respectively.

STATEMENT OF THE CASE

1. Respondent City of Chicago requires inhabitants to register their firearms, but generally prohibits the registration of handguns. Chi. Mun. Code §8-20-040(a), 8-20-050(c). This handgun ban functions

identically to that struck down as infringing the Second Amendment rights of District of Columbia residents. *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008).

Firearm registrants must immediately notify police of any changes in their registration information, including the loss or other disposition of a gun or registration certificate. Chi. Mun. Code §8-20-140. However, Respondent requires annual re-registration of firearms, initiated at least sixty days prior to the registration's expiration. Chi. Mun. Code §8-20-200. Re-registration requires the payment of additional fees and re-submission of all initial registration materials. *Id.*

If the annual re-registration process is not timely completed, the particular gun whose registration lapses becomes "unregisterable" and thus illegal to possess in Chicago. *Id.* An identical penalty befalls any firearm (and by extension, any owner of that firearm) that is acquired prior to its registration. Chi. Mun. Code §8-20-090.

On June 11, 2008, Respondent enacted a 120-day amnesty period allowing the re-registration of firearms whose registration had lapsed. The amnesty ordinance was sponsored by a city alderman who had neglected to timely re-register his firearms. App. 53.

A first violation of Chicago's ban on the ownership or possession of unregistered firearms within the home is punishable either by a fine ranging from $300 to $500, incarceration ranging from ten to

ninety days, or both. Chi. Mun. Code §8-20-250. Subsequent violations are punishable by a fine of $500 and incarceration ranging from ninety days to six months. *Id.*

2. Respondent denied each individual Petitioner's attempt to register a handgun pursuant to the handgun registration ban. Pet. App. 34-45. Petitioners Orlov and David Lawson were also denied handgun registrations pursuant to the city's pre-acquisition registration requirement. Pet. App. 37, 40.

As the registered owners of long arms, Petitioners McDonald and David Lawson are subjected to the city's re-registration requirements. App. 40-41, 44. The registration for one of Petitioner David Lawson's rifles lapsed, rendering it unregisterable. App. 41.

Petitioner David Lawson also acquired a rifle through the federal Civilian Marksmanship Program ("CMP"), which sent the rifle directly to his Chicago home, rendering it automatically unregisterable as it was acquired prior to its possible registration. Respondent denied Lawson's administrative appeal of its refusal to register the CMP rifle. Pet. App. 46-48, App. 41-42.

3. On June 26, 2008, Petitioners filed suit in the United States District Court for the Northern District of Illinois challenging Chicago's handgun ban, re-registration and pre-acquisition registration requirements, and non-registrability penalty, as violating their Second and Fourteenth Amendment rights.

Petitioners moved for summary judgment on July 31, 2008. The District Court advised that the case should be resolved on a motion to narrow the legal issues under Fed. R. Civ. P. 16. Petitioners thereafter filed such a motion, seeking to establish the Second Amendment binds Respondent under the Fourteenth Amendment's Privileges or Immunities and Due Process Clauses.

On December 4, 2008, the District Court denied Petitioners' Rule 16 and summary judgment motions, citing *Quilici* v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982). Pet. App. 18. *Quilici* followed *Presser* v. *Illinois*, 116 U.S. 252 (1886), declining to apply the Second Amendment to the states through the Privileges or Immunities Clause. *Quilici* had refused consideration of "historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments," *Quilici*, 695 F.2d at 270 n.8, key aspects of the selective incorporation analysis.

Because it held the Second Amendment inapplicable to Respondent, the District Court subsequently granted Respondent's oral motion for judgment on the pleadings. App. 83-84.

On appeal, the Seventh Circuit affirmed, holding the case controlled by this Court's opinions in *United States* v. *Cruikshank*, 92 U.S. 542 (1876), *Presser*, *supra*, and *Miller* v. *Texas*, 153 U.S. 535 (1894). Pet. App. 3. The lower court reached this conclusion despite acknowledging that these three cases "did not

consider [the] possibility, which had yet to be devised when those decisions were rendered," that the Second Amendment is selectively incorporated. Pet. App. 2. Respondents acknowledge that the court below did not address the selective incorporation question. Br. in Opp'n, 5.

SUMMARY OF ARGUMENT

1. Although this Court has never squarely addressed either the original public meaning or legislative history of the Fourteenth Amendment, it nonetheless follows a tradition of upholding individual liberty. Should this Court do what the lower courts did not, and apply settled precedent to determine whether the Second Amendment is incorporated as against the States via the Fourteenth Amendment's Due Process Clause, reversal is mandatory.

And yet this Court's various approaches to the Fourteenth Amendment fall short of upholding this provision's essential promise. State violations of rights understood and intended by the ratifying public to receive significant Fourteenth Amendment protection are not meaningfully secured by federal courts. Moreover, the failure to honor the Fourteenth Amendment's original public meaning foments confusion and controversy as courts pursue other approaches to protecting core individual rights.

This case presents a rare opportunity to correct a serious error, honor the Fourteenth Amendment's true meaning, and bring a needed measure of clarity to this Court's civil-rights jurisprudence.

2. The Fourteenth Amendment's Privileges or Immunities Clause forbids the States from abridging civil rights, including those codified in the Bill of Rights. This was the frequently expressed, never controverted purpose of the Amendment's framers, an understanding shared by the ratifying public. With the Fourteenth Amendment, Americans long dissatisfied with state treatment of free blacks and abolitionists broadly established federal birthright citizenship for all people. And they imbued that citizenship with significant protection for the individual rights that states rampantly violated, including, unambiguously, the right to keep and bear arms.

The language chosen to contain the rights of federal citizenship—"privileges or immunities"—enjoyed an established definition. Long synonymous with "rights" generally, the term acquired additional heft with a landmark decision interpreting Article IV, Section 2's guaranty that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" to encompass a broad range of rights believed naturally inherent in human beings and secured by any free government. *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). On the Civil War's eve, this Court invoked "privileges and immunities" to define citizenship, albeit in the

negative sense describing what would be denied to African Americans. In reaction, the Fourteenth Amendment reflected the broad common usage of "privileges or immunities," including the pre-existent natural rights of the sort identified in *Corfield* and the personal rights guaranteed by the Bill of Rights.

3. The Privileges or Immunities Clause was all but erased from the Constitution in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Slaughter-House* refused to consider the clause's original public meaning or its framers' well-known intent. Instead, the *SlaughterHouse* majority identified substitute language in place of Article IV's actual text, and utilized this new constitutional language to justify the imposition of its own policies upon the Fourteenth Amendment's contrary command.

SlaughterHouse transformed the Framers' broad protection of individual liberty, commonly understood, into a clause securing only the most obscure rights, rarely exercised by any American and with which the States could not ordinarily interfere even had they the will to do so. It "defeat[ed], by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted . . . turn[ing], as it were, what was meant for bread into a stone." *SlaughterHouse*, 83 U.S. at 129 (Swayne, J., dissenting).

As mandated by *SlaughterHouse*'s rationale, this Court soon held that the Privileges or Immunities Clause did not secure Americans' First and Second

Amendment rights against state action. *Cruikshank*, 92 U.S. 542; *Presser* v. *Illinois*, 116 U.S. 252 (Second Amendment); *cf. Miller*, 153 U.S. 535 (stating in dicta that the Second and Fourth Amendments are inapplicable to states).

SlaughterHouse's illegitimacy has long been all-but-universally understood. It deserves to be acknowledged by this Court. Because *SlaughterHouse* rests on language not actually in the Constitution, contradicts the Fourteenth Amendment's original textual meaning, defies the Framers' intent, and supplies a nonsensical definition for Section One's key protection of civil rights, overruling this error and its progeny remains imperative. No valid reliance interests flow from the wrongful deprivation of constitutional liberties. The reliance interest to be fulfilled remains Americans' expectation that the constitutional amendment their ancestors ratified to protect their rights from state infringement be given its full effect.

4. The Fourteenth Amendment's requirement that no person be deprived of life, liberty or property without due process of law has long been properly understood to offer substantive as well as procedural protection. Accordingly, most of the rights secured in the first eight amendments have been deemed incorporated as against the States.

The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U.S. 145, 149

(1968), or "necessary to an Anglo-American regime of ordered liberty," *id.* at 150 n.14. *Duncan* looks to the right's historical acceptance in our nation, its recognition by the States (including any trend regarding state recognition), and the nature of the interest secured by the right. The right to bear arms clearly satisfies all aspects of the selective incorporation standard.

ARGUMENT

I. THE RIGHT TO KEEP AND BEAR ARMS IS AMONG THE PRIVILEGES OR IMMUNITIES OF AMERICAN CITIZENSHIP THAT STATES MAY NOT ABRIDGE.

"[W]e are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2788 (2008) (citations and internal quotation marks omitted). Constitutional interpretation may also rely upon the framers' apparent intent. *Id.* at 2822 (Stevens, J., dissenting). "Before invoking the [Privileges or Immunities] Clause, . . . we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant."

Saenz v. *Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).[1]

In this case, either interpretive method leads to the same result. In 1868, the "privileges" and "immunities" of American citizenship were popularly understood to include a broad array of pre-existent natural rights believed secured by all free governments, as well as the personal rights memorialized in the Bill of Rights. The Fourteenth Amendment's Framers used language that successfully accomplished their intent.

A. A Constitutional Amendment Broadly Securing Americans' Rights Proved Necessary Following the Civil War.

The Fourteenth Amendment was understood and intended to provide the Union a legal framework commensurate with its military victory. The Thirteenth Amendment ended slavery, but did not improve the legal status of free blacks and their supporters. Repression of civil rights by state officials had long agitated Americans prior to the war. Continuing outrages in the unreconstructed South could no longer be tolerated.

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[1] Although the primary inquiry explores the text's original public meaning, unambiguously expressed legislative intent can supply evidence of public meaning, and exclude interpretations that are nonsensical in historical context.

Chief among the North's complaints, "[b]lacks were routinely disarmed by Southern States . . . Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms." *Heller*, 128 S. Ct. at 2810 (collecting examples). Initially, the Army sought to secure the right to arms, among other rights, by fiat. For example, in South Carolina, the occupying Union commander ordered that "[t]he constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed." Order of Gen. Sickles, Disregarding the Code, Jan. 17, 1866, in *Political History of the United States of America During the Period of Reconstruction* 37 (Edward McPheron, ed., 2d ed. 1875).

The freedmen appreciated the protection of their rights to armed self-defense:

> We are glad to learn that Gen. Scott, Commissioner for this State, has given freedmen to understand that they have as good a right to keep fire arms as any other citizens. The Constitution of the United States is the supreme law of the land, and we will be governed by that at present.

CHRISTIAN RECORDER (AFRICAN METHODIST EPISCOPAL CHURCH), Feb. 24, 1866, at 1, col. 7-2, col. 1.

But the South could not remain forever under military rule, and Congress noted the situation. "[M]en who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them,

perpetrating murders and outrages on them; and the same things are being done in other sections of the country." Cong. Globe, 39th Cong., 1st Sess. 40 (1865) (Statement of Sen. Wilson); House Ex. Doc. No. 70, *id.* at 236-39 (1866) (Kentucky "marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs," while outlaws "make brutal attacks and raids upon freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders").

Congress responded by enacting the Civil Rights Act of 1866, and the renewed Freedmen's Bureau Act. The Civil Rights Act established birthright American citizenship, and secured to all "citizens of the United States," against state action, their rights

> to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.

14 Stat. 27 (April 9, 1866).

Likewise, the Freedmen's Bureau Act secured "the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms . . . ." 14 Stat. 173, 176 (July 16, 1866).

Presidential vetoes and Southern resistance fueled doubts about such mere legislative approaches to Reconstruction, as did two antebellum precedents: *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857), holding blacks could not be citizens; and *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), holding that states were not bound to respect constitutionally-guaranteed rights absent specific textual instruction.

Sympathetic Northerners saw the need to constitutionalize civil-rights protection. Ohio Representative John Bingham reacted to the Civil Rights Act by expressing his "earnest desire to have the bill of rights in [the] Constitution enforced everywhere. But I ask that it be enforced in accordance with the Constitution of my country." Cong. Globe, 39th Cong., 1st Sess. 1291 (1866).

Bingham would author the Fourteenth Amendment's Section One, which achieved this purpose.

Dismantling *Dred Scott* required securing both federal and state citizenship. Securing state citizenship directly responded to *Dred Scott*'s holding that states could not be compelled to accept blacks as citizens. *Cf. Cooper* v. *Mayor of Savannah*, 4 Ga. 68, 72 (1848) ("[f]ree persons of color have never been recognized here as citizens; they are not entitled to bear arms . . . . "); *Aldridge* v. *Commonwealth*, 4 Va. 447, 449 (1824) (same). In the absence of constitutional correction, states could deprive black residents of state citizenship benefits—even as Article IV

required they extend those benefits to visiting citizens of other states.[2]

Indeed, southern courts also denied Congress's authority to establish federal citizenship. Mississippi's Chief Justice held the Civil Rights Act unconstitutional in upholding the conviction of black Union veteran James Lewis for carrying a gun, reasoning that only states could establish citizenship—to which Lewis was not entitled. *Decision of Chief Justice Handy, Declaring the Civil Rights Bill Unconstitutional,* N.Y. TIMES, Oct. 26, 1866, at 2, col. 2.

The Fourteenth Amendment left unaddressed the content of state citizenship. But there can be no serious question that the Fourteenth Amendment's framers intended to include basic civil rights, such as those identified in the Civil Rights Act, together with those memorialized in the Bill of Rights, within the protection of federal citizenship.

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[2] Abolitionists had long attacked this incongruity. *See A Fact*, THE LIBERATOR, Mar. 26, 1831, at 51, col. 1 (suggesting a Massachusetts free black citizen challenge a Savannah racial tax assessment under Article IV, §2).

B. "Privileges" and "Immunities" Were Popularly Understood to Encompass Pre-Existent Fundamental Rights, Including Those Enumerated in the Bill of Rights.

Whatever its language might signify to modern ears, "an amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption, . . . For it was for public adoption that it was proposed.'" *Adamson* v. *California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (citation omitted), *overruled on other grounds by Malloy* v. *Hogan*, 378 U.S. 1 (1964).

An examination of what "privileges" and "immunities" of citizenship meant to the Fourteenth Amendment's Framers shows that this language was selected neither casually nor at random.

> The words "privileges and immunities" often were used to describe fundamental rights and liberties such as those in the Federal Bill of Rights . . . . This usage stretches from the English and Colonial period, in which such rights were considered privileges of freeborn Englishmen, through the struggle for American independence, to the American Civil War and the framing of the Fourteenth Amendment and beyond.

Michael Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071,

1090 (2000) (containing exhaustive survey of American historical usage of "privileges" and "immunities").

1. Privileges and Immunities in the Early Republic.

The national debate over the Bill of Rights frequently invoked "privileges" and "immunities" to refer to the rights eventually codified therein. *Id.* at 1098-1104.

James Madison proposed that no state should violate "equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases" under Article I, Section 10. 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1027 (1971), "because it must be admitted . . . that the State governments are as liable to attack the invaluable privileges as the General Government is . . . . " *Id*. at 1033.

Referring to the Privileges and Immunities Clause of Article IV, Section 2, Madison interchangeably employed "privileges" and "rights" in discussing the Constitution's improvement over the Articles of Confederation with respect to treatment shown visiting citizens by the States. THE FEDERALIST No. 42 (James Madison). Justice Washington supplied a most-influential early definition of these "privileges and immunities":

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens

> of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union . . . .

Corfield, 6 F. Cas. at 551.

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id. at 551-52. "[S]ome" examples of privileges and immunities "deemed fundamental" included:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . [and] the elective franchise . . . .

Id. at 552.

2. Privileges And Immunities In Antebellum Usage.

The Fourteenth Amendment's framers were heavily influenced by abolitionist thought. *See generally* Jacobus tenBroek, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Richard Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 Cath. U. L. Rev. 881 (1988). Abolitionists echoed *Corfield*'s definition of "privileges and immunities," condemning slave state mistreatment of free blacks and their supporters as Article IV violations.

Quoting Article IV, Section 2, Representative Horace Mann chided the President for assisting slave apprehension, while slave states searched the mails for abolitionist sermons to burn, offered bounties for the abduction of individual Northerners, and imposed "unconstitutional imprisonment" upon free black sailors calling on southern ports. Cong. Globe, 31st Cong., 2nd Sess. 249 (1851).

> [E]very man found within the limits of a free state is prima facie FREE . . . [and] has a right to stand on this legal presumption, and to claim all the privileges and immunities that grow out of it until his presumed freedom is wrested from him by legal proof.

Id. at 241.

Referring to Article IV, Section 2 in protest of an Ohio law restricting the immigration of free blacks, an Ohio Senate committee asked:

> Was it not intended to secure to all the citizens, in each state, the right of ingress and egress to and from them, and the privileges of trade, commerce, and employment in them, of acquiring and holding property, and sustaining and defending life and liberty in any state in the Union? Does it not form one of the conditions of our national compact?

Unconstitutional Laws of Ohio, THE LIBERATOR, Apr. 6, 1838, at 53, col. 5.

Months later, an abolitionist newspaper grouped "the privileges and immunities of citizens in every State" with a host of rights enumerated in the first eight amendments, including "the uninfringeable right to keep and bear arms." *The Claim of Property in Man*, THE LIBERATOR, Sept. 21, 1838, at 149, col. 6.

Influential abolitionist attorney Joel Tiffany explained:

> What are the privileges, and immunities of citizenship, of the United States? . . . [T]o be a citizen of the United States, is to be entitled to the benefit of all the guarantys of the Federal Constitution for personal security, personal liberty, and private property.

Joel Tiffany, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 97 (1849). Among these is "the right to keep and bear arms." *Id.* at 99.

Not only abolitionists held an expansive view of "privileges and immunities." One definition of citizenship's "privileges and immunities" foremost on the

public mind would have been that supplied by *Dred Scott*:

> [I]f [blacks] were so received, and entitled to *the privileges and immunities of citizens*, it would exempt them from the operation of the special laws and from the police regulations [related to blacks]. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went*.

Dred Scott, 60 U.S. at 416-17 (emphasis added).

Abolitionists found that *Dred Scott*'s description of "privileges and immunities" ironically underscored the decision's essential injustice:

> Thank heaven! there are higher *privileges* embraced in this term, "Citizen of the United states," than all that comes to; and it is of these *privileges and rights* that the colored man is deprived, and it is of that deprivation he complains. I could find, sir, in that very

> *Dred Scott* decision, an enumeration, by the Supreme Court itself, of the rights guaranteed by the Constitution of the United States . . . *Those rights are to bear arms* . . . and various other rights therein enumerated, entirely distinct from that class of political rights . . . Of all these, in the express terms of the decision, the colored man is deprived . . .

Who Are American Citizens?, THE LIBERATOR, Jan. 21, 1859, at 10, col. 2 (emphasis added) (quoting Massachusetts State Rep. Wells).

Illinois Rep. Owen Lovejoy, brother of abolitionist martyr Rev. Elijah Lovejoy, insisted he had

> the privilege, as an American citizen, of writing my name and recommending the circulation of any and every book . . . the right of discussing this question of slavery anywhere, on any square foot of American soil . . . to which the privileges and immunities of the Constitution extend. Under that Constitution, which guaranties to me free speech.

Cong. Globe, 36th Cong., 1st Sess. app. 205 (1860).

3. Privileges and Immunities Among the Fourteenth Amendment's Framers.

The Privileges or Immunities Clause was intended to constitutionalize the preexistent natural rights protected by the Civil Rights Act, including the rights of personal security. Additionally, it was meant

to protect the personal guarantees enumerated in the Bill of Rights. The framers of the Fourteenth Amendment accomplished their purpose by adopting the language of "privileges or immunities," the public meaning of which had come to include both sets of rights.

"[D]ictionaries in the 1860s treated these terms as synonyms. Accordingly, the term 'privilege or immunities' can easily be read to denote, at the least, the rights and freedoms enumerated in the Bill of Rights." Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1302 (2000) (hereafter "Tribe") (citing WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1039 (1866) (listing "immunity" and "right" as synonyms of "[p]rivilege"); *id*. at 542 (defining "[f]reedom" as "particular privileges; . . . immunity"); *id.* at 661 (defining "[i]mmunity" as "[f]reedom from an obligation" or a "[p]articular privilege"); *id.* at 1140 (defining "[r]ight" as "[p]rivilege or immunity granted by authority")).

At least one judge in 1866 understood that the right to arms is a "privilege" of citizenship:

> The citizen has the right to bear arms in defence of himself, secured by the constitution. . . . *Should not then, the freedmen have and enjoy the same constitutional right to bear arms in defence of themselves, that is enjoyed by the citizen? It is a natural and personal right—the right of self-preservation* . . . [t]he citizens of the state and other white persons are allowed to carry arms, *the freedmen can have no adequate protection*

> *against acts of violence unless they are allowed the same privilege.*

N.Y. TIMES, Oct. 26, 1866, at 2, col. 2 ("cases of Wash Lowe and other discharged United States colored soldiers").

By 1859, Bingham firmly believed that "the Constitution of the United States does not exclude [blacks] from the body politic, and the privileges and immunities of citizens of the United States." Cong. Globe, 35th Cong., 2nd Sess. 984-85 (1859). Protesting Oregon's admission to the Union owing to the state's exclusion of blacks, Bingham declared,

> I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the "privileges and immunities" of a citizen of the United States . . . . I maintain that the persons thus excluded from the State by this section of the Oregon constitution, are citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all *the privileges and immunities of citizens of the United States, amongst which are the rights of life and liberty and property*, and their due protection in the enjoyment thereof by law.

Id. (emphasis added).

Recalling *Corfield*'s definition of "privileges and immunities," Bingham continued, "I cannot, and will

not, consent that the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights," which are "those rights common to all men, and to protect which, not to confer, all good governments are instituted." *Id.* at 985.

Bingham would add enumerated rights to his vision of "privileges and immunities." For example, he referred to the Eighth Amendment's Cruel and Unusual Punishment Clause as among the "guarantied privileges" the Fourteenth Amendment would protect. Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). Two years earlier, Rep. James Wilson referenced "the privilege of free discussion." Cong. Globe, 38th Cong., 1st Sess. 1202 (1864).

Introducing the Fourteenth Amendment in the Senate, Reconstruction Committee Member Jacob Howard explicitly defined "privileges" and "immunities" as including *Corfield* rights, as well as the personal rights secured by the Bill of Rights. Bingham and others had referred to rights both enumerated and unenumerated as "privileges" and "immunities." Howard's critical introductory speech unified both sources.

After reciting *Corfield*'s definition of "privileges and immunities," Howard continued:

> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent

> and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . and the right to keep and to bear arms . . . .
>
> [H]ere is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . .

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

The Fourteenth Amendment's opponents shared this broad view of the Privileges or Immunities Clause. Representative Rogers stated,

> What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities.

Cong. Globe, 39th Cong., 1st Sess. 2538 (1866).

In sum, a straight line of popular understanding of "privileges" and "immunities" runs from Madison through *Corfield*, leading abolitionists, *Dred Scott*, and the Fourteenth Amendment's Framers. The "privileges" and "immunities" of American citizens include two sets of overlapping rights: the natural, fundamental rights, believed to fall under Article IV, Section 2, and the rights codified in the first eight amendments.

C. The Fourteenth Amendment's Framers Intended to Apply Fundamental Rights, Including Those Secured in the Bill of Rights, Against the States.

Identifying the rights of American citizenship was insufficient. The Privileges or Immunities Clause would have to be designed as an enforcement mechanism.

> With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.

Adamson, 332 U.S. at 72 (Black, J., dissenting).

This question is now squarely before the Court.

Introducing the Fourteenth Amendment in the Senate, Reconstruction Committee Member Jacob

Howard described the personal guarantees of the Bill of Rights, in addition to *Corfield*'s delineated natural rights, as being among the privileges and immunities of federal citizenship. He then declared:

> [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them . . . there is no power given in the Constitution to enforce and to carry out any of these guarantees . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866).

The broad array of rights Howard declared would be enforced were earlier encompassed by the Civil Rights Act that the Amendment sought to constitutionalize. "[C]ivil rights are the natural rights of man." *Id.* at 1117 (Statement of Rep. Wilson). "[T]he term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country." *Id.* at 1291 (Statement of Rep. Bingham).

Representative Broomall connected the "civil rights" protected by the Act to *Corfield* privileges and immunities:

> For thirty years prior to 1860 everybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of other States: the right of speech, the right of transit, the right of domicil, the right to sue, the writ of *habeas corpus*, and the right of petition.

Id. at 1263. Representative Raymond explained that the Act's broad language also encompassed "the right of free passage . . . a right to defend [one]self . . . to bear arms . . . [and] to testify in the Federal courts . . . " *Id.* at 1266.[3]

> If the states would all observe the rights of our citizens, there would be no need of this bill. If the states would all practice the constitutional declaration, that [reciting Article IV, §2 Privileges or Immunities Clause], and enforce it, as meaning that the citizen has [reciting *Corfield*'s natural rights definition] we might very well refrain from the enactment of this bill into a law.

Id. at 1117-18 (Statement of Rep. Wilson).

And were it not for *Dred Scott* and *Barron*, Congress might have been satisfied with the Civil Rights Act, and refrained from submitting the Fourteenth

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[3] Similarly, when the House added an express protection of the right to arms to the general language protecting the "security of person and estate" in the Freedmens' Bureau Act, Senator Trumbull explained that it "[did] not alter the meaning." *Id.* at 743.

Amendment for ratification. Opponents understood as much, declaring Section One "no more nor less than an attempt to embody in the Constitution . . . that outrageous and miserable civil rights bill." *Id.* at 2538 (Statement of Rep. Rogers).

"Congress in 1866 understood perfectly well that section one was intended to repudiate *Barron*. 'Over and over [Bingham] described the privileges-or-immunities clause as encompassing 'the bill of rights'—a phrase he used more than a dozen times in a key speech . . . .'" Michael Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 19 (2007) (quoting Akhil Amar, THE BILL OF RIGHTS 182 (1998)).

> [T]hese great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States . . . [T]he legislative, executive, and judicial officers of eleven States within this Union within the last five years . . . have violated in every sense of the word these provisions . . . the enforcement of which are absolutely essential to American nationality.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866) (Statement of Rep. Bingham).

> The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for

> violation of the oaths enjoined upon them by their Constitution? . . . Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.

Id. at 1090.

> I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights . . .

Id. at 1291-92. Although Bingham at one point stated that the amendment would have "that extent—no more," *id.* at 1088, it would be a mistake to simplistically seize on this remark out of context, for Bingham then explained the amendment "seeks the enforcement of" Article IV, Section 2. *Id.* at 1089.

That states were not already bound to respect federal civil rights surprised one representative, who demanded Bingham produce precedent proving the necessity of amending the Constitution. Bingham obliged:

> I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment . . . on this subject I refer the House and the country to a decision of the Supreme Court . . . in the case of *Barron* . . . I read one further decision on this subject—

> the case of the *Lessee of Livingston* vs. *Moore* . . . . Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights . . .

Id. at 1089-90 (citing *Barron*, 32 U.S. (7 Pet.) 243 and *Livingston* v. *Moore*, 32 U.S. (7 Pet.) 469 (1833) ("[I]t is now settled that those amendments do not extend to the States")).

Bingham would later explain that his desire to defeat *Barron* directed the choice of language employed in the Privileges or Immunities Clause:

> [T]he Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention." . . . Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said "no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;" imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution . . .

Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871). "*Barron* asked for 'Simon Says' language, and that's exactly what the Fourteenth Amendment gave [the Court]." Amar, *supra*, at 164.

This understanding of the Amendment was widely shared. Thaddeus Stevens stated in offering the Fourteenth Amendment: "[T]he Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect . . . " Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). Congressman Donnelly demanded "all the guarantees of the Constitution" be enforced, lest "the old reign of terror revive in the South." *Id.* at 586. Proponents viewed constitutional security for privileges and immunities just as broadly, interpreting it to secure "the natural rights which necessarily pertain to citizenship." *Id.* at 1088 (Statement of Rep. Woodbridge).

"Not a single Senator or Congressman contradicted" Bingham and Howard's assertions that the Privileges or Immunities Clause would apply the Bill of Rights to the States. Michael Curtis, NO STATE SHALL ABRIDGE 91 (1986). Indeed, approximately thirty speeches in both houses supported this view. Akhil Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 Harv. J.L. Pub. Pol'y 443, 447 (1996).

If the Fourteenth Amendment is to be interpreted by reference to the declared intentions of its framers, the right to keep and bear arms clearly applies to Respondent.

D. The Ratifying Nation Understood that the Privileges or Immunities Clause Encompasses the Second Amendment.

That the Fourteenth Amendment compels state obedience to fundamental rights, including those codified in the Bill of Rights, did not remain a secret from the ratifying public. The nation knew full-well what the Framers intended to achieve, and shared their understanding of the Privileges or Immunities Clause.

1. Dissemination of Congressional Intent.

Congressional debates explaining the Amendment's impact received wide coverage in the press. The *New York Herald*, the largest circulation paper of the day, carried Bingham's February 26, 1866 speech on its front page. David Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 Whittier L. Rev. 695, 711-12 (2009) ("Hardy") (citation omitted). The *Herald*, along with the *Chicago Tribune*, carried on their front pages Bingham's February 28, 1866 speech, stridently demanding enforcement of the Bill of Rights among other privileges and immunities. *Id.* at 712 (citations omitted).

Bingham's speeches were also covered by the *New York Times*, and smaller newspapers, including the *Daily National Intelligencer* (Washington, D.C.),

Ft. Wayne's Daily Gazette, and the *Bangor Daily Whig & Courier*. *Id.* at 712-13 (citations omitted).

> Bingham's hometown newspaper, the *Cadiz Republican*, reprinted many of his speeches; others were bound in pamphlet form for mass distribution. Since these speeches were intended for circulation among constituents as well, they "provide clues to the sentiments of [those] constituents."

Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 69 n.66 (1993) (hereafter "Aynes") (quoting Kenneth Stamp, AMERICA IN 1857, at viii (1990)).[4]

Senator Howard's speech, defining "capital privileges or immunities" to contain *Corfield*'s natural rights and the Bill of Rights, received even greater play. Its core aspects were reprinted in the *New York Times, New York Herald, Philadelphia Inquirer, National Daily Intelligencer,* among others, and was encapsulated in other newspapers. Hardy, at 715-17 (citations omitted). One reported:

> The first clause of the first section was intended to secure to the citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government.

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[4] Order sheet records for the printing of Bingham's speeches ran into the thousands. *Id.*

Reconstruction: The Debate in the Senate, BOSTON DAILY ADVERTISER, May 24, 1866, at 1, col. 2.

The Reconstruction Committee report detailed the need for a constitutional requirement binding the states to respect civil rights. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. Rep. 39-30 (1866); Sen. Rep. 39-112 (1866).

> [A] student of the period reports that 150,000 copies of the Report and the testimony which it contained were printed in order that senators and representatives might distribute them among their constituents. Apparently the Report was widely reprinted in the press and used as a campaign document in the election of 1866 [and] was "eagerly . . . perused" for information concerning "conditions in the South."

Adamson, 332 U.S. at 108-9 (Black, J., dissenting) (alteration in original) (citing Benjamin Kendrick, JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 265 (1914)).

2. Ratification Debate.

The proposed amendment generated letters to editors, op-ed pieces, and magazine expositions discussing its impact. Paraphrasing *Corfield*, and Senator Howard's widely-publicized speech, "Madison" wrote the *New York Times*:

> The one great issue really settled is, that the people will not lose the fruits of the victory

> won in the suppression of the rebellion. They demand and will have protection for every citizen of the United States, everywhere within the national jurisdiction—*full and complete protection* in the enjoyment of life, liberty, property, the pursuit of happiness, the right to speak and write his sentiments, regardless of localities; *to keep and bear arms in his own defence*, to be tried and sustained in every way as an equal . . . Let us see how far the Constitutional Amendment is calculated to effect this object . . .
>
> What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue happiness and safety; the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of habeas corpus to take, hold, and dispose of property, either real or personal, &c., &c. These are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.

"Madison," *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. TIMES, Nov. 10, 1866, at 2, cols. 2-3 (second emphasis added).

Twelve days before its ratification, *The Nation* explained that the Amendment "would, indeed, be almost a revolution; it would give to the liberty of the

individual inhabitant the will of the nation as its basis, instead of the will of a State." *Pomeroy's Constitutional Law*, THE NATION, July 16, 1868, at 54.

Negative Southern reaction confirmed the proposed Amendment's impact. The Texas House Committee tasked with reviewing the amendment urged its rejection:

> [I]n these privileges would be embraced the exercise of suffrage at the polls, participation in jury duty in all cases, bearing arms in the militia, and other matters which need not be here enumerated . . . these [are] "privileges and immunities," now sought to be forced on the Southern States.

TEX. HOUSE JRNL., 11TH LEGISLATURE, 578 (1866).[5]

Southern resistance to the Privileges or Immunities Clause manifested itself in President Johnson's proposed compromise. The alternative amendment duplicated Section One's language with one exception: Article IV's Privileges and Immunities Clause was repeated in place of the Privileges or Immunities Clause. 1 Walter Fleming, DOCUMENTARY HISTORY OF RECONSTRUCTION 238 (1906).

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[5] Individuals bearing arms in an organized militia "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *United States* v. *Miller*, 307 U.S. 174, 179 (1939).

Interior Secretary Orville Browning publicly conveyed President Johnson's opposition to the Fourteenth Amendment, predicting the Due Process Clause would "subordinate the State judiciaries in all things to Federal supervision and control; [and] totally annihilate the independence and sovereignty of State judiciaries," in civil and criminal matters. Browning charged the Amendment would be unnecessary as states could be entrusted with the protection of civil rights. *The Political Situation: Letter from Secretary Browning*, N.Y. TIMES, Oct. 24, 1866, at 1, col. 1.

The *New York Times* retorted:

> The Constitution of the United States . . . provides that "the right of the people to keep and bear arms shall not be infringed." But this restriction is . . . a restriction upon the power of the United States alone, and gave to James Lewis no protection against the law of Mississippi, which deprived him, because of his color, of a right which every white man possessed.

Mr. Browning's Letter and Judge Handy's Decision, N.Y. TIMES, Oct. 28, 1866, at 4, col. 1; *see discussion, supra,* at 14.

Mississippi's Constitution contained a Second Amendment analog, "[b]ut Judge Handy got round that safeguard very easily . . . which he could hardly have done if the proposed amendment had formed part of the Constitution." *Id.* at col. 2. Repeating *Wash*

Lowe's description of the right to carry arms as a "privilege," *supra*, 22-23, the Times concluded: "It is against just such legislation and such judicial decisions that the first section of the Amendment is designed to furnish a protection." *Id.*

Northern debate confirmed this point. Speaking before constituents, Ohio Congressman Columbus Delano declared that citizens

> have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the chivalry of Southern slaveholders . . . . We are determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected.

Cincinnati Commercial, Aug. 31, 1866, at 2, col. 3.

Speaking in Philadelphia, Connecticut Governor Joseph Hawley reportedly stated that

> [t]here were men who had been honorably discharged from our armies who had been ruthlessly stripped of the very weapons given them by the Government for their fidelity to it. He claimed that the war was not over until every man should have free and uninterrupted possession of every right guaranteed him by the Constitution.

Philadelphia Inquirer, Sept. 5, 1866, at 8, col. 3.

Summing up a wide array of speeches debating the amendments' ratification, one commentator concluded:

> The declarations and statements of newspapers, writers and speakers, . . . show very clearly . . . the general opinion held in the North . . . that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States.

Horace Flack, THE ADOPTION OF THE FOURTEENTH AMENDMENT 153 (1908). Flack's survey overlooked statements specifically contemplating the Bill of Rights' application to the states, some of which are noted here, but he nonetheless "inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it." *Id.* at 153-54.

3. Legal Scholarship.

The earliest treatises covering the Fourteenth Amendment period asserted that it applied fundamental rights. Pomeroy referred to "the immunities and privileges guarded by the Bill of Rights." John Pomeroy, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 147 (1868). Describing *Barron* as "unfortunate," *id.* at 149, Pomeroy added that "a remedy is easy, and the question of its

adoption is now pending before the people," referring to the Fourteenth Amendment. *Id.* at 151.

Judge Farrar agreed. Referring to precedent holding the Bill of Rights inapplicable to the states, Farrar wrote: "All these decisions . . . are entirely swept away by the 14th amendment." Timothy Farrar, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 546 (2d ed. 1869). Writing during the Fourteenth Amendment's ratification period, Judge Paschal offered that "[t]he new feature declared is that the general principles, which had been construed to apply only to the national government, are thus imposed upon the States." George Paschal, THE CONSTITUTION OF THE UNITED STATES 290 (1868). Added Israel Andrews:

> And as it has been maintained that the first eight Amendments had no reference to the State governments, but were restraints upon the general government only, this Fourteenth Amendment declares explicitly that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Israel Andrews, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 274 (1874).

It is simply impossible to maintain that the public, including political leaders, common citizens, and the Bar, did not comprehend that the Privileges or Immunities Clause applies fundamental civil

rights against the States. This understanding was widely communicated, and never denied.

II. *THE SLAUGHTERHOUSE CASES, UNITED STATES* V. *CRUIKSHANK*, AND *PRESSER* V. *ILLINOIS* MUST BE OVERRULED.

As late as 1937, this Court referred to the Bill of Rights as securing "privileges" and "immunities," in describing the "exclusion of . . . immunities and privileges from the privileges and immunities protected against the action of the states . . . ." *Palko* v. *Connecticut*, 302 U.S. 319, 326 (1937), *overruled by Benton* v. *Maryland*, 395 U.S. 784 (1969).

The error should have been self-evident. But *Palko* described accurately the state of affairs produced by *The SlaughterHouse Cases* and its unavoidable progeny, *Cruikshank* and *Presser*. These cases established that the States could continue to violate virtually all privileges and immunities of American citizens, including those codified in the Bill of Rights, notwithstanding Section One's clear textual command to the contrary.

One notable scholar described *SlaughterHouse* as "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court." Charles Black, Jr., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 55 (1997). The decision, and its progeny, lack legitimacy. Faced with a clear conflict between precedent and the Constitution, this Court should uphold the Constitution.

A. This Court's Privileges or Immunities Doctrine Is Profoundly Erroneous.

The earliest federal court decisions interpreting the Fourteenth Amendment correctly interpreted the Privileges or Immunities Clause. Before being reversed by the Supreme Court, Justice Bradley held New Orleans's slaughtering monopoly unconstitutional as states were forbidden from "interfer[ing] with the fundamental privileges and immunities of American citizens." *Live-Stock Dealers' & Butchers' Ass'n* v. *Crescent City Live-Stock Landing & Slaughter-House Co.,* 15 F. Cas. 649 (C.C.D. La. 1870). Justice Bradley thereafter urged this view upon future Justice William Woods, who had written him seeking advice in deciding the then-pending case of *United States* v. *Hall*, 26 F. Cas. 79 (S.D. Ala. 1871). Aynes, *supra*, at 97. *Hall* held that the Fourteenth Amendment's Privileges or Immunities "are undoubtedly those" as described in *Corfield*, and "[a]mong these we are safe in including those which in the constitution are expressly secured to the people . . . " *Hall*, 26 F. Cas. at 81.

Yet when this Court first passed on the Fourteenth Amendment, it announced a theory of the Privileges or Immunities Clause never apparently considered by anyone during the framing and ratification process, standing diametrically opposed to every statement of intent and understanding related to the Privileges or Immunities Clause.

SlaughterHouse first observed that while individuals held both federal and state citizenship, the Clause at issue protects only privileges and immunities of national citizenship. *SlaughterHouse*, 83 U.S. at 74. It then purported to quote Article IV as securing "the privileges and immunities of citizens of the several States." *Id.* at 75. Reading these asserted rights of state citizenship broadly, in line with *Corfield*, *SlaughterHouse* declared Article IV "did not create those rights, which it called privileges and immunities of citizens of the States." *Id.*

Was the Fourteenth Amendment intended "to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?" *Id.* at 77. Incorrectly, *SlaughterHouse* answered in the negative. Without consulting the Fourteenth Amendment's history, the *SlaughterHouse* majority simply refused to contemplate so great a change had occurred, *id.* at 78, although the nearly-contemporaneous Thirteenth and Fifteenth Amendments undeniably effected significant change.

With this decision, civil rights inhering naturally in individuals, and which predate the Constitution, would be left to the States' protection. The Fourteenth Amendment would protect only rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. In dicta, *SlaughterHouse* suggested that these included the right to visit the federal subtreasuries, petition the federal government, access federal seaports, seek diplomatic protection abroad, enjoy treaty

benefits, and travel among the States. *Id.* at 79-80. Except for the last one, none of these rights were consistent with *SlaughterHouse*'s view that the Fourteenth Amendment was primarily meant to resolve the Freedmen's problems.

Three years later, *Cruikshank* explored whether the Justice Department could prosecute anyone for violating the First and Second Amendment rights of freedmen, massacred in a coup against the government of Grant Parish, Louisiana. Under *Slaughter-House*, this proved impossible: citizens "can demand protection from each [government] within its own jurisdiction." *Cruikshank*, 92 U.S. at 550.

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government . . . The government of the United States when established found it in existence.

Id. at 551. Likewise, the Second Amendment right to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *Id.* at 553. *Presser* reaffirmed as much. *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886).

It is hard to quarrel with *Cruikshank*'s assessment of the First and Second Amendments' provenance. Yet precisely because these amendments

secure ancient, natural rights, under *SlaughterHouse*, protection of their enjoyment by freedmen fell to Louisiana's government. Months following the *Cruikshank* decision, a former Confederate General was declared the winner of the state's gubernatorial election.

The Framers' condemnation of this doctrine was predictable, Aynes, *supra*, at 99, but their opponents did not substantively disagree. Reconstruction's foes acknowledged the error—and celebrated it. *Id.* at 99-101. One commentator applauded this Court for having "dared to withstand the popular will as expressed in the letter of [the Fourteenth] amendment." Christopher Tiedeman, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 103 (1890). At this Court's Memorial Service for Chief Justice Waite, a congressman

> noted that [*Cruikshank*] contravened the intent of the framers of the Fourteenth Amendment: "[M]any of the framers of these Amendments received information regarding their intentions which was new, and was not calculated to allay the apprehensions with which they saw Chief Justice Waite go upon the bench" . . . historians would later praise Waite primarily because "the lapse of years has matured men's views and cooled their feelings regarding the results of the late war."

Aynes, *supra*, at 100 (quoting *Appendix, In Memoriam, Morrison Remick Waite, L.L.D.*, 126 U.S. 585, 600 (1888)).

The *SlaughterHouse* doctrine vindicated the Court's role as a check on the Constitution itself, specifically, against the Fourteenth Amendment's alleged "immaturity":

> [A]fter the lapse of years, when the temper and spirit in which the text of the Amendments was penned have cooled, and the views of men have matured, it is seen on a survey of all the decisions considered as a body, that the value of the Court as the great conservative department of the government was never greater than then.

2 Hampton Carson, HISTORY OF THE SUPREME COURT 485-86 (1891).

Today the Civil War and the Reconstruction Amendments are widely viewed as having been necessary steps toward increased protection of individual liberty. But consensus regarding *Slaughter-House*'s analytical merit stands unchanged. "Virtually no serious modern scholar—left, right, and center—thinks that [*SlaughterHouse*] is a plausible reading of the Amendment." Akhil Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001).

SlaughterHouse's errors are obvious:

1. The Privileges or Immunities Clause Implemented Significant Changes.

Justice Miller refused to accurately interpret the Privileges or Immunities Clause because the consequences of doing so would be

> so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions . . . . [that we] are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

SlaughterHouse, 83 U.S. at 78.

Of course the Fourteenth Amendment enacted a "serious," "far-reaching and pervading," "great departure from the structure and spirit of our institutions." Countless Civil War dead and the chaos of Reconstruction demanded that the States be forced to respect the basic civil rights of American citizens. For the Fourteenth Amendment's framers, *Barron* and the ugly history of antebellum repression refuted the notion that the States were traditional guarantors of federally protected rights.

Less enthusiastically, opponents predicted the Fourteenth Amendment would "result in a revolution worse than that through which we have just passed." Cong. Globe, 39th Cong., 1st Sess. 2538 (1866) (Statement of Rep. Rogers). Another opponent decried that the amendment would defeat

> the reserved rights of the States . . . declared by the framers of the Constitution to belong to the States exclusively and necessary for the protection of the property and liberty of the people. The first section of this proposed amendment . . . is to strike down those State rights and invest all power in the General Government.

Id. at 2500.

A Texas House committee declared the amendment "would profoundly modify if not destroy our political and even our social institutions," TEX. HOUSE JRNL., *supra*, at 579, and "virtual[ly] repeal" the Tenth Amendment. *Id.* at 580. It would "centralize all power in the Federal Congress, making the States mere appendages to a vast oligarchy, at the National Capitol." TEX. SENATE JRNL., 11TH LEGISLATURE, 422-23 (1866).

President Johnson's surrogate not only declared the amendment would "totally annihilate the independence and sovereignty of State judiciaries in the administration of state laws," he predicted it would "change the entire structure and texture of our Government, and sweep away all the guarantees of safety devised and provided by our patriotic sires of the revolution." N.Y. TIMES, Oct. 24, 1866, at 1, col. 1.

Opponents of the Amendment may have overstated its impact on federalism, but any examination of the Amendment's history reveals an intent to effect

significant change. Substituting its preferences for those historically expressed, *SlaughterHouse* reduced the Fourteenth Amendment to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *SlaughterHouse*, 83 U.S. at 96 (Field, J., dissenting).

As Bingham foreshadowed in 1859,

> the failure to maintain [natural rights] inviolate furnishes, at all times, a sufficient cause for the abrogation of such government . . . impos[ing] a necessity for such abrogation, and the reconstruction of the political fabric on a juster basis, and with surer safeguards.

Cong. Globe, 35th Cong., 2nd Sess. 985 (1859). The Privileges or Immunities Clause effected change "novel and large [but] the novelty was known and the measure deliberately adopted." *Id.* at 129 (Swayne, J., dissenting).

2. *SlaughterHouse* Contradicts History.

> It is a little remarkable that, so far as the reports disclose, no one of the distinguished counsel who argued this great case (*the SlaughterHouse Cases*), nor any one of the judges who sat in it, appears to have thought it worth while to consult the proceedings of the Congress which proposed this amendment to ascertain what it was that they were seeking to accomplish.

William Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S. L. Rev. 558, 563 (1879).

Ignoring the amendment's historical context and ratification proceedings allowed the *SlaughterHouse* majority to substitute its own conjecture for the Framers' and their public's contrary understanding. *SlaughterHouse* found it

> a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.

SlaughterHouse, 83 U.S. at 74.

What is remarkable is *SlaughterHouse*'s premise that the Amendment could only be given broad interpretation were it concerned with protecting "the citizen of a State." The Framers shared the long-held view of many that all American citizens, as such, enjoyed a broad array of "privileges and immunities" regardless of their state citizenship. Their amendment "caus[ed] citizenship of the United States to be paramount and dominant instead of being subordinate and derivative." *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918).

SlaughterHouse's refusal to acknowledge the primacy of federal citizenship was not unprecedented:

> In what manner are we citizens of the United States? . . . [E]very citizen is a citizen of some State or Territory, and, as such, under an express provision of the constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this, and no other sense, that we are citizens of the United States.

2 The Works of John C. Calhoun 242-43 (Richard Cralle, ed., 1888). This is exactly what the Fourteenth Amendment rejected.

In any event, the Citizenship and Privileges or Immunities Clauses had different origins, the former a late Senate amendment, the latter a heavily debated product of the Joint Committee, and there is no evidence that Congress considered the impact of one upon the other. "[O]nce the textual discrepancy between the citizenship and privileges or immunities clause is removed as a viable rationale, *Slaughter-House* simply fails." Michael Lawrence, *Rescuing the Fourteenth Amendment Privileges or Immunities Clause: How "Attrition of Parliamentary Processes" Begat Accidental Ambiguity; How Ambiguity Begat SlaughterHouse*, 18 Wm. & Mary Bill of Rights Jrnl. ___ (forthcoming 2009), available at: http://ssrn.com/abstract=1462184. *SlaughterHouse*'s

> studied distinction between the privileges deriving from state and national citizenship . . . should have been seriously doubted by

> anyone who read the Congressional debates of the 1860s.

Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877, at 530 (2002).

3. *SlaughterHouse* Rests on a Misquotation, Reflecting a Premise Rejected by the Amendment's Framers.

The other errors notwithstanding, *SlaughterHouse*'s attempt to distinguish the privileges and immunities of the Fourteenth Amendment from those of Article IV fails for "an even more astounding and obvious difficulty." Tribe, AMERICAN CONSTITUTIONAL LAW at 1306. The distinction rests upon a misquotation of Article IV, which secures the rights of "citizens *in* the several States," U.S. Const. art. IV, §2 (emphasis added), not the rights of "citizens *of* the several States." *SlaughterHouse*, 83 U.S. at 75 (quoting U.S. Const. art. IV, §2) (emphasis added). Justice Bradley identified the error, to no avail. *Id.* at 117 (Bradley, J., dissenting).

Bingham specifically rejected the construction *SlaughterHouse* placed on Article IV's alleged language. "There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens *of the United States* in the several States' that it guaranties." Cong. Globe, 35th Cong., 2nd Sess. 984 (1859) (emphasis added).

In any event, the language *SlaughterHouse* claims to exist in Article IV—"citizens of the several States"—was understood differently in the Thirty-Ninth Congress. Contrary to *SlaughterHouse*'s supposition, the Framers used that same language to describe the Fourteenth Amendment's Privileges or Immunities Clause. Introducing the Fourteenth Amendment, Senator Howard remarked: "[t]he first section of the amendment they have submitted for the consideration of the two Houses relates to the privileges of *citizens of the several states* . . . " Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). Section One's correct text, "privileges or immunities of citizens of the United States," then follows in the record. *Id.*

Even had it existed, *SlaughterHouse*'s distinction—"citizens of the several states" as opposed to "citizens of the United States"—would have been one without a difference to the Fourteenth Amendment's Framers.

4. *SlaughterHouse* Is Illogical.

Construing the rights of federal citizenship as necessarily relating to the creation of the federal government misreads the Fourteenth Amendment's plain text. The privileges and immunities states are forbidden to infringe are those "of citizens of the United States," meaning, of "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof," U.S. Const. amend. XIV, §1, as opposed to the rights of some other category of people.

It does not logically follow that American citizenship fails to secure pre-existing natural rights. With the Privileges or Immunities Clause, the Framers sought to protect "rights that attach to citizenship in all free Governments." Cong. Globe, 39th Cong., 1st Sess. 3031 (1866) (Statement of Sen. Henderson). "To be a citizen of the United States carries with it some rights, and what are they? They are those inherent, fundamental rights, which belong to free citizens or free men in all countries . . . . " *Id.* at 1757 (Statement of Sen. Trumbull). In *Corfield*'s oft-cited words, they are "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." *Corfield*, 6 F. Cas. at 551.

"It must be remembered that the National Government, too, is republican in essence and in theory . . . . 'To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 839 (1995) (Kennedy, J., concurring) (quoting THE FEDERALIST No. 2, at 38-39 (Clinton Rossiter ed. 1961)). Under the original understanding of American citizenship, *SlaughterHouse*'s narrow reading of "Privileges or Immunities" defines the federal government as unfree.

The rights secured by the Privileges or Immunities Clause are not merely important. Presumably, the Clause protects rights that states were abridging—hence, its ratification. Justice Miller

believed the Amendment protected an individual's "life, liberty, and property when on the high seas or within the jurisdiction of a foreign government." *SlaughterHouse*, 83 U.S. at 79. Yet in proposing protection for Privileges and Immunities, Bingham lamented, "We have the power to vindicate the personal liberty and all the personal rights of the citizen in the remotest sea . . . while we have not the power in time of peace to enforce the citizens' right to life, liberty, and property within the limits of South Carolina . . . . " Cong. Globe, 39th Cong. 1st Sess. 1090 (1866).

> The right to travel to the seat of government had been protected by the Court since 1867, before ratification of the Fourteenth Amendment, so the amendment would not affect it, and exactly how a state would abridge an American citizen's rights in France or on the high seas is unclear. The Arkansas navy perhaps? Finally, rights under treaties were already protected by the Supremacy Clause. In other words, Miller's effort to show that fundamental rights were left completely under state control was shameful.

Lucas Powe, Jr., THE SUPREME COURT AND THE AMERICAN ELITE 1789-2008, at 136 (2009).

B. *Stare Decisis* Does Not Secure the *SlaughterHouse* Line.

"[T]he *stare decisis* hurdle posed by *Slaughter-House* appears fairly insignificant. It would take but

a little wind, and far from a hurricane, to blow that House down." Tribe, at 1324.

At times, "a prior judicial ruling should come to be seen so clearly as error that its enforcement [is] for that very reason doomed." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 854 (1992). Petitioners submit this to be the case with *SlaughterHouse* and its progeny.

> [T]he construction put upon the language of [Section One] by [*SlaughterHouse*] is not its primary and most obvious signification. Ninety nine out of every hundred educated men, upon reading this section over, would at first say that it forbade a state to make or enforce a law which abridged any privilege or immunity whatever of one who was a citizen of the United States; and it is only by an effort of ingenuity that any other sense can be discovered that it can be forced to bear.

Royall, 4 S. L. Rev. at 563.

A doctrine originally celebrated for defying the Constitution, and which cannot seriously be defended against the overwhelming weight of text and history, must not be allowed to continue depriving Americans of their civil rights. "[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes."

Payne v. *Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

Stare decisis protects erroneous decisions out of "prudential and pragmatic considerations." *Casey*, 505 U.S. at 854. The doctrine has particular value in the common law, which is inherently judge-made, and in the interpretation of statutes and regulations where error can be easily corrected by the coordinate branches. *Stare decisis*,

> to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts.

Payne, 501 U.S. at 834-35 (Scalia, J., concurring).

Yet "*stare decisis* is not 'an imprisonment of reason.'" *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting). Nor is it "an inexorable command." *Payne*, 501 U.S. at 828 (citation omitted).

> [W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional

> decisions. This has long been accepted practice . . . .

Smith v. *Allwright*, 321 U.S. 649, 665 (1944).[6]

"The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its framers when they added the Amendment to our constitutional scheme." *Malloy*, 378 U.S. at 5. When "[m]embers of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding" of constitutional text, this Court has been receptive. *Crawford* v. *Washington*, 541 U.S. 36, 60 (2004).

Beyond cases such as the *SlaughterHouse* line, plainly compelling correction, this Court may look to four prudential factors in considering to overrule precedent:

> We may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far

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[6] For the frequency of this Court's practice in overruling past decisions, *see* cases collected in *Payne*, 501 U.S. at 828 n.1; *Smith,* 321 U.S. at 665 n.10; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393, 407 n.2 (1932) (Brandeis, J., dissenting).

> developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Casey, 505 U.S. at 854-55 (citations omitted).

The *SlaughterHouse* doctrine fails each of these factors.

1. *SlaughterHouse* Is Not Truly Practical.

The *SlaughterHouse* doctrine offers a workable definition of the Privileges or Immunities Clause—by virtually eliminating it—but workability measured by the impact on the Fourteenth Amendment as a whole is less satisfying.

"[T]he demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence," *Saenz*, 526 U.S. at 527-28 (Thomas, J., dissenting), by closing off the natural textual mechanism for securing basic rights against state action. "There is a very real threat that the doctrinal shakiness of substantive due process may in turn undermine public confidence in the institution of judicial review and in the ability of judges honestly to interpret the dictates of the Constitution." Tribe, at 1317.

2. Correcting This Court's Privileges or Immunities Doctrine Would Not Upset Legitimate Reliance Interests.

The *SlaughterHouse* doctrine has engendered only the sort of reliance interests never meriting this Court's protection. The statute at issue in *Slaughter-House* might have been upheld as a legitimate "restraint[ ] as the government may justly prescribe for the general good of the whole," *Corfield*, 6 F. Cas. at 552. Sustaining the measure by trivializing the fundamental rights of American citizenship was excessive.

SlaughterHouse was originally the redoubt of monopolists, while *Cruikshank* helped place Klan violence beyond the Justice Department's reach. For the latter reason, one early commentator called the decisions "most fortunate":

> They largely eliminated from National politics the negro question which had so long embittered Congressional debates; they relegated the burden and the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.

3 Charles Warren, THE SUPREME COURT IN UNITED STATES HISTORY 330 (1922). Of course, *Slaughter-House* and *Cruikshank* restored only *some* Southern people's confidence in this Court.

But there can be no valid reliance interests in depriving individuals of their constitutional rights. If anything, reliance interests cut against preserving the *SlaughterHouse* doctrine. Americans are inclined to believe that their "citizenship is not an empty name, but . . . has connected with it certain incidental rights, privileges, and immunities of the greatest importance." *SlaughterHouse*, 83 U.S. at 116 (Bradley, J., dissenting). "[W]e are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." *Id.* at 118 (Bradley, J., dissenting).

Nor would invocation of the Privileges or Immunities Clause, referencing the rights of "citizens," rather than under the Due Process Clause, which protects "person[s]," necessarily deprive non-citizens of any rights. One way to read the Privileges or Immunities Clause comprehends that "the reference to citizens may define the class of rights rather than limit the class of beneficiaries." John Ely, DEMOCRACY AND DISTRUST 25 (1980). That is, rights of the sort belonging to citizens cannot be the subject of abridgment, regardless of who would benefit.

Moreover, honoring the Privileges or Immunities Clause does not require abandonment of the Due Process or Equal Protection Clauses. Regardless of a right's textual anchor in the Privileges or Immunities Clause, non-citizens are procedurally entitled to challenge any unlawful alienage restriction. Courts

would continue to subject alienage classifications to strict scrutiny. *See Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). Approving of a state law banning immigrants from possessing hunting guns, this Court suggested barring aliens from having "pistols that may be supposed to be needed occasionally for self-defence" could be viewed differently. *Patsone* v. *Pennsylvania*, 232 U.S. 138, 143 (1914). Perhaps more critically, in *SlaughterHouse*'s absence, state-level alienage restrictions would remain broadly pre-empted by the federal immigration power. *Toll* v. *Moreno*, 458 U.S. 1, 12-13 (1982).

Had the Framers intended for Fourteenth Amendment rights, rooted in citizenship, to be denied wholesale to non-citizens, surely the concept would have engendered some debate considering the amendment was designed in part to prevent arbitrary denial of citizenship as a tool of denying substantive rights. Yet the opposite is true. Without contradiction, Senator Howard offered that the Amendment, "if adopted by the States, [would] forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, *and to all persons who may happen to be within their jurisdiction*." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (emphasis added).

Bingham agreed: "That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment." *Id.* at 2543. The purpose

of Section One is "to protect by national law the privileges and immunities of all the citizens of the Republic *and the inborn rights of every person within its jurisdiction* whenever the same shall be abridged by the unconstitutional acts of any State." *Id.* at 2542 (emphasis added). "It seems to be generally agreed that no conscious intention to limit the protection of the clause to citizens appears in the historical records." Ely, *supra*, at 25.

3. *SlaughterHouse* Is Largely Anachronistic.

The third *Casey* factor clearly militates against sustaining *SlaughterHouse*. The *SlaughterHouse* majority's limitation of the Fourteenth Amendment's purpose to redress solely the problems of the freedmen, 83 U.S. at 81, is not considered authoritative today. *Compare*, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515 (1996) *with SlaughterHouse*, 83 U.S. at 81 ("[w]e doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]").

Most of the rights codified in the Bill of Rights, and many others likely included within the privileges and immunities of citizenship as historically understood, are protected against state infringement under the Due Process Clause. "[T]he law's growth in the intervening years has left" [*SlaughterHouse*'s] "central

rule a doctrinal anachronism discounted by society." *Casey*, 505 U.S. at 855. Even the "privileges and immunities" rejected in *SlaughterHouse*, today remain protected under the non-discrimination provisions of Article IV. *See, e.g., Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985) (privilege of practicing law). It is unclear why a state violating civil rights without regard to residence is preferable to a state that honors those rights only when exercised by its residents. The Constitution condemns both, via the Fourteenth Amendment and Article IV, §2, respectively, and the American people are entitled to its full protection.

4. Modern Factual Understandings Render *SlaughterHouse* Untenable.

This Court is not merely presented with a situation in which the facts have "come to be seen so differently." *Casey*, 505 U.S. at 855. The facts had never been examined by this Court at all. *Slaughter-House* announced a set of assumptions, which later courts would not re-examine. Notwithstanding the precedent, with respect to the Privileges or Immunities Clause, this is arguably a case of first impression.

III. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS INCORPORATED AS AGAINST THE STATES BY THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

Although the case for applying the Second Amendment to the States, textually and historically, rests primarily upon the Privileges or Immunities Clause, Petitioners are also entitled to relief pursuant to the Fourteenth Amendment's Due Process Clause.

It is now well-established that the Due Process Clause has a substantive dimension, and that deprivation of enumerated constitutional rights is thus largely incompatible with due process. A "law" depriving one of life, liberty or property "must not have exceeded the limits of legislative power marked by natural and customary rights." Frederick Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585, 644-45 (2009). Almost every provision of the Bill of Rights considered for incorporation in the modern era has been incorporated.

Given that the Due Process Clause has incorporated virtually all other enumerated rights, "[t]he obvious question . . . is what exactly justifies treating the Second Amendment as the great exception." Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 653 (1990). Second Amendment rights must be among those incorporated.

In the early days of incorporation, this Court explained that

> immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

Palko, 302 U.S. at 324-25. The Second Amendment, given its forceful command and basis in the inherent human right of self-preservation, would surely pass this test.

More recently, this Court settled on an analysis proven yet more amenable to incorporation. The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968), or "necessary to an Anglo-American regime of ordered liberty," *id.*, 150 n.14. *Duncan*'s analysis suggests looking to the right's historical acceptance in our nation, its recognition by the states (including any trend regarding state recognition), and the nature of the interest secured by the right. The right to bear arms clearly satisfies all aspects of the selective incorporation standard.

A. The Right to Arms Is Secured in the Nation's Legal Traditions.

"By the time of the founding, the right to have arms had become fundamental for English subjects." *Heller*, 128 S. Ct. at 2798 (citations omitted). When the Constitution was written, English law had "settled and determined" that "a man may keep a gun for the defence of his house and family." *Mallock* v. *Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). The violation of that right by George III "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Heller*, 128 S. Ct. at 2799. "[T]he right contains both a political component—it is a means to protect the public from tyranny—and a personal component—it is a means to protect the individual from threats to life or limb." *Nordyke* v. *King*, 563 F.3d 439, 451 (9th Cir.), *reh'g en banc granted*, 575 F.3d 890 (2009) (citation omitted).

There should be no need to recite the exhaustive historical evidence considered in *Heller*. The matter is settled: the Second Amendment "codified a right inherited from our English ancestors." *Heller*, 128 S. Ct. at 2802 (citation omitted).

B. States Historically Acknowledge the Right to Arms.

All five state constitutional ratifying conventions that proposed amendments to the Constitution sought a right to arms. Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF

THE FEDERAL CONSTITUTION (1836), 1:326 (New Hampshire), 1:328 (New York), 1:335 (Rhode Island) 3:659 (Virginia), 4:244 (North Carolina). Free speech merited only three requests, *id.*, 1:328 (New York), 1:335 (Rhode Island), 3:658-9 (Virginia), 4:244 (North Carolina), while protection from double-jeopardy was sought only by New York. *Id.* at 1:328.

Today, forty-four of the fifty states secure a right to arms in their constitutions. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006). Of these, fifteen are either new or strengthened since 1970. *Id.*

These Second Amendment analogs are effective and consequential. Modern state courts enforce these provisions against laws impermissibly restricting the possession and carrying of arms. *See, e.g., Kellogg* v. *City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State ex rel. City of Princeton* v. *Buckner*, 377 S.E.2d 139 (W. Va. 1988); *State* v. *Delgado*, 692 P.2d 610 (Ore. 1984).

C. The Interest Secured by the Right to Arms Is an Aspect of Liberty.

The Second Amendment's purpose confirms its incorporation. "The inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2818. Blackstone described that right as preserving "'the natural right of resistance and self-preservation,' and 'the right of having and using arms for self-preservation and defence.'" *Id.* at 2792 (citations omitted). This concept was well-accepted in

1868 America. *See* Clayton Cramer, Nicholas Johnson, and George Mocsary, *"This Right is Not Allowed by Governments that are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment was Ratified*, 17 Geo. Mason L. Rev. ___ (forthcoming 2010), available at http://ssrn.com/abstract=1491365.

"[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) (citation omitted). States must respect various rights which, like the Second Amendment, are rooted in deference to preserving personal autonomy. Observing that

> no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law,

Cruzan v. *Dir., Mo. Dep. of Health*, 497 U.S. 261, 269 (1990) (citation omitted), this Court recognized a right to refuse life-sustaining medical care. *Id.* at 278; *see also Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) ("the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Lawrence* v. *Texas*, 539 U.S. 558, 562 (2003) ("liberty of the person both in its spatial and more transcendent dimensions" supports right to consensual intimate relationships);

Rochin v. *California*, 342 U.S. 165 (1952) (right of bodily integrity against police searches).

"[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. It is unfathomable that the states are constitutionally limited in their regulation of medical decisions or intimate relations, because these matters touch upon personal autonomy, but are unrestrained in their ability to trample upon the enumerated right to arms designed to enable self-preservation.

Casey invoked the second Justice Harlan's celebrated passage describing the liberty protected by the Due Process Clause as broader than

> a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.

Id. at 848 (quoting *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (emphasis added). Liberty cannot now be defined so narrowly as to exclude one of its more obvious attributes.

Indeed, the right to purchase contraception was discovered as related to the "indefeasible right of personal security." *Griswold* v. *Connecticut*, 381 U.S. 479, 484 n.* (1965) (citation omitted). This Court's landmark abortion right decision in *Roe* v. *Wade*, 410 U.S. 113 (1973) "may be seen not only as an exemplar

of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity." *Casey*, 505 U.S. at 857. "[T]he right to define one's own concept of existence" lying "[a]t the heart of liberty," *id.* at 851, includes the right of armed self-defense against violent criminal attack.

The Second Amendment also has another purpose, spelled out in the prefatory clause: preservation of the people's ability to act as militia. *Heller*, 128 S. Ct. at 2800-01. The Amendment's framers believed this purpose was "necessary to the security of a free state." U.S. Const. amend. II. By its own terms, the Second Amendment secures a fundamental right.

Heller has defined the contours of the Second Amendment right: it identified the right's origins, traced its history, and described its core purposes. Applying these variables to this Court's established selective incorporation doctrine yields a judgment of reversal.

CONCLUSION

The judgment below must be reversed.

Respectfully submitted,

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