

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, ILLINOIS, ET AL.,

Respondents.

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

**AMICUS CURIAE BRIEF OF THE
AMERICAN CENTER FOR LAW AND JUSTICE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS*

Amicus, the American Center for Law and Justice (ACLJ), is a public interest legal and educational organization committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued before the Supreme Court of the United States and other Federal and State courts in numerous cases involving constitutional issues, with a particular emphasis on the First Amendment, most recently *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).¹ The proper resolution of this case is a matter of substantial concern to the ACLJ because it concerns proper application of the Bill of Rights to the States.

SUMMARY OF THE ARGUMENT

While this Court's historically has used the Due Process Clause of the Fourteenth Amendment to incorporate against the States provisions of the Bill

* The parties in this case have consented to the filing of this brief upon receipt of the required seven (7) days' notice of ACLJ's intent to file and letters of consent are on file with the Clerk of this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

¹ See, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs. v. Jews for Jesus*, 482 U.S. 569 (1987).

of Rights, a precise textual reading of the Fourteenth Amendment's Privileges or Immunities Clause and an understanding of the historical context surrounding the terms "privileges" and "immunities" demonstrates that the Privileges or Immunities Clause of the Fourteenth Amendment is better suited historically and textually to incorporate against the States the individual guarantees contained in the Bill of Rights, including the Second Amendment.

Relying upon the Privileges or Immunities Clause of the Fourteenth Amendment for incorporation against the States of individual guarantees contained in the Bill of Rights, including the Second Amendment, is supported both by the expressed intent of the principal drafter of Section 1 of the Fourteenth Amendment, John Bingham, and by contemporary learned commentary on the amendment.

Incorporating the Second Amendment against the States through the Privileges or Immunities Clause would not require this Court to overrule its decision in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, (1873). To the extent that its decisions in *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), hold that the Second Amendment is not incorporated against the States, however, those decisions should be overruled.

ARGUMENT

For over 100 years, this Court has used the Fourteenth Amendment's Due Process Clause to

enforce provisions of the Bill of Rights against the States. But, the amendment's Privileges or Immunities Clause is better suited textually and historically, and thus a sounder basis, for incorporating the individual guarantees contained in the Bill of Rights.

I. The Privileges or Immunities Clause of the Fourteenth Amendment is Better Suited for Incorporating the Individual Protections of the Bill of Rights, Including the Second Amendment.

In interpreting the Constitution, this Court is “guided by the principle that [t]he 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) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). This reference to the phrase “normal and ordinary” should be read to include the way in which the terms were understood in contemporary legal discourse.

Section 1 of the Fourteenth Amendment states,

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

A. A True Textual Interpretation of Section I of the Fourteenth Amendment Supports Incorporation Through the Privileges or Immunities Clause.

A full appreciation of the historical understanding of the terms “privileges” and “immunities” is necessary to properly understand incorporation of the Bill of Rights through the Privileges or Immunities Clause. See Eric R. Claeys, *Blackstone’s Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 San Diego L. Rev. 777, 781 (2008). William Blackstone recognized the true relationship between man’s natural rights and the law of governments as their protectors. He wrote, “[T]he principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute” 1 William Blackstone, *Commentaries* *120–21. He explained that human laws should “take notice of these absolute rights, and provide for their lasting security.” *Id.* at *121. Blackstone made clear that man naturally possesses liberty to do as he pleases, but, as a member of a civil political society, his absolute rights may be tempered in some

respects. Still, the political society must provide positive protections in place of those tempered portions of absolute liberty. Claeys, 45 San Diego L. Rev. at 781. Blackstone characterized these positive law rights as “civil privileges” and “private immunities.” Blackstone, *supra*, at *125.

Blackstone’s undeniable influence over American legal thought imparted this understanding of privileges and immunities to the Founders. Claeys, 45 San Diego L. Rev. at 793. Alexander Hamilton wrote:

“The principal aim of society, is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature; but which could not be preserved, in peace, without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws, is to maintain and regulate these absolute rights of individuals.”

. . . .

[N]atural liberty is a gift of the beneficent Creator *Civil liberty is only natural liberty modified and secured by the sanctions of civil society.*

Alexander Hamilton, *The Farmer Refuted*, in 2 *The Works of Alexander Hamilton* 37, 44, 61 (John C. Hamilton ed., New York, Charles C. Francis & Co. 1851) (*quoting* Blackstone, *supra*, at *120) (emphasis in the original). Hamilton quotes Blackstone's position that the terms "privileges" and "immunities" referred to the sacred and fundamental natural rights of all men as guarded by the sentinel of positive political enactments. In other words, particular rights referenced do not owe their existence to the political State, but they are granted enumerated protections by it.

This understanding of the terms "privileges" and "immunities" is not inconsistent with prevailing case law at the time of the Fourteenth Amendment. Excepting the Fourteenth Amendment, the other most noted appearance of the terms "privileges" and "immunities" in American law occurs in Article IV of the Constitution. U.S. Const. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). Of the possible interpretations of the Privileges and Immunities Clause of Article IV, the interpretation that dominated antebellum case law and commentary was a reading that "require[ed] [S]tates to grant visiting citizens *some* of the same privileges and immunities which the [S]tate conferred upon its own citizens." Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, at 18 (Loyola Law Sch. Legal Studies Paper No. 2009-29, 2009), *available at* <http://ssrn.com/abstract=1457360> (click on SSRN link

for download) (emphasis in the original). In *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), the leading Antebellum case on the interpretation of Article IV, the court rejected the notion that Article IV permitted Delaware citizens to access oyster beds claimed by the State of New Jersey. *Id.* at 552. Though the court did not provide a comprehensive list of the privileges and immunities covered by Article IV, it did recognize that they were limited, as they did not include oyster gathering. The court never explicitly defined the terms “privileges” and “immunities.” The court did recognize, however, that those terms denoted rights “which are, in their nature, fundamental” as protected by the State. *Id.* at 551–52. Such a characterization is not inconsistent with Blackstone’s understanding of the terms, as societal legal provisions protecting the natural, fundamental rights of men.

Applying this history of the origins of the terms “privileges” and “immunities” to the text of the amendment, the terms “privileges” and “immunities,” when paired together, “did not refer to the natural rights belonging to all people or institutions, but referred instead to rights belonging to a certain group of people or a particular institution.” Lash, *supra*, at 16; *see also Magill v. Brown*, 16 F. Cas. 408, 428 (C.C.E.D. Pa. 1833) (No. 8952) (privileges and immunities are “the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places, whereby a particular man, . . . is exempted from the rigor of the common law . . .”); *Campbell v. Morris*, 3 H & McH. 535, 553 (Md. 1797) (opinion of Chase, J.)

(the Privileges or Immunities Clause of Article IV contemplates “peculiar advantages and exemptions”); The Declaration of Rights and Grievances (U.S. 1774) (“That these His Majesty’s colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.”). See generally Lash, *supra*.

As this Court has noted, the Privileges or Immunities Clause also explicitly recognized national citizenship by prohibiting States from abridging “the privileges or immunities of citizens of the United States.” *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873) (*quoting* U.S. Const., amend. XIV, § 1). This text reads as both a limitation on the States and a substantive guarantee of certain “privileges or immunities” as part of national citizenship. Thus, the Clause cannot be given its natural textual effect without discussing the phrase “citizens of the United States.” In a purely textual sense, it is abundantly clear what definition the phrase should be given, as the preceding clause provides it. The first clause of Section 1—the Citizenship Clause—overturned *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and made “all persons born within the United States and subject to its jurisdiction citizens of the United States,” and citizens of the State in which they reside. *Slaughter-House*, 83 U.S. (16 Wall.) at 73. The Citizenship Clause recognizes that national citizenship and State citizenship are “distinct from each other.” *Id.* at 74.

This reading of the Fourteenth Amendment does not leave non-citizens unprotected, because unlike the Privileges or Immunities Clause, the Due Process Clause applies to “any person.” This was a necessary inclusion, since incorporating the Fifth Amendment Due Process guarantee through the Privileges or Immunities Clause would secure that guarantee only for citizens. *See* Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1224-26 (1992). At the time of the Fourteenth Amendment’s framing, the meaning of the words “due process of law” were likely thought to have a similar meaning to the Fifth Amendment protection. *Id.* at 1225. Representative John Bingham (R-OH), Section 1’s principal drafter, when asked by Representative Andrew Rogers (D-NJ) what he meant “by ‘due process of law,’” replied, “the courts have settled that long ago, and the gentleman can go and read their decisions.” Cong. Globe, 39th Cong., 1st Sess. 1089 (1866). Under a plain reading of the clause, its purpose was to require States to provide all persons due judicial process before deprivation of life, liberty, or property. Christopher Wolfe, *The Rise of Modern Judicial Review* 131 (rev. ed. 1994).

In addition, the Equal Protection Clause complements the judicial process protected by the Due Process Clause. It seeks to ensure that if a State has laws providing due process before deprivation of life, liberty, and property, those laws apply equally to all persons. This was a particularly important part of the Fourteenth Amendment because the Drafters were concerned about violations of the Bill of Rights, manifested in attempts to subjugate the freedmen to

a slave-like status. *See* Rep. of the J. Comm. on Reconstruction, H.R. Rep. No. 30, pt. 2, at 142 (1st Sess. 1866).

Only with these relevant terms properly defined may a textual reading of the Amendment be accomplished. Indeed, in its truly textual sense, the Privileges or Immunities Clause of the Fourteenth Amendment should be read to prohibit any State from “mak[ing] or enforc[ing] any law which shall abridge” the positive law protections afforded by the United States to any person “born or naturalized in the United States” as a safeguard for certain fundamental rights. U.S. Const. amend. XIV, § 1. Thus, to ensure proper application of the amendment, a single question remains to be answered: To which privileges and immunities does the Fourteenth Amendment refer?

It is this question that has long perplexed jurists and legal scholars. While the amendment does not specifically refer to any particular complete set of “privileges or immunities,” this does not render it impossible to discern whether certain rights are included within the amendment’s scope. On more than one occasion, this Court has defined privileges of citizenship by looking at constitutionally enumerated rights. In *Dred Scott*, Chief Justice Taney stated that the “rights and privileges of the citizen are regulated and plainly defined by the Constitution itself.” 60 U.S. (19 How.) at 449. He then listed many of the rights guaranteed in the Bill of Rights, including the right to keep and bear arms. *Id.* at 450. In *The Prize Cases*, 67 U.S. (2 Black) 635

(1863), Justice Grier stated that during the Civil War, besides the rebels, all “others were peaceful citizens, entitled to all the privileges of citizens under the Constitution.” *Id.* at 695. Finally, in *Slaughter-House*, Justice Bradley in dissent said, “we 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.” *Slaughter-House*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting).

Taking this Court’s direction, in light of the precise definitions of the terms “privileges” and “immunities,” the Fourteenth Amendment’s reference to “privileges or immunities of citizens of the United States” should be read to include those enumerated protections of fundamental rights contained within the Constitution. As such, the fundamental rights referred to by the Privileges or Immunities Clause of the Fourteenth Amendment necessarily include those individual guarantees secured by enumeration in the Bill of Rights.

B. The Second Amendment Reinforces this Textual Understanding of the Privileges or Immunities Clause.

The Second Amendment provides the consummate example of support for the textual interpretation of the Privileges or Immunities Clause. In fact, this Court has recognized that the Second Amendment comprises the enumerated civil

protection of the historical natural right to self-preservation, as provided by the United States Government. *Heller*, 128 S. Ct. at 2798-99. This understanding is supported by the historical inclusion of the right to self-defense or preservation within the bundle of natural and absolute rights referred to by Blackstone. For instance, in his *Commentaries*, Blackstone identified three basic rights of all mankind that were protected by the privileges and immunities of English citizens: the rights of private property, personal liberty, and personal security. Blackstone, *supra*, at *125. He characterized this right to personal security as the absolute protection of life and limb so fundamental that even homicide must be pardoned in its just defense. According to Blackstone, the right to security is so inviolable that it “cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.” *Id.* at *126.

English history bears out the natural right to self-preservation by characterizing attempted denials of arms possession as impermissible infringements upon the right of personal security. For example, King James II actively sought to disarm his opposition even though from medieval times Englishmen were expected to keep arms to assist in the common defense. This caused English citizens to fear consolidated government forces, which ultimately led to the positive civil protection for the right to keep arms as assurance for individual security and liberty to be included within the English Bill of Rights. *Heller*, 128 S. Ct. at 2798.

The Second Amendment is a direct result of the ideals expressed by Blackstone and events of English history. “It is undeniable that the Founding Fathers drew upon their English heritage in defining our legal rights and customs” Cliff Stearns, *The Heritage of our Right to Bear Arms*, 18 St. Louis U. Pub. L. Rev. 13, 18 (1999). Indeed, before the American Revolution, the colonists asserted, and many of the colonial charters guaranteed, that they were entitled to all the privileges and immunities enjoyed by all Englishmen, *Saenz v. Roe*, 526 U.S. 489, 523-24 (1999) (Thomas, J. dissenting). Those privileges included the right to bear arms. *Heller*, 128 S.Ct. at 2798. Moreover, this Court has explicitly characterized the English positive protection of the right to keep and bear arms as “the predecessor to our Second Amendment,” *id.*, and stated that the individual 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 2797 (emphasis added) (citation omitted). Thus, the Founders, as former Englishmen, held the natural right to self-preservation in such high regard that they thought it necessary to enumerate it in the Bill of Rights to guarantee its protection to the fullest extent possible for all citizens.

II. The Understanding of Rep. Bingham and of Learned Commentators During or Shortly After Ratification Also Supports Incorporation by the Privileges or Immunities Clause.

A. Bingham Understood Both Incorporation and the Notion of Distinct State and National Citizenships and Adjusted Section 1 Accordingly.

The ultimate understanding expressed by the principal drafter of Section 1 of the Fourteenth Amendment, Representative John Bingham, was consistent with this textual reading and provides insight into Section 1's meaning at the time. To understand Bingham, it is important to look at his two different drafts of the Fourteenth Amendment, and his reason for altering the first.

Bingham's first draft of the amendment read,

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). This language was modeled after Article IV, evidencing

Bingham’s belief that “the Privileges and Immunities Clause of Article IV, Section 2 protect[ed] rights of national rather than state citizenship.” Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 69 (1993). Bingham further believed that Congress lacked enforcement authority, *id.* at 71, and “that, properly interpreted, the Clause would read: ‘The citizens of each State shall be entitled to all privileges and immunities of citizens [of the United States] in the several States.’” *Id.* at 69–70 (alteration in the original) (citation omitted).

During House debate on the first draft, Bingham stated that the goal of his amendment was “not to transfer the laws of one State to another State” but “to secure to the citizens of each State all the privileges and immunities of citizens of the United States in the several States.” Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). Bingham considered the Bill of Rights to be among the privileges and immunities of citizens of the United States. In a speech on the first draft, he said, “Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States Why are gentlemen opposed to the enforcement of the bill of rights, as proposed?” *Id.* at 1089. He explained that the amendment’s only purpose was to “arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution” *Id.* at 1088; *see also* 1908 Horace Edgar Flack, *Adoption of*

the Fourteenth Amendment 59 (John Hopkins Press 1908).

The text of Bingham's first draft was insufficient to accomplish his goals. In criticizing the first draft, Representative Giles Hotchkiss (R-NY) stated that "Constitutions should have their provisions so plain that it will be unnecessary for courts to give construction to them," and suggested that he and Bingham take time to compare views and "agree upon an amendment that shall secure beyond question what the gentleman desires to secure." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866).

Bingham's second draft of the Fourteenth Amendment was much clearer:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Cong. Globe, 42nd Cong., 1st Sess. App. 84 (1871).

In 1871, Bingham explained that he changed the language of what would become Section 1 after re-reading this Court's decision in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and understanding, as he "never did before," the need for express language limiting the States. Cong. Globe, 42nd Cong., 1st Sess. App. 84 (1871). Bingham focused on Chief

Justice Marshall's words, "[h]ad 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." *Id.* at 84 (quoting *Barron*, 32 U.S. (7 Pet.) at 250)). Not wanting his amendment to suffer the same defect, Bingham added express language limiting the States. In his speech he listed the first eight amendments in the Bill of Rights and explained that, "until made so by the [F]ourteenth [A]mendment," these provisions did not limit the States. *Id.* He explained that Justice Washington's opinion in *Corfield* construed Article IV and "only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own." *Id.* Thus,

[i]s it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the [F]ourteenth [A]mendment made them limitations.

Id.; see also Lash, *supra*, at 54-56.

Senator Jacob Howard (R-MI), who introduced the final draft of the amendment in the Senate, also

included the textual provisions of the Bill of Rights in his speech on the amendment, in which he defined privileges and immunities as including

the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; . . . the right to keep and 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, . . . some by the first eight amendments of the Constitution

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). He explained, however, that the courts had held that “all these immunities, privileges, rights, thus guaranteed [sic] by the Constitution or recognized by it,” were secured only to United States citizens and did not restrain State legislation. *Id.* Consequently, these privileges and immunities simply stood, “as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating” them. *Id.* at 2766. Clarifying the purpose of the proposed Fourteenth Amendment, however, he stated, “[t]he great object of the first section of this amendment is, . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.” *Id.*

In summarizing the Senate debates over the Fourteenth Amendment, Flack noted that no one questioned Howard's interpretation of Section 1. Flack, *supra*, at 94. Michael Kent Curtis, in his extensive research on the debates, has found no one who contradicted Bingham and Howard's statements that "the amendment would require the [S]tates to obey the Bill of Rights," and "[n]o one complained that the amendment would allow the [S]tates to continue to deprive citizens of the rights secured by the Bill of Rights." Michael Kent Curtis, *No State Shall Abridge* 91 (Duke University Press 1986); *see also* Kevin Newsom, *Setting Incorporation Straight: A Reinterpretation of The Slaughter-House Cases*, 109 Yale L.J. 643, 699 (2000).

B. Early Learned Commentary on the Fourteenth Amendment Supports Incorporation Through the Privileges or Immunities Clause of the Bill of Rights Against the States.

Bingham's understanding that the Fourteenth Amendment incorporated the Bill of Rights was confirmed in contemporary legal treatises. In his 1868 treatise, *An Introduction to the Constitutional Law of the United States*, the University of New York Law School Dean John Norton Pomeroy explained that under constitutional structure and court precedent, only the United States was forbidden "to deprive a person of any of the immunities and privileges guarded by the Bill of Rights." John Norton Pomeroy, *An Introduction to the*

Constitutional Law of the United States: Especially Designed for Students, General and Professional 147 (1868); see also Aynes, 103 Yale L.J. at 89-90. Pomeroy believed this to be “unfortunate,” because “[t]he United States, as sovereign, as supreme over all [S]tate governments, should be able to afford complete protection to its citizens.” Pomeroy, *supra*, at 149. The Fourteenth Amendment’s Section 1, however, provided a remedy. *Id.* at 151. He called the amendment “by far the most important than any which had been adopted since the organization of the government, except alone the one abolishing the institution of slavery,” and explained the amendment “would give the nation complete power to protect its citizens against local injustice and oppression” without “interfer[ing] with any of the rights, privileges, and functions which properly belong to the individual [S]tates.” *Id.* Dean Pomeroy’s interpretation of the Fourteenth Amendment and its importance in applying the Bill of Rights to the States was cited with approval in a review of his treatise by *The Nation*. *Pomeroy’s Constitutional Law*, *The Nation*, July 16, 1868, at 54.

In the 1872 edition of his treatise, *Manual of the Constitution of the United States*, Judge Timothy Farrar “noted judicial precedents that had held the Bill of Rights inapplicable against the States, but, under the title ‘Settled Questions’ concluded, ‘All these decisions . . . are entirely swept away by the 14th [A]mendment.’” Aynes, 103 Yale L.J. at 84–85 (quoting Timothy Farrar, *Manual of the Constitution of the United States of America* 546 (3d ed. 1872)).

Several cases decided shortly after the Fourteenth Amendment's ratification also demonstrate an understanding that the Amendment was intended to incorporate the individual guarantees of the Bill of Rights against the States.

In *United States v. Hall*, then-Circuit Judge Woods said that the “rights enumerated in the first eight amendments to the [C]onstitution of the United States, are the privileges and immunities of citizens of the United States” 26 F. Cas. 79, 82 (S.D. Ala. 1871) (No. 15,282). In *Ohio ex rel Garnes v. McCann*, 21 Ohio St. 198 (1871), Judge Day wrote that

[t]he language of the [Fourteenth Amendment's Privileges or Immunities Clause] . . . taken in connection with other provisions of the amendment, and of the [C]onstitution of which it forms a part, affords strong reasons for believing that it includes only such privileges or immunities as are derived from, or recognized by, the [C]onstitution of the United States.

Id. at 209-10. Judge Day warned that a broader construction could open “into a field of conjecture limitless as the range of speculative theories, and might work such limitations of the power of the States to manage and regulate their local institutions and affairs as were never contemplated by the amendment.” *Id.* at 210. In *In re Hobbs*, 12 F. Cas. 262 (C.C.N.D. Ga. 1871) (No. 6550), District Judge Erskine explained that the purposes of the

Fourteenth Amendment and the Civil Rights Bill were not just to guarantee “equality before the law throughout the whole land; but also, to protect from invasion and abridgement all the privileges and immunities—essential rights—that belong to the citizen and which flow from the [C]onstitution.” *Id.* at 264.

III. This Court’s Decisions in *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller* Should Not Bar This Court From Incorporating the Second Amendment Through the Privileges or Immunities Clause.

A. Slaughter-House Can be Read to Support the Incorporation of the Second Amendment and the Rest of the Bill of Rights Through the Fourteenth Amendment Privileges or Immunities Clause.

The Seventh Circuit stated below that this Court’s decision in *Slaughter-House* “holds that the privileges and [sic] immunities clause does not apply the Bill of Rights, en bloc, to the [S]tates.” *Nat’l Rifle Ass’n of America v. Chicago*, 567 F.3d 856, (7th Cir. 2009). But *Slaughter-House* makes no such definitive statement. As argued in Section I, *supra*, the Privileges or Immunities Clause provides a textually and historically sound basis for incorporating the Bill of Rights against the States. As we will explain, this Court need not overrule *Slaughter-House* to reach that result.

In raising their Privileges or Immunities Clause claim, the butchers in *Slaughter-House* did not rely on the rights set forth in the Bill of Rights.² Kevin Newsom, *Setting Incorporation Straight: A Reinterpretation of The Slaughter-House Cases*, 109 Yale L.J. 643, 658 (2000). Rather, they claimed that the challenged act created a monopoly, conferred “odious and exclusive privileges” on a small group of people at the expense of others, and deprived butchers in the city of “the right to exercise their trade.” *Slaughter-House*, 83 U.S. (16 Wall.) at 60. Their counsel, John Campbell, put forward an expansive definition of privileges and immunities, stating, “[t]hey are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country.” *Id.* at 55 (syllabus) (argument of John Campbell). As Newsom notes, although Campbell “made passing reference to the freedoms of speech and of the press, the rights to trial by jury and to counsel, and the privilege of habeas corpus as freedoms ‘incorporated in the bill of rights,’” he “did not rely on explicit textual guarantees in making the butchers’ argument” and even “candidly conceded to the Court at oral argument that there was no specific textual basis in the Constitution for the right he claimed on behalf of his clients. ‘There is not,’ he admitted, ‘a grant of this

² The butchers did unsuccessfully challenge the Act under the Due Process Clause of the Fourteenth Amendment, although Justice Miller noted that the argument had “not been much pressed.” *Slaughter-House*, 83 U.S. (16 Wall.) at 80.

right nor a prohibition of its violation in direct terms.” Newsom, 109 Yale L.J. at 658–59 (footnotes omitted) (*quoting* Brief for Plaintiffs, *Slaughter-House* (Nos. 475–480), *reprinted in* 6 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 535, 537–38, 559 (Philip B. Kurland & Gerhard Casper eds., 1975); Plaintiffs’ Oral Argument, *Slaughter-House* (Nos. 475–480) (Feb. 3–4, 1873), *in* 6 *Landmark Briefs, supra*, at 733, 757)).

In rejecting the butchers’ claim, Justice Miller took a narrow approach to interpreting the Privileges or Immunities Clause of the Fourteenth Amendment that focused on rights that were Federal in character—those that were enumerated and guaranteed in the Constitution, such as the Bill of Rights, or implied from the structure of the Federal government. He first set out the distinction between national and State citizenship, and the privileges and immunities associated with those citizenships, since Section 1 of the Fourteenth Amendment addressed the privileges and immunities of citizens of the United States. *Slaughter-House*, 83 U.S. (16 Wall.) at 72–73. The butchers’ claims fell under the privileges and immunities of State citizenship, *id.* at 78, which included “nearly every civil right for the establishment and protection of which organized government is instituted.” *Id.* at 76. The privileges and immunities of citizens of the United States, however, were narrowly defined as those that, “owe[d] their existence to the Federal government, its National character, its Constitution, or its laws.” *Id.* at 79. The term “existence” did not mean that the

Constitution created the right. Rather, the rights were “guaranteed by the Federal Constitution.” *Id.* Included in Justice Miller’s list were textual provisions of the Constitution and Bill of Rights, such as “[t]he right to peaceably assemble and petition for redress of grievances” and the “privilege of the writ of habeas corpus,” along with “the rights secured by the thirteenth and fifteenth articles of amendment,” and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 79–80. Because the butchers’ claim was not a privilege or immunity of citizens of the United States, Justice Miller found it “useless to pursue this branch of the inquiry.” *Id.* at 80.

The wisdom of Justice Miller’s approach is seen in the possible consequences of the butchers’ broad definition of privileges or immunities. Justice Miller noted that if the Court accepted the butchers’ argument, Congress would have the power to “pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects.” *Id.* at 78. The Supreme Court would become “a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.” *Id.* Calling the consequences of the butchers’ argument “serious,” “far-reaching,” “pervading,” and “so great a departure from the structure and spirit of our institutions,” Justice Miller noted that the effect of the argument would be

to “fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character” and “radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.” *Id.* Given “the absence of language which expresses such a purpose too clearly to admit of doubt,” Justice Miller stated that “no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.” *Id.* In other words, the radical definition proposed by the butchers was entirely lacking in textual support.

Justice Miller’s narrow and carefully drawn interpretation of the Privileges or Immunities Clause was clearly an attempt to avoid the broad construction and sweeping consequences of the butchers’ claim. Miller looked carefully at Section 1’s grammar and wording to ascertain the amendment’s purpose, Robert Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. Ill. L. Rev. 739, 741, which was largely, “the freedom of the slave race, . . . and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” *Slaughter-House*, 83 U.S. (16 Wall.) at 71. It was not, as Justice Miller asked hypothetically “to transfer the security and protection of all the civil rights . . . from the States to the Federal government?” *Id.* at 77. While today we

view civil rights as synonymous with the Bill of Rights, as Newsom points out, during the Reconstruction era, the term “civil rights” were largely defined as economic rights, such as those mentioned in the Civil Rights Bill. Newsom, 109 Yale L.J. at 670–73. Bingham opposed the Civil Rights Bill in part because he believed that it would “strip the [S]tates of power to govern, centralizing all power in the Federal [g]overnment.” *Adamson v. California*, 332 U.S. 46, app. 100 (1947) (Black, J., dissenting). In a March 9, 1866, speech he explained that “the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government” and that his amendment “sought to effect no change in that respect in the Constitution of the country.” Cong. Globe, 39th Cong., 1st Sess. 1292 (1866).

Justice Miller’s narrow opinion was also a counter to the dissenting justices, who broadly defined the scope of Section 1 of the Fourteenth Amendment. Justice Field believed that “the recent amendments to the Federal Constitution protect[ed] the citizens of the United States against the deprivation of their common rights by State legislation,” and that this result “was so intended by the Congress which framed and the States which adopted it.” *Slaughter-House*, 83 U.S. (16 Wall.) at 89 (Field, J., dissenting). He further stated that “grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any *bill of rights* to render them void.” *Id.* at 111 (Field, J., dissenting) (emphasis added).

While Justice Bradley recognized that the Constitution provided “an authoritative declaration of some of the most important privileges and immunities of citizens of the United States,” *id.* at 118 (Bradley, J., dissenting), and listed some of the provisions of the Bill of Rights in his opinion, he was unwilling to limit his list to enumerated textual provisions, stating that “even if the Constitution were silent, the fundamental privileges and immunities of citizens . . . would be no less real and no less inviolable than they now are.” *Id.* at 119 (Bradley, J., dissenting).

A close reading of Justice Miller’s illustrative list of privileges and immunities of citizens of the United States supports incorporation of the Bill of Rights. His limited discussion of the Bill of Rights could be attributed to the nature of the butchers’ claim, which, under his definition, clearly fell outside the scope of privileges and immunities of citizens of the United States. He explicitly referred to several constitutional provisions, including, significantly, the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the First Amendment right to peaceably assemble and petition the government. *Id.* at 79–81. His failure to list all of the enumerated provisions in the Bill of Rights does not evidence a desire to exclude the rights not listed. He specifically noted that his list was not exhaustive. *See Slaughter-House*, 83 U.S. (16 Wall.) at 79–80. Newsom has postulated that the provisions he listed were in response to the enumerated constitutional rights that Bradley listed in dissent. Newsom, 109 Yale L.J. at 679–80. Whatever Justice Miller’s

reasoning, it would be “hard to imagine” that he intended to exclude the other Bill of Rights provisions from his understanding of privileges and immunities of citizens of the United States. *Id.* at 680. Finally, Justice Field’s reference to “requir[ing] no aid from any *bill of rights* to render” a “grant[] of exclusive privileges” void, *Slaughter-House*, 83 U.S. (16 Wall.) at 111 (Field, J., dissenting) (emphasis added), likely was a response to an incorporation reading of Miller’s opinion. Field criticized the majority for giving the amendment no meaning by limiting its definition of privileges and immunities to those that are “specially designated in the Constitution [before the adoption of the Fourteenth Amendment] or necessarily implied as belonging to citizens of the United States” *Id.* at 96 (Field, J., dissenting); see also Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051, 1094 (2000).

**B. The Court’s Opinions in
Cruikshank, Presser, and Miller
Should be Overruled to the Extent
They Hold that the Second
Amendment is not Applicable to
the States.**

The Seventh Circuit below stated that this Court “has rebuffed requests to apply the [S]econd [A]mendment to the states,” citing *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S.

535 (1894). *Nat'l Rifle Ass'n of America v. Chicago*, 567 F.3d 856, (7th Cir. 2009). Similarly, this Court in *Heller* cited those three cases as “reaffirm[ing] that the Second Amendment applies only to the Federal Government.” *Heller*, 128 S. Ct. at 2813 n.23. But in *Heller* this Court questioned *Cruikshank*’s “continuing validity on incorporation,” and noted that this Court in *Cruikshank* “did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.” *Id.*

Cruikshank, *Presser*, and *Miller* all cited to *Barron* for the proposition that the Bill of Rights “was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.” *Cruikshank*, 92 U.S. at 552; *see also Presser*, 116 U.S. at 265; *Miller*, 153 U.S. at 538. These cases, however, did not directly discuss the impact of the Fourteenth Amendment’s Privileges or Immunities Clause on the Second Amendment’s applicability to the States. Therefore, to the extent that these cases hold that the Second Amendment is not applicable to the States, such a holding is unsupported by the text and historical understanding of the Privileges or Immunities Clause, and this Court should overrule this line of cases.

CONCLUSION

We respectfully ask that the judgment of the court of appeals be reversed.

Respectfully submitted,

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