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

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Each of the *amici curiae* is a law professor who has published a book or law review article on the Fourteenth Amendment and the Bill of Rights. *Amici* teach courses on constitutional law and have devoted significant attention—in some cases, for several decades—to studying the Fourteenth Amendment.

Amici submit this brief to bring to the foreground of this case a remarkable scholarly consensus and well-documented history that shows that the Privileges or Immunities Clause of the Fourteenth Amendment was intended to protect substantive, fundamental rights, including the individual right to keep and bear arms at issue in this case.

Amici do not, in this brief, take a position on whether the particular regulation challenged in this case is constitutional in light of the individual privilege to bear arms, which, as the Court noted in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008), may be regulated to a certain extent.

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[1] Counsel for all parties received notice of *amici*'s intent to file this brief at least ten days prior to the due date; all parties have consented to this filing. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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SUMMARY OF ARGUMENT

The question in this case is whether the individual right to keep and bear arms recently recognized in *District of Columbia v. Heller*, and held applicable to the federal government, must also be protected against state infringement. The textually and historically accurate way to

determine if the states must respect an individual right to keep and bear arms is to examine the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.

Amici submit to the Court that the original meaning of the Privileges or Immunities Clause protected substantive, fundamental rights against state infringement, including the constitutional right of an individual to keep and bear arms. Indeed, the framers of this Clause specifically desired to protect the right to bear arms so that newly freed slaves and unionists would have the means to protect themselves, their families and their property against well-armed former rebels and chose language whose meaning would accomplish this end.

Precedent does not preclude the Court from adopting this faithful interpretation. The *Slaughter-House Cases* and its progeny, which held that the Fourteenth Amendment does not apply the Bill of Rights to the states, have been completely undermined by subsequent Supreme Court decisions.

Reviving the Privileges or Immunities Clause and limiting *Slaughter-House* and its progeny would bring this Court's jurisprudence in line with constitutional text and a near-unanimous scholarly consensus on the history and meaning of the Clause. *Slaughter-House* read the Privileges or Immunities Clause so narrowly as to essentially read it out of the Amendment, but "[v]irtually no serious modern scholar—left, right, and center—

thinks that this is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).

ARGUMENT

I. THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS SUBSTANTIVE FUNDAMENTAL RIGHTS AGAINST STATE INFRINGEMENT.

The Privileges or Immunities Clause was written and ratified to secure the substantive liberties protected by the Bill of Rights, as well as other fundamental rights. By 1866, the words "privileges" and "immunities" were commonly used to refer to core, inalienable rights, including those set out in the Bill of Rights. History shows that leading proponents and opponents alike of the Fourteenth Amendment understood the words of the Clause to protect substantive fundamental rights, including the rights enumerated in the Constitution and Bill of Rights.

A. Crafted Against A Backdrop Of Rights-Suppression In The South, The Privileges Or Immunities Clause Was Written To Protect Substantive Fundamental Rights.

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment was designed to make

former slaves into full and equal citizens in the new republic and secure for the nation the "new birth of freedom" President Lincoln promised at Gettysburg. 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed. 1953). The opening words of the Fourteenth Amendment marked a dramatic shift from pre-war conceptions of federalism, declaring federal citizenship paramount rather than derivative of state citizenship, and overruled the Supreme Court's decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), which held that a former slave was not a U.S. citizen under the Constitution because of his race.

In addition to declaring equal, birthright citizenship, the Amendment guaranteed federal protection of substantive fundamental rights. The framers of the Fourteenth Amendment were keenly aware that southern states had been suppressing some of the most precious constitutional rights of both slaves and their allies. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 160 (1998) ("The structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill—not just the rights and freedoms of slaves, but of free men and women too.").

Starting around 1830, southern states enacted laws restricting freedom of speech and press to suppress anti-slavery speech, even criminalizing such expression; in at least one state, writing or publishing abolitionist literature was punishable by death. These laws applied broadly, forbidding any

person—whether slave or free—from engaging in expression critical of slavery. *Id.* at 160-61; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 30, 40 (1986); MICHAEL KENT CURTIS, FREE SPEECH: THE PEOPLE'S DARLING PRIVILEGE 295-96 (2000). Political speech was repressed as well, and Republicans could not campaign for their candidates in the South. CURTIS, NO STATE SHALL ABRIDGE, at 31.

Flagrant denials of freedom of speech were most often cited, but they were hardly the only violations of fundamental rights that the Fourteenth Amendment was designed to prevent. Slaves could not freely practice their chosen religion, possess arms, or own property. Fundamental aspects of personal liberty and personal security were denied to the slaves on a daily basis. Whippings, forced separation of husbands and wives and of parents and children, rape and compulsory childbearing, were all a central part of the lives the slaves led. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 504 (1866) ("He had not the right to become a husband or father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend.") (Sen. Howard); RANDALL KENNEDY, RACE, CRIME AND THE LAW 77 (1998) ("Long after maiming, branding, ear cropping, whipping, [and] castration…had waned as an approved method of chastising whites, they remained available for the correction of slaves.").

To prevent these sorts of abuses, and new ones arising after the Civil War, the framers of Section One of the Fourteenth Amendment chose language specifically intended to protect the full panoply of fundamental rights:

> 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.[2]

The "privileges or immunities" language was chosen after an exhaustive investigation of the

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[2] U.S. CONST. amend. XIV, § 1. This sentence of Section One was the brainchild of Ohio congressman John Bingham, who served on the Joint Committee on Reconstruction. On April 21, 1866, fellow committee member Thaddeus Stevens proposed an amendment with the following as its first section: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 83-84 (1914). The fifth section of Rep. Stevens' proposal empowered Congress to enforce the amendment. Later the same day, Rep. Bingham successfully moved that the language that would eventually become the second sentence of Section One be added. *Id.* at 87. Thus, for a time, Rep. Bingham's language coexisted with Rep. Stevens' exclusively nondiscrimination provision, suggesting that their meanings were not identical. Eventually, on April 28, the Committee approved and sent to the full Congress the amendment with Rep. Bingham's Section One, *id.* at 106-07; the Citizenship Clause was added later in the Senate.

abuses of freedmen and Unionists by the Joint Committee on Reconstruction, composed of members of both the House and Senate (including Sen. Howard and Rep. Bingham). The Committee issued their findings in a June 1866 report, 150,000 copies of which were distributed widely throughout the country. *See* KENDRICK, at 265. The report confirmed the systematic violation of fundamental rights by southern states, demanding "changes of the organic law" to secure the "civil rights and privileges of all citizens in all parts of the republic." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xxi (1866).

The problems motivating the framers of the Privileges or Immunities Clause—for example, deprivations of the right to free speech, the right to bear arms, and other denials of liberty and personal security in the southern states—are strong evidence that the Clause was drafted to protect fundamental rights against state infringement. As discussed in the next sections, the public meaning of the words "privileges" and "immunities" and the floor debates over the Amendment confirm the intent to use the Clause to protect substantive rights in the States.

B. By 1866, The Public Meaning Of "Privileges" And "Immunities" Included Fundamental Rights.

The words Bingham chose—"privileges or immunities"—to protect fundamental rights against state infringement carried established public meaning. By 1866, the privileges or

immunities of citizenship were understood to include the rights and liberties already protected by the Constitution, such as the right to keep and bear arms, as well as other rights inherent in full and equal citizenship. In addition to providing the textual basis for protection of the liberties in the Bill of Rights, the Clause is "the natural textual home for…unenumerated fundamental rights." Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 449 (1990). It mimics the Ninth Amendment, which provides that there are individual rights protected by the Constitution not spelled out in the text. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

From our very beginnings, Americans used the words "privileges" and "immunities" interchangeably with words like "rights" or "liberties." *See* AMAR, at 166-69; Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1094-1136 (2000). The earliest charters of the American colonies referred to "Liberties, Franchises, and Immunities," as in Virginia's 1606 charter, or "[L]iberties Immunities and priveledges," as in Massachusetts' 1641 charter.[3]

[3] The First Charter of Virginia (1606), *reprinted in* SOURCES OF OUR LIBERTIES 39, 44 (Richard L. Perry ed. 1978) [hereinafter SOURCES], and Massachusetts Body of Liberties, pmbl. (1641), *reprinted in* SOURCES, at 148; *see also* The Charter of Maryland, art. XVI (1632), *reprinted in* SOURCES,

When James Madison proposed the Bill of Rights in Congress, he spoke of the "freedom of the press" and "rights of conscience" as the "choicest privileges of the people," and included in his proposed Bill a provision restraining the States from violating freedom of expression and the right to jury trial because "State governments are as liable to attack these invaluable privileges as the General Government is…." 1 Annals of Congress 453, 458 (1789); *see also id.* at 766 (discussing the proposed Bill of Rights as "securing the rights and privileges of the people of America").

The phrase "privileges and immunities" appears in the original Constitution in Article IV, § 2: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), Justice Bushrod Washington—a nephew of George Washington who advocated for ratification of the Constitution in Virginia before serving for several decades on the Supreme Court—explained the meaning of this phrase in a lengthy

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at 105, 111 ("Rights, Jurisdictions, Liberties, and Privileges…."); The Charter of Massachusetts Bay (1629), *reprinted in* SOURCES, at 82, 93 ("[L]iberties and Immunities…."); Pennsylvania Charter of Privileges (1701) ("Liberties, Franchises and Privileges...."), *reprinted in* SOURCES, at 255–56; Concessions and Agreements of West New Jersey (1677) ("[T]he common law or fundamental rights and privileges...."), *reprinted in* SOURCES, at 184. For further discussion, see Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1296 & n.6 (2009).

passage that would repeatedly be quoted in its entirety by members of the Thirty-ninth Congress:[4]

> 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.

6 F. Cas. at 551-52 (emphasis added). *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 62-65 (2004) (describing the repeated reliance on *Corfield*).

Justice Washington's canonical definition of the Constitution's term "privileges and immunities" drew on the framing-era understanding that the words "privileges" or "immunities" were associated with broad protection of substantive liberty. Indeed, Washington's formulation was little more than a restatement of the Declaration of Independence's recognition that "all men are created equal" and "endowed by their Creator with

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[4]*See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull) (invoking *Corfield*); *id.* at 1117-18 (Rep. Wilson) (same); *id.* at 1835 (Rep. Lawrence) (same); *id.* at 2765 (Sen. Howard).

certain unalienable rights," and that "among these are life, liberty, and the pursuit of happiness." *See* CHARLES L. BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 50 (1997) ("It was natural…that the famous words of the Declaration should be taken as supremely suitable to fill out and explain the words 'privileges and immunities of citizens'.").

Corfield was not alone in looking to the words of the Declaration of Independence for guidance. By 1868, when the Fourteenth Amendment was ratified, twenty-seven states (of the thirty-seven states then in the Union) had inserted into their own state constitutions provisions that guaranteed the protection of fundamental, inalienable rights, many tracking the words of the Declaration. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in History and Tradition?*, 87 TEX. L. REV. 7, 88 (2008). The Indiana, New York, and Wisconsin constitutions, for example, hewed to the wording of the Declaration,[5] while many others used a formulation virtually identical to *Corfield*'s.[6]

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[5] IND. CONST. art. I, § 1 ("WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."); N.Y. CONST. of 1777 pmbl. ("We hold these Truths to be self-evident, that all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the Pursuit of Happiness."); WISC. CONST. art. I, § 1 (amended 1982) ("All men are born equally free and

independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness….").

[6] *E.g.*, ILL. CONST. of 1818 art. VIII, § 1 ("[A]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness."); IOWA CONST. art. I, § 1 (amended 1998) ("All men are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursing and obtaining safety and happiness."); MASS. CONST. pt. I, art. I (amended 1976) ("All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."); N.H. CONST. pt. 1, art. II (amended 1974) ("All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and ...seeking and obtaining happiness."); OHIO CONST. art. I, § 1 ("All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety...."); PA. CONST. art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."); VT. CONST. ch. 1, art. I (amended 1924) ("[A]ll men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety....").

Thus, when Justice Washington in *Corfield* described some of the privileges and immunities of Article IV, § 2, as "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," he was describing what were commonly understood to be core fundamental rights. Justice Washington's interpretation informed the public meaning of the text of the Privileges or Immunities Clause in the Fourteenth Amendment.

C. The Congressional Debates Over The Fourteenth Amendment Show That The Privileges Or Immunities Clause Encompassed Substantive Fundamental Rights, Including The Personal Rights In The Bill Of Rights.

In line with the public meaning identifying "privileges" or "immunities" with broad protections for substantive liberty, the debates in Congress over the adoption of the Fourteenth Amendment affirm that the Privileges or Immunities Clause was understood and described to the ratifying public as securing substantive fundamental rights, including the right to keep and bear arms and other fundamental rights enumerated in the Bill of Rights.

Indeed, it was precisely because the words "privileges" and "immunities" were so closely associated with the Declaration of Independence's protection of fundamental rights that the Fourteenth Amendment's framers turned to these

words in drafting the Privileges or Immunities Clause. The Declaration's promises—invoked by Lincoln at Gettysburg in his call for a "new birth of freedom"—were at the heart of the Fourteenth Amendment's constitutional design. In the words of Rep. Schuyler Colfax, Speaker of the House in 1866, the Fourteenth Amendment would be "the gem of the Constitution…because it is the Declaration of Independence placed immutably and forever in our Constitution." *See* CINCINNATI COMMERCIAL, Aug. 9, 1866, at p.2, col. 3.

In the Senate debates on the Amendment, the clearest description of the Privileges or Immunities Clause was provided by Sen. Jacob Howard, who spoke on behalf of the Joint Committee. Sen. Howard distinguished between two categories of "privileges or immunities of citizens of the United States as such." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). The first were those "privileges and immunities of the citizens of each State in the several states," *id*., to which Article IV, § 2, refers. Sen. Howard quoted in its entirety the relevant passage of the "very learned and excellent," *id*., Justice Washington's opinion in *Corfield*, including its invocation of the canonical formulation of fundamental, inalienable rights drawn from the Declaration: "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*. (quoting *Corfield*, 6 F. Cas. at 551-52).

Second, after observing that the "privileges and immunities spoken of in the second section of the fourth article...are not and cannot be fully defined in their entire extent and precise nature," Sen. Howard offered another source of privileges or immunities:

> [T]o 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 of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right pertaining to each and all of the people; *the right to keep and bear arms*; the right to be exempted from the quartering of soldiers in a house without consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (emphases added). *See also* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509,

1562-63 (2007) (discussing Sen. Howard's speech and noting that it refutes any claim that the privileges or immunities of Section One were unrelated to the protections in the Bill of Rights).[7] Sen. Howard omitted from his list the "due process of law," which was expressly extended to all "persons" in Section One.

With respect to this "mass of privileges, immunities, and rights, some of them secured by" Article IV, § 2, and "some by the first eight amendments," Sen. Howard noted judicial decisions holding that neither set of rights "operate in the slightest degree as a restraint or prohibition upon State legislation" infringing the rights of the state's own citizens. Cong. Globe, 39th Cong., 1st Sess. at 2765. For example, "it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon

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[7] This speech by Sen. Howard, explaining that the Privileges or Immunities Clause included at least the rights guaranteed by the first eight amendments in the Bill of Rights, "was reprinted as front page news the next day in the New York Times." Wildenthal, 68 OHIO ST. L.J. at 1564. In addition, "[a]t least four other major papers apparently covered the relevant parts of Sen. Howard's speech: the Philadelphia Inquirer, the Washington, D.C. National Intelligencer, the front page of the New York Herald, and, with only slight ambiguity, the front page of the Boston Daily Advertiser." *Id*. The coverage of the debates—in particular, speeches by Rep. Bingham and Sen. Howard—"provides substantial evidence that the national body politic, during 1866-68, was placed on fair notice about the incorporationist design of the Amendment." *Id*. at 1590.

State legislation, but applies only to the legislation of Congress." *Id*. Nor are such rights enforceable under "the sweeping clause of the Constitution…." *Id*. at 2766. "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." *Id*.

In the House, Thaddeus Stevens, a member of the Joint Committee, made it abundantly clear that the substantive privileges and immunities of citizens encompassed the liberties set forth in the Bill of Rights. He explained that "the 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). James Wilson, Chairman of the House Judiciary Committee, similarly stated, prior to the drafting of the Amendment, that "the people of the free States should insist on ample protection to their rights, privileges and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike." Cong. Globe, 38th Cong., 1st Sess. 1203 (1864).

Rep. Bingham, too, emphasized that the Privileges or Immunities Clause protected the fundamental rights of citizens, noting that the Clause provided a remedy against "State injustice and oppression…in the State legislation of the Union, of flagrant violations of the guarantied privileges of citizens of the United States…." Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). Rep. Bingham saw in the words "privileges" or "immunities" a broad constitutional mandate for

protection of "life, liberty, and property," *id.*, a view dating back at least to 1859, when Bingham had objected that a provision of the Oregon Constitution that denied free blacks the right to reside or hold property in the State violated Article IV's Privileges and Immunities Clause.[8]

Rep. Bingham reiterated his long-held view that Congress should have the power to enforce the Bill of Rights against the States. Before the Fourteenth Amendment was introduced, he had explained to the House that a constitutional amendment was needed to empower Congress to protect the privileges or immunities of citizens because of the Supreme Court's opinions in *Barron v. Baltimore*, 32 U.S. 243 (1833), and *Livingston v. Moore*, 32 U.S. 469 (1833), both of which held that the Bill of Rights did not apply to the states. Cong. Globe, 39th Cong., 1st Sess. 1089-90 (1866). Rep. Bingham viewed the Fourteenth Amendment as correcting this "want," and ensuring national protection of "the privileges and immunities of all the citizens of the Republic and all the inborn rights of every person…whenever the same shall be abridged or denied by the unconstitutional acts of

[8] As in the 1866 debates, in 1859, Rep. Bingham had argued that constitutionally-protected privileges and immunities included "rights of life and liberty and property, and their due protection in the enjoyment thereof," specifically including freedoms such as "the right to know; to argue and to utter according to…conscience; [and] to work and enjoy the product of [one's] toil." Cong. Globe, 35th Cong., 2nd Sess. 984, 985 (1859).

any State." Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).[9]

Accordingly, the most influential and knowledgeable members of the Reconstruction Congress went on record with their express belief that Section One of the Fourteenth Amendment—and, in most instances, the Privileges or Immunities Clause specifically—protected against state infringement of fundamental rights, including the liberties secured by the first eight articles of the Bill of Rights. Not a single senator or representative disputed this understanding of the privileges and immunities of citizenship or Section One. *See, e.g.*, AMAR, at 187; CURTIS, NO STATE SHALL ABRIDGE, at 91; Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 932 (1986). To the contrary, whether in debates over the Fourteenth Amendment or its statutory analogue, the Civil Rights Act of 1866, Republicans in Congress affirmed two central points: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the

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[9] After ratification, Rep. Bingham maintained that "the privileges or immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871). After reading the first eight amendments word for word, he continued: "These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment." *Id.* *See generally* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment,* 103 YALE L.J. 57, 74 (1993).

Bill of Rights, and that, in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship.

D. The Wording Of The Privileges Or Immunities Clause Is Broader Than The Privileges And Immunities Clause Of Article IV.

While the Privileges or Immunities Clause in the Fourteenth Amendment draws on the public meaning of "privileges" and "immunities" in Article IV, discussed, *supra*, in Section I.B, its wording is more expansive in at least two respects.

First, unlike Article IV, which forbids a state from discriminating against outsiders by denying them the "Privileges And Immunities" protected by the Clause, *see* THE FEDERALIST No. 80 (Alexander Hamilton) 476-77 (Clinton Rossiter ed. 1999) (describing Article IV as the "basis of the Union" because it demands "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled"), the Privileges or Immunities Clause is not limited to discrimination. Instead, it prohibits the making or enforcement of any state law that "abridges the privileges or immunities" of any or all citizens of the United States. It concerns the substantive fundamental rights that all states must respect. To make out a violation of the Privileges or Immunities Clause, a citizen need not show that she has been subject to discrimination, only that governmental action has violated her fundamental rights.

Second, unlike Article IV's reference to "citizens *of each state*," Section One of the Fourteenth Amendment protects all the "privileges or immunities of citizens *of the United States*." Citizens of the United States not only possessed the privileges and immunities identified in *Corfield*, they also possessed the privileges and immunities enumerated in the Bill of Rights and elsewhere in the Constitution. By enforcing all such rights against the states, Section One thereby reversed *Barron v. Baltimore*, 32 U.S. 243 (1833). In addition, Section Five of the Fourteenth Amendment expressly empowered Congress to enforce Section One's restriction on the lawmaking power of states, unlike Article IV, § 2.

That the public meaning of the Privileges or Immunities Clause in Section One was broader than the Privileges and Immunities Clause in Article IV is evidenced by an alternative to the Fourteenth Amendment, then pending ratification in the states, that was drafted in consultation with President Johnson by a group of Southerners, including the governors of Mississippi, South Carolina, Alabama, Florida, and North Carolina.[10] Their aim was "to agree on some measure as a basis of reconstruction, which will be adopted by the Southern people, meet the views of the

[10] *See* N.Y. TIMES, Feb. 5, 1867, at 5 ("During the past two weeks a large number of prominent Southern men, who may be taken as representative men of their States, have been [in Washington] and have daily consultations with the President upon this important subject.").

President, and at the same time receive approval of the majority in Congress."[11] Their efforts culminated in a proposed amendment that eliminated the congressional enforcement power in Section Five, and made a revealing change to Section One. The third section of their proposal was worded as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States in which they reside; and *the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States*. No State shall 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.[12]

Significantly, the only deviation from Section One was the substitution of the wording of Article IV, § 2—with that provision's focus on rights of state citizenship and non-discrimination—for the wording of the Privileges or Immunities Clause.

This alternative formulation is powerful evidence that the public meaning of the Privileges or Immunities Clause of Section One was broader

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[11] *Id*. *See also* WALTER FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 238-40 (1906) (reprinting draft with President Johnson's annotations).

[12] N.Y. TIMES, *supra*, at 5 (emphasis added).

than the Privileges and Immunities Clause of Article IV. When combined with the elimination of Section Five, this alteration would have sharply curtailed, if not eliminated, the power of the federal courts and Congress to protect fundamental rights of blacks, Unionists and Republicans in the South. Arguably, neither the courts nor Congress could have enforced the substantive protections of the Bill of Rights against the states, and whatever protection might have been afforded U.S. citizens would have been limited to discrimination against U.S. citizens from other states.

II. THE FOURTEENTH AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE INCLUDED AN INDIVIDUAL RIGHT TO BEAR ARMS.

As was shown in Section I, *supra*, the public meaning of "privileges or immunities of citizens of the United States" included the "personal rights guarantied and secured by the first eight amendments of the Constitution," such as the individual "right to keep and bear arms." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard).

The Reconstruction Congress was particularly concerned that the right to arms be protected in order to enable the freedmen to protect themselves from violence, including violence by southern militias. "Confederate veterans still wearing their gray uniforms…frequently terrorized the black population, ransacking their homes to seize shotguns and other property and abusing those

who refused to sign plantation labor contracts." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 203 (1988). *See also* Cong. Globe, 39th Cong., 1st Sess. 40 (1866) (Sen. Wilson) ("In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them."); *id.* at 914, 941 (Letter from Colonel Samuel Thomas to Major General O.O. Howard, quoted by Sens. Wilson and Trumbull) ("Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of [the state] militia."). *See generally* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 346 (1991) (arguing that efforts to disarm freed slaves "played an important part in convincing the 39th Congress that traditional notions concerning federalism and individual rights needed to change").

Of central concern to the Joint Committee on Reconstruction and Congress were the Black Codes.[13] The Black Codes undermined the ability of the freedmen to defend themselves by prohibiting former slaves from having their own firearms. *See* FONER, at 199-201; CURTIS, NO STATE SHALL ABRIDGE, at 35. *See also Heller*, 128 S.Ct. at

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[13] For discussions of the Black Codes in Congress, see Cong. Globe, 39th Cong., 1st Sess. 93-94 (1865); *id.* at 340 (1866); *id.* at 474-75; *id.* at 516-17; *id.* at 588-89; *id.* at 632; *id.* at 651; *id.* at 783; *id.* at 1123-24; *id.* at 1160; *id.* at 1617; *id.* at 1621; *id.* at 1838.

2810 (noting that "[b]lacks were routinely disarmed by Southern States after the Civil War" and that opponents of "these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms"). Members of the Reconstruction Congress condemned these laws. One senator explained that the newly freed slaves should be guaranteed the "essential safeguards of the Constitution," including "the right to bear arms," Cong. Globe, 39th Cong., 1st Sess. at 1183 (Sen. Pomeroy); another member of Congress described how southern states had disarmed blacks. *Id.* at 1838-39 (Rep. Clarke). Rep. Eliot decried a Louisiana ordinance that prevented freedmen not in the military from possessing firearms within town limits without special written permission from an employer. *Id.* at 516-17.

Because state statutes disarming freedmen—as well as legislative restrictions on other fundamental rights—were considered to be the South's post-war attempt to re-institutionalize the system of slavery in a different guise, Congress initially thought itself justified in exercising its Thirteenth Amendment powers to enact the Civil Rights Act of 1866. If slavery is the opposite of liberty, then the Thirteenth Amendment empowered Congress to police restrictions on fundamental liberties that amounted to a partial imposition of slavery.[14] However, as Frederick

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[14] *See id.* at 474 (Sen. Trumbull) ("Liberty and slavery are opposite terms; one is opposed to the other."); *id.* at 475 ("[I]t is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law...that does not

Douglass explained in 1865, the Thirteenth Amendment was not adequate protection for these liberties:

> [W]hile the Legislatures of the South can take from him the right to keep and bear arms, as they can—they would not allow a Negro to walk with a cane where I came from, they would not allow five of them to assemble together—the work of the Abolitionists is not finished. Notwithstanding the provision in the Constitution of the United States, that the right to keep and bear arms shall not be abridged, the black man has never had the right either to keep [or] bear arms; and the Legislatures of the States will still have the power to forbid it, under this Amendment.

Speech of Frederick Douglass to the Anti-Slavery Society, May 10, 1865 *in* THE CIVIL WAR ARCHIVE: THE HISTORY OF THE CIVIL WAR IN DOCUMENTS 584 (Henry Steele Commager & Erik Bruun eds. 2000).

The Joint Committee investigated the disarmament of African Americans, raising concerns about the deprivation of the right to arms. It reported testimony that the Southerners "are

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allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.").

extremely reluctant to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property," and noted that "[t]he planters are disposed…to insert into their contracts tyrannical provisions,…to prevent the negroes from leaving the plantation…or to have fire-arms in their possession." REPORT OF THE JOINT COMMITTEE Pt. II, 4 and Pt. II, 240. *See* Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995) (presenting chronologically testimony heard by the Joint Committee on southern efforts to disarm freedmen and Unionists).

In this way, "Reconstruction Republicans recast arms bearing as a core *civil* right.…Arms were needed not as part of political and politicized militia service but to protect one's individual homestead." AMAR, at 258-59. *See also* William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1251-53 & n.55 (1994) (noting that the "personal protection" aspect of the right to keep and bear arms was even more clear at the time the Fourteenth Amendment was passed than in the original Second Amendment). Sen. Pomeroy listed as one of the constitutional "safeguards of liberty" the "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866); *see also id.* ("And if the cabin door of the freedmen is broken open…then should a well-loaded musket be in the hand of the

occupant to send the polluted wretch to another world…."). There is no record of any member of Congress ever denying this claim.

The Reconstruction Congress acted to explicitly protect the right of the freedmen to keep and bear arms in the re-enacted Freedman's Bureau Bill, which provided that African Americans should have "the full and equal benefit of all laws and proceedings for the security of person and property, *including the constitutional right of bearing arms*." 14 Stat. 173 (39th Cong. 1866) (emphasis added). *See also* Cong. Globe, 39th Cong., 1st Sess. 654 (Rep. Eliot) (proposing the addition of the words "including the constitutional right to bear arms"); *id.* at 585 (Rep. Banks) (stating his intent to modify the bill so that it explicitly protected "the constitutional right to bear arms").

By employing the phrase "privileges or immunities of citizens of the United States," the Joint Committee on Reconstruction worded Section One broadly enough to protect substantive fundamental rights enumerated in the Bill of Rights, including the right to keep and bear arms.

III. PRECEDENT DOES NOT PREVENT THE COURT FROM RECOGNIZING THAT THE PRIVILEGES OR IMMUNITIES CLAUSE PROTECTS AN INDIVIDUAL RIGHT TO BEAR ARMS AGAINST STATE INFRINGEMENT.

This Court should follow the text, history, and original public meaning of the Privileges or

Immunities Clause of the Fourteenth Amendment to protect an individual right to bear arms. Previous decisions notwithstanding, it is never too late to adhere to the text of the Constitution.

A. *Slaughter-House* And Its Progeny Were Wrong As A Matter Of Text And History And Have Been Completely Undermined By This Court's Subsequent Application Of Most Of The Bill Of Rights To The States.

In explaining to the House the need for a constitutional amendment to secure fundamental rights, Rep. Bingham complained of the absurdity that "[w]e 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). Ironically, when the Supreme Court later limited the scope of the Privileges or Immunities Clause to rights of a purely federal nature, it gave as an example the right to "the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government," *Slaughter-House Cases*, 83 U.S. 36, 79 (1873), despite the fact that the authors of the Clause clearly saw the protection of life, liberty, and property in the states as requiring more immediate federal protection.

Further stalling the project of rights-protection in the states, three years later, the Court

held that the protections of the Bill of Rights limited only the federal government. *United States v. Cruikshank*, 92 U.S. 542 (1876) (finding that the First and Second Amendments secure rights only against federal infringement). *Cruikshank* essentially reinstated *Barron v. Baltimore*, which the framers of the Fourteenth Amendment thought they had superseded. *See supra* Section I.C. Both *Slaughter-House* and *Cruikshank* reflected a national mood that had grown weary of Reconstruction. *See* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 38 (2007) (arguing that "there can be no doubt that *Slaughter-House* and *Cruikshank* reflected America's loss of will to memorialize the reforms begun in the late-1860s").

The reasoning employed by Justice Miller to reach the result in *Slaughter-House* directly contradicted the original meaning of the Privileges or Immunities Clause and eviscerated its intended effect from that day to this. While Justice Miller did cite *Corfield*, it was only to reject the proposition that the framers of the Fourteenth Amendment intended to protect the fundamental rights recognized by Justice Washington. Justice Miller's principal support for this claim was that the consequences of providing federal protection of these civil rights would be too radical to have been intended by Congress. *Slaughter-House*, 83 U.S. at 75-78. He offered no evidence for this speculation—and ignored overwhelming evidence to the contrary. Justice Miller effectively wrote the Privileges or

Immunities Clause out of the Constitution, bringing the Amendment in line with President Johnson's alternative Fourteenth Amendment that Miller had supported. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 660 n. 228 (1994).

In contrast, the dissents in *Slaughter-House* summarized the original meaning of the Privileges or Immunities Clause described in Section I, *supra*, and powerfully rebutted Justice Miller's opinion. Justice Swayne observed that the majority's cramped reading of the Clause "turns...what was meant for bread into stone. By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment." *Slaughter-House*, 83 U.S. at 129 (Swayne, J., dissenting). Similarly, Justice Field accused the majority of reducing the Clause to "a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage." *Id.* at 96 (Field, J., dissenting). Following a lengthy quote from *Corfield,* Field declared: "This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those *which of right belong to the citizens of all free governments*." *Id*. at 97.

The decision in *Slaughter-House* was immediately condemned by former members of the Thirty-ninth Congress as a "great mistake," Cong.

Rec., 43rd Cong., 1st Sess. 4116 (1874) (Sen. Boutwell), which had perverted the Constitution by "assert[ing] a principle of constitutional law which I do not believe will ever be accepted by the profession or the people of the United States." *Id.* at 4148 (Sen. Howe). Senator George Franklin Edmunds said that the *Slaughter-House* Court's view of the Privileges or Immunities Clause "radically differed" from the framers' intent. CURTIS, NO STATE SHALL ABRIDGE, at 177; s*ee also* Lawrence, 72 MO. L. REV. at 29-35.

The reading given to the Privileges or Immunities Clause in *Slaughter-House* and its progeny is contrary to an overwhelming consensus among leading constitutional scholars today, who agree that the opinion is egregiously wrong.[15] "Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the Amendment." Amar, 28 PEPP. L. REV. at 631 n.178.[16]

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[15] *E.g.*, AMAR, at 163-230; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22-30 (1980); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 7-6, at 1320-31 (2000); BARNETT, at 195-203; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313-15, 317-18 (2007); Aynes, 11 U. PA. J. CONST. L. at 1310. *See generally* DAVID H. GANS & DOUGLAS T. KENDALL, THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT (2008).

[16] Undoubtedly, there are a handful of modern scholars willing to come to the defense of Justice Miller's interpretation of the Privileges or Immunities Clause, but the contrary consensus of preeminent constitutional scholars and

Indeed, the principle for which *Slaughter-House* and *Cruikshank* stand—that the personal liberties in the Bill of Rights and other fundamental rights do not limit the states—has been repudiated by the Supreme Court's subsequent "incorporation" of most of the Bill of Rights as a limit on the states, and its protection of unenumerated fundamental rights. In overruling cases such as *Maxwell v. Dow*, 176 U.S. 581 (1900), *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947),[17] the Court has rejected the foundation upon which *Slaughter-House* was built: the idea that the Fourteenth Amendment did not fundamentally change the balance of federal/state power and that Americans should look solely to state government for the protection of their most basic rights.[18]

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authoritative historians of otherwise disparate viewpoints is truly remarkable.

[17] *E.g.*, *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964) (overruling *Twining* and *Adamson*); *Duncan v. Louisiana*, 391 U.S. 145, 154-55 (1968) (rejecting dicta in *Maxwell*).

[18] Recognizing at long last the original meaning of the Privileges or Immunities Clause would not prevent the states from exercising their police power to regulate the rights to which it refers. As was explained by Justice Bradley, "[t]he right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves." *Slaughter-House*, 83 U.S. at 114 (Bradley, J., dissenting). Since *Slaughter-House* was decided, the Court has gained much experience in policing this type of

With the reasoning of *Slaughter-House* superseded by modern Supreme Court doctrine, *amici* urge the Court to take this opportunity to restore the Privileges or Immunities Clause to its rightful and intended place at the heart of the Fourteenth Amendment. As professors of constitutional law, we look forward to the day when we can teach our students how the Supreme Court corrected this grievous error.

B. Reviving The Privileges Or Immunities Clause Will Not Prejudice The Constitutional Rights And Liberties Of Noncitizens.

The Thirty-ninth Congress was particularly concerned with extending citizenship to the freedmen and protecting their rights as citizens, which had been denied in *Dred Scott*, as well as the rights of Unionists and Republicans in the South. However, it also took care to ensure that the fundamental rights of all "persons" would be protected by the Due Process and Equal Protection Clauses.

As was explained by Rep. Bingham as early as 1859, the Due Process Clause of the Fifth Amendment protected the fundamental rights of

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line in a variety of contexts where fundamental rights are at stake.

life, liberty, and property of all persons, citizen and noncitizen alike, from arbitrary restrictions.

> [N]atural and inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word "person," as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race….

Cong. Globe, 35th Cong., 2nd Sess. 983 (1859). According to Rep. Bingham, the the Fourteenth Amendment's Due Process Clause protected the "natural rights" of life, liberty and property of "all persons, whether citizens or strangers," *id*., from infringement by states.

Later discussing a precursor of the Fourteenth Amendment, Rep. Bingham explained that "no man, no matter what his color, no matter beneath what sky he may have been born…shall be deprived of life or liberty or property without due process of law…." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866). He also demanded that "all persons, whether citizens or strangers, within this the land…have equal protection in every State of this Union in the rights of life and liberty and property." *Id.* at 1090. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1224 (1992) ("Bingham, Howard, and company wanted to go even further [than

protecting citizens] by extending the benefits of state due process to aliens."). *See also* AMAR, at 182 (explaining that the "privileges-or-immunities clause would protect citizen rights, and the due-process and equal-protection principles (which Bingham saw as paired, if not synonymous) would protect the wider category of persons"); Aynes, 103 YALE L.J. at 68 ("An examination of the language of the proposed Amendment shows that its 'privileges and immunities' clause would apply only to citizens, whereas its 'life, liberty, and property' clause would apply more expansively to 'all persons.'").

Additionally, Sen. Howard explained how the Equal Protection Clause in the Fourteenth Amendment bars caste legislation and protects all persons from arbitrary classifications. The Equal Protection Clause "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). *See also id.* at 2459 (Rep. Stevens) ("This amendment…allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.").

Indeed, the very first statute passed to enforce the Fourteenth Amendment protected the rights of aliens to equality under the law. In 1870, Congress used its newly granted power to enforce the Fourteenth Amendment to pass the Enforcement Act of 1870, 16 Stat. 140, 144 (codified at 42 U.S.C. § 1981), which protected the rights of resident

aliens, primarily Chinese immigrants in California, against pervasive racial discrimination. *See* Neal K. Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1368-70 (2007) (discussing statute). As one senator explained, "we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws and the same laws that other men are." Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870). During the debates over the Enforcement Act, Rep. Bingham emphasized that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws." *Id.* at 3871.

Amici believe the existing rights of noncitizens are fully protected by the Due Process and Equal Protection Clauses. State governments are required to provide noncitizens with a full range of procedural protections and need a constitutionally permissible reason for either restricting the liberties of noncitizens or discriminating against any "person" with regard to the fundamental rights accorded to citizens.

CONCLUSION

The text, history, and original public meaning of the Privileges or Immunities Clause show that the Clause protects substantive fundamental rights—including the personal liberties enumerated in the Bill of Rights—against state infringement. Accordingly, *amici* urge the Court to find that the Privileges or Immunities Clause

protects an individual right to keep and bear arms against state infringement, reverse the decision of the Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

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