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## Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses

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The Second Amendment,<sup>1</sup> alternately maligned over the years as the black sheep of the constitutional family<sup>2</sup> and praised as a palladium of the liberties of a republic,<sup>3</sup> should be recognized by the United States Supreme Court to apply to the several States through the Fourteenth Amendment privileges or immunities clause or, alternatively, through the due process clause.

This article suggests that the issue of Second Amendment incorporation presents a useful contemporary mechanism for the Court to revive the long-dormant Fourteenth Amendment privileges or immunities clause. Such judicial recognition of the clause is necessary to respect the Framers' vision, as inspired by the Declaration of Independence and laid out in the amended Constitution, for a government that would serve, instead of rule, the people. Government would exercise its necessary, limited role, and otherwise leave the people alone, with the Constitution standing ever watchful as guardian to assure that government would not overstep its bounds, as governments are apt to do.

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1. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

2. Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 783 (1997) (concluding that the Second Amendment is a fundamental personal right).

3. 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1897, at 646 (Melville M. Bigelow ed., Little, Brown, and Co. 5th ed. 1891) (1833) (describing Second Amendment as a "palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, . . . [thus] enabl[ing] the people to resist and triumph over them."

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## I. INTRODUCTION

The Constitution that was actually enacted and formally amended creates islands of government powers in a sea of liberty. The judicially redacted constitution creates *islands of liberty rights in a sea of government powers*.<sup>4</sup>

Whether by resurrecting the privileges or immunities clause or, alternatively, through application of the Court's "selective incorporation" doctrine under the due process clause, historical evidence demonstrates that the Second Amendment was originally intended and understood to provide

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4. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION 1* (2004) (emphasis added).

constitutional protection from federal *and* state government encroachment.<sup>5</sup> The question of whether the Second Amendment should be incorporated presents a useful vehicle for the Court to extend upon its 1999 acknowledgement in *Saenz v. Roe* that the Fourteenth Amendment privileges or immunities clause continues to exist in twenty-first century America. *Saenz* raises the possibility that the clause may still, after all this time, be allowed to fulfill the original civil libertarian meaning that the framers and the ratifying States intended for it.

The enactment and ratification of the privileges or immunities clause, together with the rest of the Fourteenth Amendment, was a monumental achievement in American history. With this radical act, We the People moved to counteract American government's time-proven discriminatory *modus operandi* by strictly prohibiting any exercise of governmental power that would "abridge the privileges or immunities," meant to be broadly read as "individual natural rights," including the Bill of Rights and other enumerated and unenumerated rights of all American citizens.<sup>6</sup> In returning to the Enlightenment-inspired Revolutionary ideals expressed in the Declaration of Independence, Constitution, and Bill of Rights,<sup>7</sup> section one was designed to

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5. Let us be perfectly clear: to say that a right is entitled to constitutional protection is *not* to say that the right is immune from government regulation. Shared governmental/popular sovereignty contemplates that government may properly regulate (but not prohibit) even constitutionally-protected liberties if it meets its heavy burden of proof that the regulation is necessary and proper and serves a compelling government interest. *See infra* text accompanying notes 27-30. Narrowly-tailored regulations on guns, with their inherent dangerous nature as a weapon with great potential to cause deadly harm to others, serve government's compelling interest to protect health and safety. Professor Laurence Tribe correctly notes,

[measures that] by and large do not seek to ban all firearms, but seek only to prohibit a narrow type of weaponry (such as assault rifles) or to regulate gun ownership by means of waiting periods, registration, mandatory safety devices, or the like . . . are plainly constitutional. . . . Even in colonial times the weaponry of the militia was subject to regulation, and Article I, § 8, clause 16, evidently contemplates a continuing role for Congress in deciding how the "militia" may be "organiz[ed], arm[ed], and disciplin[ed]."

1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 902-03 (3d ed. 2000) (alteration in original).

6. The Fourteenth Amendment Framers' desire for *freedom and independence* was at the core of the Constitution's founders' desire to abolish the culture of pervasive dependence that existed from the earliest colonial days up until the Revolution. *See generally* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

7. *See, e.g.*, WOOD, *supra* note 6 at 189-91 (stating, "[f]or the revolutionary generation, America became the Enlightenment fulfilled. . . . 'the opening of a grand scene and design in Providence for the illumination of the ignorant, and the emancipation of the slavish part of mankind all over the earth.'" (quoting John Adams, *Disser-*

reinstate, to borrow Professor Barnett's imagery, an American "sea of [individual] liberty" interrupted only occasionally by discrete "islands of government power[]." <sup>8</sup>

It is helpful to recall Publius's conception of government's subordinate role in the constitutional design, as explained in Federalist 51 in the *New York Packet* on February 8, 1788, urging ratification of the new Constitution:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. *A dependence on the people is, no doubt, the primary control on the government*; but experience has taught mankind the necessity of auxiliary precautions. This policy of [correcting], by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the *constant aim* to divide and arrange the several offices in such a manner as that each may be a check on the other *that the private interest of every individual may be a sentinel over the public rights.* <sup>9</sup>

The damage done by the Supreme Court to this expressed ideal in two cases less than a decade after ratification of the Fourteenth Amendment—which had, after all, been designed and ratified with the purpose of restoring the primacy of "the private interest of every individual" over an out-of-control (in this case, State) government—cannot be overstated. The Court effectively nullified the privileges or immunities clause in the *Slaughter-House Cases*,<sup>10</sup> and in *United States v. Cruikshank*,<sup>11</sup> the Court held that the Bill of Rights, including the Second Amendment right to keep and bear arms, did not apply to the States. In these two rulings, the Court betrayed the will of the people as it had been expressed and

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*tation on the Feudal and Canon Law, in GORDON S. WOOD, THE RISING GLORY OF AMERICA, 1760-1820, at 29 (1971)).* Bernard Bailyn stated:

No less a figure than Voltaire stated [in 1734] that America was the refinement of all that was good in England, writing in his *Lettres Philosophiques* that Penn and the Quakers had actually brought into existence "that golden age of which men talk so much and which probably has never existed anywhere except in Pennsylvania."

BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 84 (1967).

8. BARNETT, *supra* note 1, at 1.

9. THE FEDERALIST No. 51 (James Madison) (emphasis added).

10. 83 U.S. 36, 78-79 (1872). For a discussion of the *Slaughter-House Cases* see *infra* notes 111-26 and accompanying text.

11. 92 U.S. 542 (1875). For a discussion of *Cruikshank*, see *infra* notes 146-59 and accompanying text.

ratified in section one. Moreover, by failing to correct its mistakes thereafter, the Court betrays the will of the people still, some 130 years later.

This is not to lay the blame for the failed promise of American freedom solely at the feet of the Supreme Court. It is not the Court, after all, that makes and executes the laws that abridge individual liberties: it is the popularly-elected legislature and executive. When representatives govern in ways that abridge constitutionally-protected liberties, they betray not only the people's trust but also, by extension, their own oaths of office by failing to "bear true faith to" the U.S. Constitution.<sup>12</sup> To be fair, they are faced with the basic conundrum of republican democracy: driven by the desire to win the next election, representatives are sorely tempted to vote in ways designed to gain favor with a majority of voters. The majority of voters, however, sometimes take positions that abridge the individual liberties of the minority. So what's a representative to do? The answer is to do the "right thing," which is to act in a way "faithful to" the core civil libertarian spirit of the Constitution *regardless* of the effect on the next election. Practically speaking, *that's what the oath requires*.<sup>13</sup> It is because too many representatives fail these tests, perhaps not understanding that the very core essence of the Nation as reflected in its founding documents is its civil libertarian character, that the Court is called into service in the first place.

The Court's proper role in this scheme is to act as merely a guardian of the Constitution. As Chief Justice John Roberts put it in his September 2005 Senate confirmation hearings in response to a query of whether he viewed the Court as Congress's taskmaster, "I don't think the court should be taskmaster of Congress. [T]he Constitution is the Court's taskmaster, and it's Congress's taskmaster as well."<sup>14</sup>

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12. The oath to which members of Congress swear states,  
I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

5 U.S.C. § 3331 (2000).

13. Acts or votes bearing faith to the Constitution both (1) authorize only those government actions that are "necessary" and "proper"; and (2) do *not* abridge individual liberties, except in the most extenuating of circumstances.

14. Linda Greenhouse, *In Roberts Hearing, Specter Assails Court*, N.Y. TIMES, Sept. 15, 2005. As James Madison argued (as urged by his friend Thomas Jefferson) on June 8, 1789 asking the First Congress to adopt the Bill of Rights, "one [needs] to control the majority from those acts to which they might be otherwise inclined." 12 THE PAPERS OF JAMES MADISON 196, 205 (Charles F. Hobson et al. eds., 1979). Madison further argued that "independent tribunals of justice will consider themselves in a peculiar manner . . . [to] be an impenetrable [barrier] against every assumption of power in the legislative or executive [branch]; they will be naturally led to resist every encroachment upon rights." *Id.* at 207.

Chief Justice Roberts's comment nicely captures the essence of the political theory underlying this Nation's system of government: It is the *Constitution* — not Congress, not the Executive, not even the Judiciary — that establishes the baseline conduct to which government must faithfully adhere. It is the *Constitution* that is sovereign; and nothing any official in any branch of government tries to say can change the underlying axiomatic proposition that government, in the conduct of its official duties, simply may not ignore basic constitutional guarantees of individual liberty.<sup>15</sup>

The proposition that the written Constitution shall prevail over contrary acts of the government is unremarkable. Indeed, this is the message of the most famous case of all, *Marbury v. Madison*.<sup>16</sup> It also forms the basis of "originalist" constitutional theory, which holds as preeminent for interpretive purposes the meaning of the Constitution as it was originally conceived *in principle* by its framers and ratifiers.<sup>17</sup> What is remarkable is how the

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15. The Court may, and does, fail in its elucidation of constitutional *law* from time to time, but the Constitution itself, as reflected in its text and original meaning, as amended, never fails.

16. 5 U.S. (1 Cranch) 137, 178 (1803) (stating "the constitution is to be considered, in court, as a paramount law").

17. Fidelity to "original meaning" does not require untold reliance upon the expected application of the constitutional provision at the time of the framing. *See, e.g.*, Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 570-71 (1998) ("[O]riginal meaning, properly understood, must contemplate the possibility that a traditional practice is unconstitutional, and more broadly that requiring fidelity to original practices is inconsistent with interpreting constitutional provisions to stand for principles."). The fact that ear-cropping and flogging were accepted punishments in the eighteenth century, for example, does not mean that they do not constitute cruel and unusual punishment today. *Id.* at 570. A useful heuristic is to imagine the interpretive process as one of translation of text in one language (or era) to text in another. "If the translation succeeds — if it is a good translation — then there is an important relation between the two texts, in these two contexts: naively put, their 'meaning' is to be 'the same.' Different texts; different contexts; same meaning." Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1371 (1997). For example, it is necessary to "translate" the meaning of the Fourth Amendment's right to be secure of unreasonable searches and seizures to take account of modern-day technologies such as wiretapping and remote sensing in order "to give citizens in the twentieth century the sort of protection that the Framers gave citizens in the Eighteenth." *Id.* at 1379. The key point is that the underlying moral *principle* of the constitutional provision governs meaning, not current practice. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 216 (1980) ("Like parents who attempt to instill values in their child by both articulating and applying a moral principle, they may have accepted, ore even invited, the eventuality that the principle would be applied in ways that diverge from their own views.") (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134 (1977)).

As to why we should observe an ancient written constitution and the "dead hand" control of those long-since departed, one real value is that it "locks in" the process by which government may properly govern. BARNETT, *supra* note 1, at 103

“originalism” mantle has been appropriated by generations of jurists and scholars who have enabled the willy-nilly expansion of government power at the expense of individual liberty with the surprising claim that the democratic processes created by the Constitution were originally intended to allow government to prevail over individual liberty.<sup>18</sup> To the enduring detriment of the people’s freedom, this interpretation turns the *genuine* original intention and meaning of the Declaration and the Constitution — to create a vast “sea of liberty” only occasionally interrupted by small “islands of government power” — on its head.

The design of the Constitution, while recognizing the need for some form of government,<sup>19</sup> provides protection for the people from government of *any* description.<sup>20</sup> From the opening words of the Preamble,<sup>21</sup> the Constitution paints a picture of shared sovereignty between the people and government.<sup>22</sup>

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(“The Constitution is a law designed to restrict the lawmakers. . . . In particular, it is put in writing so these [political] actors cannot themselves make the laws by which they make law.”). See also Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 363 (1992) (characterizing a written constitution as “an anchor in the past”). What the framers-as-persons thought is not especially important; rather, it is that the framers’ actions and words offer the best available conduit to the very core *idea* underlying the founding document: *Freedom*.

Those adopting non-originalist approaches as means of recognizing “new” rights, privileges, liberties and immunities may view originalism more favorably if such rights are considered as not “new” at all, but rather as fully embraced *within* the original meaning.

18. See, e.g., Rebecca Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531 (1998). Brown states that the

presumption that majority rule is the starting point of inquiry . . . is not justified by the text of the Constitution, nor has it been justified by extrinsic theoretical arguments. Majority rule has a place under the Constitution, but that document does not purport to elevate popular will to a position of even presumptive primacy. Indeed popular political will is a force to be tempered at every turn.

*Id.* at 556 (footnote omitted). “[M]ajoritarian government exists to support the Bill of Rights” and other liberties. *Id.* at 574.

19. As James Madison said in Federalist 51, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” THE FEDERALIST NO. 51 (James Madison).

20. While the main perceived governmental threat at the time of the founding was the central government (as reflected in the explicit limits placed on Congress by the Bill of Rights), by the time of Reconstruction it was clear that the States were the greater governmental oppressors. The Fourteenth Amendment corrected this defect.

21. “We the People of the United States, in Order to form a more perfect Union . . .” U.S. CONST. pmb1.

22. See ELIZABETH PRICE FOLEY, *LIBERTY FOR ALL* 14-15 (2006) Though the Federalists and Anti-Federalists vehemently debated which powers properly belonged to the federal government and which properly belonged to the states, but it was a debate about precisely how to divide the govern-

The landscape depicted is one of a limited government<sup>23</sup> that is coequal, and even subservient, to the people and their interests; it is certainly *not* a scene in which the people are subservient to a dominant government.<sup>24</sup> Thomas Jefferson argued in 1774 that kings are “the servants and not the proprietors of the people.”<sup>25</sup>

Part II of this article explains that at the time of its ratification the Bill of Rights likely was not intended to be applied to the States. Part III discusses how the privileges or immunities clause of the Fourteenth Amendment applies the Second Amendment, together with the rest of the Bill of Rights and other enumerated and unenumerated rights, to the States. This conclusion is

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mental pie, not the parameters of the pie itself. The Framers had a clear concept of the legitimate scope of government power in toto and . . . focused merely on which level of government – federal or state – should exercise these legitimate powers.

*Id.* at 14-15.

23. *See, e.g.*, LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 3-4 (1999) (“Over a period of a century and a half [before the founding], America became accustomed to the idea that government existed by consent of the governed, . . . that the compact reserved their natural rights, and that it constituted a fundamental law to which the government was subordinate.”). Barnett qualifies traditional social contract (*i.e.*, “consent of the governed”) theory this way:

[W]e are asked to accept the proposition that merely by virtue of living in the town in which we were born, or by failing to leave the country, we have “consented” to obey nearly any command that is enacted by the reigning legal system. And the consent of a majority is supposed to bind not only themselves, but dissenters and future generations as well.

BARNETT, note 1, at 24. Additionally, he adds that “in the absence of actual consent [*i.e.*, acquiescence is not enough], to be legitimate, an existing legal system must provide assurances that the laws it imposes are both necessary [to protect the rights of others] and proper [insofar as they do not violate the preexisting rights of the persons on whom they are imposed].” *Id.* “If a lawmaking process provides these assurances, then it is ‘legitimate’ and the commands it issues are entitled to a benefit of the doubt. They are binding in conscience unless shown to be unjust.” *Id.* at 45.

24. *See, e.g.*, *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 556-57 (1840) (C.P. Van Ness’s oral argument arguing against *Barron*’s refusal to apply the Bill of Rights to the States). VanNess also asserted that some amendments are declarations of absolute rights inherent in the people . . . of which no power can legally deprive them. . . . principles which lie at the very foundation of civil liberty, and are most intimately connected with the dearest rights of the people. . . . [and] deserve to be diligently taught to our children, and to be written upon the posts of the houses, and upon the gates.

*Id.* For a discussion of *Barron v. Baltimore* see *infra* text accompanying notes 36-40. Indeed, in this light, the Preamble’s “more perfect union” language refers not just to a union of states (the conventional view), but rather to a broader union of governmental (state, federal, Indian) and popular sovereigns.

25. WOOD, *supra* note 6, at 168. Further, “[g]overnment [in Revolutionary America] was now being widely pictured as merely a legal man-made contrivance having little if any natural relationship to the family or to society.” *Id.* at 167.



based on the plain reading of the text together with an understanding of the context in which the clause was proposed and ratified, as found in the historical record demonstrating the meanings assigned to the amendment by the leaders in the Thirty-ninth Congress and ratifying States in 1866-1868. Part IV then argues that the Supreme Court's existing selective incorporation doctrine requires that the Second Amendment be applied to the States under the Fourteenth Amendment due process clause. The article concludes that the right to keep and bear arms protected by the Second Amendment "is necessary to an Anglo-American regime of ordered liberty"<sup>26</sup> — that is, it was considered by American revolutionaries and reconstructionists and their English progenitors alike to be indispensable to the protection of liberty<sup>27</sup> — and thus meets the Court's current doctrinal test for selective incorporation.

## II. DID THE BILL OF RIGHTS APPLY TO THE STATES PRIOR TO RATIFICATION OF THE FOURTEENTH AMENDMENT?

It is unclear from the text and legislative history of the Bill of Rights whether the First Congress and ratifying States originally intended, in 1791, for the amendments to apply to the States. On one hand, an examination of the political theory prevalent among the founders and framers reveals that many would have supported such a conclusion. James Madison, for example, the Bill of Rights' primary author and champion in the First Congress, sought to include the provision that, "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."<sup>28</sup>

Professor Michael Kent Curtis describes Professor William Crosskey's arguments for the plausible case that the Bill of Rights applied to the States from the time of its framing: "(1) that the rights recognized in the Bill of Rights were basic liberties of the citizen that no government, state or national, had power to deny; (2) the Constitution was the supreme law of the land; and (3) consequently, acts of the states infringing rights in the Bill of Rights were void."<sup>29</sup> These and similar arguments were advanced by leading abolitionists during the antebellum era, and notably by one ahead-of-its-time southern State court, which commented that the purpose of the Bill of Rights "was to declare to the world the fixed and unalterable determination of our people,

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26. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968). For a discussion of *Duncan v. Louisiana* see *infra* text accompanying notes 241-45.

27. See *infra* notes 240-45 and accompanying text.

28. 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1023, 1027 (Bernard Schwartz ed., 1971); see *infra* note 31 and accompanying text.

29. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 22 (1986); see William Winslow Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. CHI. L. REV. 1, 10 (1954) (effectively rebutting the claims of Charles Fairman, who had written an enormously influential — though deeply flawed — article in 1949 arguing against incorporation of Bill of Rights against the states).

that these invaluable rights . . . should never be disturbed by *any* government” and that the Bill was “*our American Magna Charta*.”<sup>30</sup>

On the other hand, Madison’s proposal was rejected by the House,<sup>31</sup> reflecting the looming Article Five practical reality for Madison and other Bill of Rights advocates in Congress that without the support of three-fourths of the thirteen States, any sort of amendment to the Constitution would be dead in the water. And of course, a number of those were slave States, where any sort of federally-imposed and enforced protections of individual liberties would prove to be problematic in their plans to perpetuate the institution of slavery.

Moreover, Thomas Jefferson himself, the craftsman of the linguistic “wall separating church and state,”<sup>32</sup> said in his second inaugural address on March 4, 1805, that religious matters, while beyond the federal government’s reach, are “under the direction and discipline of the church or state authorities.”<sup>33</sup> Although he did not comment upon the broader issue of incorporation of the Bill of Rights, Jefferson’s comment suggests that he believed that at least *one* part of the Bill did not apply to the States. Consistent with this view, in responding to a call in the First Congress for a national day of thanksgiving, Representative Thomas Tucker commented, “[I]t is a religious matter, and, as such, is proscribed to us. If a day of thanksgiving must take place, let it be done by the authority of the several States; they know best. . . .”<sup>34</sup>

Given the religious diversity of the continent — with Congregationalists dominating New England, Anglicans down south, Quakers in Pennsylvania, Catholics huddling together in Maryland, Baptists seeking refuge in Rhode Island, and so on — a single national religious regime would have been horribly oppressive to many men and women of faith; local control, by contrast, would allow dissenters in

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30. *Campbell v. State*, 11 Ga. 353, 367-68 (1852) (emphasis added). *See also* *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 340 (1857) (“[T]he amendments of the Constitution of the United States, in the nature of a bill of rights, [may be considered] as the annunciation of great and fundamental principles, to be always held in regard, both morally and legally, by those who make and those who administer the law . . . [not just] precise and positive directions and rules of action.”).

31. This was one of the very few points of Madison’s proposal for the entire Bill of Rights that *was* rejected. CURTIS, *supra* note 29, at 21 (“Although most of Madison’s proposals were adopted, many in the very language in which he proposed them, his proposal for these explicit limitations on the power of the states was not.”).

32. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1486 (2d ed. 2005).

33. Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *available at* <http://www.britannica.com/presidents/article-9116903>.

34. 1 ANNALS OF CONG. 950 (Joseph Gales, ed., 1834).

any place to vote with their feet and find a community with the right religious tone.<sup>35</sup>

It thus seems questionable that the Bill of Rights would have been ratified if the States had known they were to be applied against them.

The Supreme Court weighed-in during 1833 in the case of *Barron v. Baltimore*<sup>36</sup> when Chief Justice John Marshall stated that, while the question of whether the Bill of Rights applies to the States was “of great importance,, but [it was] not of much difficulty.”<sup>37</sup> *Barron* involved a claim by a dock owner in Baltimore that the city had deprived him, without just compensation, of the use of his property in violation of the Fifth Amendment takings clause. Chief Justice Marshall commented that “limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument”;<sup>38</sup> and that if the framers had meant to limit the States, “they would have declared this purpose in plain and intelligible language”<sup>39</sup> of the sort used in Article I, Section 10, which explicitly directs that “no state . . . shall pass any bill of attainder or *ex post facto* law,”<sup>40</sup> even though Article I Section 9 contains a general prohibition — similar in language to the takings clause — on the same topic, “No Bill of Attainder or *ex post facto* Law shall be passed.”<sup>41</sup>

In short, most scholars are persuaded by the weight of the historical evidence that *Barron* was correctly decided.<sup>42</sup> Neither James Madison’s desires nor the compelling arguments of nineteenth-century abolitionists and others negate the conclusion that the Bill of Rights as originally intended and understood in 1791 likely did not apply to the States.<sup>43</sup>

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35. AKHIL REED AMAR, *THE BILL OF RIGHTS* 45 (1998)(observing, “in the worst case scenario, it was always easier to flee an oppressive locality or state than the nation as a whole). *Id.* at 56

36. 32 U.S. (7 Pet.) 243 (1833).

37. *Id.* at 247.

38. *Id.*

39. *Id.* at 250.

40. *Id.* at 248.

41. U.S. CONST. art. 1, § 9, cl. 3.

42. *See, e.g.,* CURTIS, *supra* note 29, at 22-23 (“The Bill of Rights was adopted because of the fear of abuses of power by the federal government. It simply had no application to the states.”); AMAR, *supra* note 35, at 142 (“Purely as a matter of textual exegesis and application of lawyerly rules of construction, Marshall’s argument is hard to beat.”).

43. *See supra* notes 29-30 and accompanying text.

### III. RETURN TO ORIGINAL MEANINGS: APPLICATION OF THE BILL OF RIGHTS AND OTHER ENUMERATED AND UNENUMERATED RIGHTS TO THE STATES THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE

*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.*<sup>44</sup>

Many Americans seek to protect themselves and others from gun violence by denying the enforceability of the Second Amendment<sup>45</sup> on the States, on the view perhaps that state and local government policy should impose outright bans on guns. The thinking goes that fewer guns in fewer hands will result in fewer casualties. This is understandable; many Americans are killed and maimed with guns every year. Indeed, statistics show that many more people are killed and maimed in America on a per capita basis than in other countries.<sup>46</sup> One natural governmental policy response to this troubling fact is to seek to ban guns.

There's one problem with this approach: the Constitution prohibits it. Section one of the Fourteenth Amendment declares, "[n]o state shall make or enforce any law which shall abridge the privileges or immunities"<sup>47</sup> of American citizens, a phrase which was meant from the beginning to include all of those fundamental rights, privileges, and immunities enumerated in the Bill of Rights and elsewhere in the Constitution, as well as other unenumerated rights as contemplated by the Ninth Amendment.<sup>48</sup> History demonstrates that the Second Amendment, by definition as one of the Bill of Rights, protects a "right," or a "privilege," or a "liberty," or an "immunity"<sup>49</sup> that the Thirty-ninth Congress meant to protect and that the States understood and

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44. U.S. CONST. amend. XIV, § 1 (emphasis added).

45. *See supra* note 2.

46. Among countries with population in excess of 3.8 million and an adjusted GDP per capita in excess of \$20,000, the United States has a crude firearm homicide rate of about 4.4 per 100,000 inhabitants. Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs*, 72 J. RISK & INS. 359, 361 (2005). This is 5.5 times higher than the rate in Italy, which is the country with the next highest rate. *Id.*

47. U.S. CONST. amend. XIV, § 1.

48. *See infra* notes 189-90 and accompanying text.

49. Terms like "rights," "liberties," "privileges," and "immunities" seem to have been used interchangeably in 1866 and before. *See, e.g.,* CURTIS, *supra* note 29, at 64-65. The author of Section one, Congressman John Bingham "used the words *privileges* and *immunities* as a shorthand description of fundamental or constitutional rights. Use of the words in this way had a long and distinguished heritage" back to Blackstone. *Id.* at 64.

accepted when they ratified the amendment.<sup>50</sup> For practical purposes, the question of whether States would or would not have been able to ban guns before 1868<sup>51</sup> is simply moot, because according to the terms of section one, States simply may not prohibit guns, despite twentieth-century claims to the contrary.<sup>52</sup> The fact that the Supreme Court has not yet explicitly recognized this principle does not change the original intent of the people to apply the Bill of Rights and other rights, privileges, liberties and immunities to the States. This intent was memorialized in the Fourteenth Amendment, and since the amendment has never been repealed or itself amended, it is still the official word of the Constitution.<sup>53</sup>

In a broader sense, efforts to deny the Second Amendment's enforceability on the States,<sup>54</sup> while perhaps well-meaning, are simply misdirected, because they discount the right of the government to exercise the limited authority it *does* possess to enact necessary-and-proper laws, including laws that would regulate, though not prohibit, the right of the people to keep and bear arms.<sup>55</sup> In insisting that the Second Amendment does not apply to the States, however, we throw the baby out with the bathwater by sacrificing individual liberty for enhanced police-power, and we greatly diminish our authority to claim that government must keep its hands off other enumerated and unenumerated fundamental rights.

#### A. *The Fourteenth Amendment*

The Court's opinion in *Barron v. Baltimore*<sup>56</sup> galvanized the efforts of many to extend the Bill of Rights to apply to the states. These efforts ultimately succeeded — but only after the Civil War<sup>57</sup> — with the ratification of the Fourteenth Amendment. At the time of the amendment's proposal in the Thirty-ninth Congress in 1866 and ratification in 1868, it was “abundantly clear that Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, *the right to bear*

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50. See generally *infra* Part III.A.

51. See *supra* Part II.

52. See *infra* notes 253-58 and accompanying text for description of the “states'/collective-right” theory of the Second Amendment.

53. See, e.g., JED RUBENFELD, FREEDOM AND TIME 223 (2001) (“The only constitutional law binding on a democracy that seeks to be the author of its own fundamental legal and political commitments is law that derives from the nation's own acts of memorialization.”).

54. See *infra* notes 253-55 and accompanying text.

55. See *supra* note 5.

56. 32 U.S. (7 Pet.) 243 (1833). For a discussion of *Barron v. Baltimore*, see *supra* text accompanying notes 36-40.

57. AMAR, *supra* note 35, at 6.

arms, trial by impartial jury, and protection against cruel and unusual punishment and unreasonable search and seizure.”<sup>58</sup>

As Michael Kent Curtis explains, “[b]y 1866 leading Republicans in Congress and in the country at large shared a libertarian reading of the Constitution. The Constitution meant what its preamble said. It established liberty.”<sup>59</sup> As stated by radical Republican Senator Timothy Howe from Wisconsin and conservative Republican Congressman George Anderson from Missouri, respectively, “[w]e have [formerly] taken the Constitution in a solution of the spirit of State rights. Let us now take it as it is sublimed and crystallized in the flames of the most gigantic war in history”;<sup>60</sup> and “[w]e are today interpreting the Constitution from a freedom and not from a slavery standpoint.”<sup>61</sup>

58. ERIC FONER, RECONSTRUCTION 258 (1988) [hereinafter, FONER, RECONSTRUCTION] (emphasis added). According to Representative John A. Bingham, “the powers of the States have been limited and the powers of Congress extended [with Section Five]” *Id.* Further,

discriminatory state laws could be overturned by the federal courts regardless of which party dominated Congress. . . . Congress placed great reliance on an activist federal judiciary for civil rights enforcement – a mechanism that appeared preferable to maintaining indefinitely a standing army in the South, or establishing a permanent national bureaucracy empowered to oversee Reconstruction.

*Id.*

59. CURTIS, *supra* note 29, at 215. Curtis explains that “[m]ost Republicans believed that the states were already required to obey the Bill of Rights. They did not accept the positivist notion that the Constitution was merely what the Supreme Court of the moment said it was.” *Id.* at 218.

60. CONG. GLOBE, 39th Cong., 1st Sess., 163, 1478 (1866).

61. *Id.* at 1478. *See also* Curtis, *supra* note 29, at 54 (“To Republicans the great objects of the Civil War and Reconstruction were securing liberty and protecting the rights of citizens . . .”). In 1864, Abraham Lincoln commented, “We all declare for liberty, . . . but in using the same *word* we do not all mean the same *thing*.” ERIC FONER, THE STORY OF AMERICAN FREEDOM 97 (1998) [hereinafter, FONER, FREEDOM]. Foner adds,

[t]o the North, freedom meant for “each man” to enjoy “the product of his labor”; to southern whites, it conveyed mastership – the power to do “as they please with other men, and the product of other men’s labor.” The Union’s triumph consolidated the northern understanding of freedom as the national norm.

*Id.* The concept of “freedom truly defined the nation’s existence. A ‘new nation’ emerged from the war, declared Illinois congressman Isaac N. Arnold, new because it was ‘wholly free.’” *Id.* at 100. The Southern idea of freedom “ultimately insisted that slaveholders had a constitutional right, protected by the due process clause, to take and hold slaves in any territory. Chief Justice Taney gave their argument his stamp of judicial approval in . . . *Dred Scott*.” CURTIS, *supra* note 29, at 27. They even argued that “emancipation in the northern states had been an outrageous attack on property rights and that state laws prohibiting slavery were unconstitutional.” *Id.*

At the time of its creation and ratification, the Fourteenth Amendment represented the authoritative reclamation by the people of the core principles of the individual rights, privileges, liberties, and immunities originally claimed in the Declaration of Independence, won in the Revolutionary War, trumpeted in the Preamble, and guaranteed in the Bill of Rights. Moreover, the amendment *corrected* the overwhelming flaw of the original Constitution: its regrettable compromise in allowing the institution of slavery to continue within the states.<sup>62</sup> Compromise or not, “[w]ith the faith of the nation broken at the very outset, the system of slavery untouched, and twenty years’ respite given to the slave-trade to feed and foster it,” said W.E.B. DuBois, “there began, with 1787 . . . a moral, political, and economic monstrosity, which makes the history of our dealing with slavery . . . so discreditable to a great people.”<sup>63</sup> In this latter capacity, then, the Fourteenth Amendment was nothing less than the “reconstruction of the moral foundation of the United States.”<sup>64</sup>

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62. James McPherson explains that Abraham Lincoln, for one, reasoned that the founders in 1776 and framers in 1787 had actually opposed slavery, and so allowed it only provisionally in the Constitution:

They adopted a Declaration of Independence that pronounced all men created equal. They enacted the Northwest Ordinance of 1787 banning slavery from the vast Northwest Territory. To be sure, many of the founders owned slaves. But they asserted their hostility to slavery in principle while tolerating it temporarily (as they hoped) in practice. That was why they did not mention the words “slave” or “slavery” in the Constitution, but referred only to “persons held to service.” “Thus, the thing is hid away, in the constitution,” said Lincoln, “just as an afflicted man hides away a wen or a cancer, which he dares not cut out at once, lest he bleed to death; with the promise, nevertheless, that the cutting may begin at the end of the given time.”

JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 127 (2003).

63. W.E.B. DU BOIS, *The Suppression of the African Slave-Trade to the United States of America, 1638-1810*, in *WRITINGS* 197 (1986); see also Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 *ALA. L. REV.* 483, 497 (2003) (The Constitution’s endorsement of slavery “made every American who wished to love his or her country complicit in the endorsement of white superiority at its origination. At its very founding, then, our country broke the spirit of its highest aspirations . . .”).

64. Magee Andrews, *supra* note 63, at 497.

[F]or many, the debasement of moral principle represented by the Constitution’s sanction of slavery undermined the spiritual foundation of the new country: It broke the country’s spirit. It follows, then, that the constitutional codification of our commitment to abolition would be seen as giving back what the slavery compromises took away: they were to mend the country’s spirit.

*Id.* at 500.

The Constitution’s slavery provisions were subject to alternative interpretations during the antebellum era itself. Abolitionists like William Lloyd Garrison and

The Amendment “transcended race and region, . . . challenged legal discrimination throughout the nation and changed and broadened the meaning of freedom for all Americans”;<sup>65</sup> together with the thirteenth and fifteenth amendments, it was indeed the very centerpiece of the Reconstruction, a concerted post-war effort in which “Americans made their first attempt to live up to the noble professions of their political creed — something few societies have ever done.”<sup>66</sup> The Reconstruction and its program of legislation “enjoyed broad support both in Congress and the North at large,”<sup>67</sup> and “produced a sweeping redefinition of the nation’s public life.”<sup>68</sup>

The Amendment completed the Civil War’s transformation of the meaning of Freedom, or Liberty, to include *positive* liberty, as well as the more familiar revolutionary-era negative liberty. James McPherson describes the distinction in the Afterword to *Battle Cry of Freedom*, his masterful Pulitzer Prize-winning one-volume treatment of the Civil War:

[A useful] way of defining the distinction between these two concepts of liberty is to describe their relation to power. Negative liberty and power are at opposite poles; power is the enemy of liberty, especially power concentrated in the hands of a central government. That is the kind of power that many of the founding fathers feared most; that is why they fragmented power in the Constitution and the federal system; that is why they wrote a bill of rights to restrain the power of the national government to interfere with individual liberty....

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Representative John Quincy Adams, on one hand, minced few words in criticizing the Constitution’s “covenant with death” and the motivations and personal character of slaveholders. See, e.g., MCPHERSON, *supra* note 62, at 120. See also JOHN NIVEN, SALMON P. CHASE 45 (1995). On the other, more pragmatic, hand, anti-slavery lawyers like Salmon P. Chase gave voice to a “freedom national, slavery local” interpretation in suggesting that because slavery is

admitted, on all hands to be contrary to natural right. Whenever it exists at all, it exists only in virtue of positive law. The right to hold a man . . . is a naked legal right. . . . which in its own value, can have no existence beyond the territorial limits of the state which sanctions it.

*Id.* at 53.

65. FONER, RECONSTRUCTION, *supra* note 58, at 257-58.

66. FONER, RECONSTRUCTION, *supra* note 58, at xxvii (1988).

67. *Id.* at xxii.

68. *Id.* at xxvii. As W.E.B. Du Bois said, “[t]he slave went free; stood a brief moment in the sun; then moved back again toward slavery.” W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 30 (1935). Reconstruction also spurred “a violent reaction that ultimately destroyed much . . . of what had been accomplished.” FONER, RECONSTRUCTION, *supra* note 58, at xxvii. Further, “for blacks, [Reconstruction’s] failure was a disaster whose magnitude cannot be obscured by the genuine accomplishments that did endure. For the nation as a whole, the collapse of Reconstruction was a tragedy that deeply affected the course of its future development.” *Id.* at 604.



Throughout the antebellum era, southern defenders of slavery relied on this concept of negative liberty to deny the power of the national government to interfere with their right to own slaves and take them into the territories. “That *perfect* liberty they sigh for,” said Lincoln in 1854, is “the liberty of making slaves of other people.”...

Positive liberty in the form of the *power* of Union armies became the newly dominant American understanding of liberty. Liberty and power were no longer in conflict.... This new concept of positive liberty permanently transformed the U.S. Constitution, starting with the 13th, 14th, and 15th Amendments....

Lincoln understood that secession and war had launched a revolution that changed America forever. Eternal vigilance against the tyrannical power of government remains the price of our negative liberties, to be sure. But it is equally true that the instruments of government power remain necessary to defend the equal justice under law of positive liberty.<sup>69</sup>

In short, the Fourteenth Amendment mandated, in the most emphatic manner possible under the United States’ system of government — constitutional amendment — that the States discontinue efforts to discriminate or otherwise deprive individuals of their rights, privileges, liberties, and immunities, and, moreover, that Congress would have the power to enforce this principle.<sup>70</sup> Constitutional memorialization was necessary because, even after the War, the typical Southern legislature “apparently believed that its power to regulate its local black population, short of actual reenslavement, was undiminished. . . . [and so] passed Black Codes denying blacks many important liberties secured to whites. . . . [including] such basic rights as the freedom to move, to contract, to own property, to assemble, and *to bear arms*.”<sup>71</sup>

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69. MCPHERSON, *supra* note 62, at 866-67.

70. “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5. The rest of the Fourteenth amendment — Sections Two, Three and Four — primarily addressed the practical issues concerning Southern states’ representation in Congress.

71. CURTIS, *supra* note 29, at 35 (emphasis added). According to Foner, the northern journalist Sidney Andrews discovered late in 1865, “the whites seem wholly unable to comprehend that freedom for the negro means the same thing as freedom for them. They . . . admit that the Government has made him free, but appear to believe that they have the right to exercise the same old control.”

FONER, FREEDOM, *supra* note 61, at 103. Foner notes further, [S]outhern state governments . . . enact[ed] the notorious Black Codes, which denied blacks equality before the law and political rights, and im-

The fourteenth amendment was unambiguous and its meaning was plain.<sup>72</sup> The Constitution has never been amended to retract or alter these words so the restrictions they impose on American government remain as broad and as enforceable today as when the people first added them to the Constitution.

### 1. Congress's Response to the *Barron* Court's Guidance for Applying the Bill of Rights to the States

Section one's primary author in Congress, the well-regarded and influential Representative John Bingham of Ohio,<sup>73</sup> and his Republican colleagues were aware that for practical purposes the Supreme Court's 1833 *Barron* opinion had settled the debate on whether the Bill of Rights applied to the States.<sup>74</sup> They were determined, therefore, to amend the Constitution to make clear that the Bill of Rights and protections of other basic rights *do* apply to the States. To that end, in drafting section one, Bingham looked to *Barron* itself for guidance. Within the words of Chief Justice John Marshall he found clear instructions: "Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention."<sup>75</sup> Bingham drew a parallel from Article I, section 10, which provided explicitly that "*no State shall* emit bills of credit, pass any bill of attainder, *ex post facto*

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posed on them mandatory year-long labor contracts, coercive apprenticeship regulations, and criminal penalties for breach of contract. . . . Thus, the death of slavery did not automatically mean the birth of freedom. But the Black Codes so flagrantly violated free labor principles that they invoked the wrath of the Republican North.

*Id.* at 104.

72. See *supra* text accompanying note 43; *infra* text accompanying note 110.

73. Charles Fairman reports that Bingham was considered, "an effective debater, well informed, ready, and versatile. A man of high principle, of strong faith, of zeal, enthusiasm, and eloquence, he could always command the attention of the House." 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, PART ONE, at 1270 (1971). He was also "the most eloquent member of the Ohio delegation, and, perhaps with one or two exceptions, of the House of Representatives. . . . He was a man of genial, pleasing address, rather too much given to flights of oratory, but always a favorite with his colleagues . . . ." *Id.* at 1270 (second omission in original).

74. See *supra* notes 36-40 and accompanying text. "[A] recurring theme in the debates of the Thirty-ninth Congress was the need to protect the rights of citizens and to require states to respect those rights." CURTIS, *supra* note 29, at 42 (emphasis added). Further, "[n]ot a single Republican in the Thirty-ninth Congress said in debate that states were not and should not be required to obey the Bill of Rights. *Barron v. Baltimore* was mentioned only when Republicans urged its repudiation." *Id.* at 130.

75. Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871).

law, or law impairing the obligations of contracts,” leaving no doubt of what is prohibited of the states.<sup>76</sup> Bingham thus noted: “Acting upon this suggestion [from *Barron*] I did imitate the framers of the original Constitution. . . . *imitating their example and imitating it to the letter*, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution.”<sup>77</sup>

If ever there was a clear path on how Congress should phrase an amendment were it to seek to apply the Bill of Rights to the States — one that thereafter would be entitled to extreme judicial deference — surely this would be it. As Amar notes, “[t]he Supreme Court Justices in *Barron* asked for ‘Simon Says’ language, and that’s exactly what the Fourteenth Amendment gave them.”<sup>78</sup>

Congress in 1866 understood perfectly well that section one was intended to repudiate *Barron*. “Over and over [John Bingham] described the privileges-or-immunities clause as *encompassing* ‘the bill of rights’ — a phrase he used more than a dozen times in a key speech on February 28.”<sup>79</sup> Although Bingham was not so convinced on the separate issue of Congress’s constitutional authority to enforce all the guaranties of the Constitution through legislation,<sup>80</sup> regarding the effect of the privileges or immunities

76. *Id.* (first emphasis added).

77. *Id.* (emphasis added).

78. AMAR, *supra* note 35, at 164 “[I]f the framers of the original Bill were entitled to rely on rules of construction implicit in the Philadelphia Constitution and made explicit by Publius in *The Federalist* No. 83, surely the framers of the Fourteenth Amendment were entitled to rely on the authoritative language of *Barron* itself.” *Id.* See also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 386-88 (2005) (hereinafter AMAR, *CONSTITUTION*) Amar explained,

In ordinary nineteenth-century language, the various civil rights and freedoms mentioned in the Bill of Rights were indeed quintessential “privileges” and “immunities” of Americans. . . . American citizenship entitled a person to a broad set of “privileges and immunities” exemplified by the Bill of Rights. Henceforth, Bingham and others explained, no state would be allowed to abridge these fundamental freedoms.

*Id.* at 386-87.

79. AMAR, *supra* note 35, at 182. Bingham rhetorically asked, “Who had ever before heard . . . ‘that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States?’” CURTIS, *supra* note 29, at 70.

80. CURTIS, *supra* note 29, at 61-64. “[Bingham] thought the provisions of the Bill of Rights were binding on state officers by their oath and by the privileges and immunities clause of article IV, section 2, but he denied that the requirements of the Bill of Rights were enforceable by the national government.” *Id.* at 64. “[Bingham] warned his colleagues that a constitutional amendment was required before Congress would have the power to enforce all the guaranties of the Constitution.” *Id.* at 61-62. This warning ultimately resulted in section five.

clause on the States there was no question<sup>81</sup> — and in response to John Bingham's strong statements in the House, nobody spoke up to disagree with him.<sup>82</sup>

Similarly in the Senate, Senator Jacob Howard, chair of the Joint Committee on Reconstruction, commented on May 24, 1866:

[Section one is intended to impose a] general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. . . . It is not, perhaps, very easy to define with accuracy what is meant by the expression, "citizen of the United States". . . . To these privileges and immunities, whatever they may be — for they are not and cannot be fully defined in their entire extent and precise nature — *to these should be added the personal right guaranteed and secured by the first eight amendments of the Constitution*; such as the freedom of speech, . . . [and] *the right to keep and to bear arms* . . . . [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it . . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them . . . . [Presently,] they

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81. AMAR, *supra* note 35, at 181-83.

[Bingham] explained why a constitutional amendment was necessary, citing . . . *Barron* and one of its progeny, *Livingston v. Moore*. The day before, a colleague of Bingham's, Robert Hale, had suggested that states were already bound by the Bill, but Bingham set Hale and others straight with the following quotation from *Livingston*: "As to the amendments of the Constitution of the United States, they must be put out of the case, since it is now settled that those amendments do not extend to the States . . . ." Six weeks later Bingham . . . invok[ed] "the bill of rights" six times in a single speech and again remind[ed] his colleagues that it "has been solemnly ruled by the Supreme Court of the United States" that "the bill of rights . . . does not limit the powers of States." In . . . January 1867, while the amendment was pending in the states, Bingham again reminded his audience that his amendment would overrule *Barron*.

*Id.* at 182-83 (second and fourth omission in original) (footnotes omitted).

During the ante-bellum era so-called "*Barron*-contrarians" maintained that *Barron* was incorrectly decided. See AMAR, *supra* note 35 at 145-56. The Supreme Court itself at times intimated as much. Indeed, even in that most infamous of cases, *Dred Scott*, Chief Justice Taney listed as one of the reasons for denying blacks "citizen" status the fact that states would otherwise be obliged not to infringe their privileges and immunities, including *the right to bear arms*. See *Dred Scott v. Sandford*, 60 U.S. 393, 416-17 (1856). See also *supra* note 24 (Justice Van Ness's 1840 *Holmes v. Jennison* opinion disputing *Barron*'s conclusions).

82. AMAR, *supra* note 35, at 187 (stating "[s]urely, if the words of section 1 meant something different, this was the time to stand up and say so").

stand simply 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 the principles embraced in them except by their own local constitutions, which may be altered from year to year. *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.*<sup>83</sup>

As Curtis reports,

[t]here was no extended discussion of section 1 in the Senate after Howard spoke. Senator John Brooks Henderson's remarks on section 1 were brief but consistent . . . He discussed the first section "only so far as citizenship is involved in it. . . . It makes plain only what has been rendered doubtful by the past action of the Government." The remaining provisions of section 1, Henderson said, "merely secure the rights that attach to citizenship in all free Governments."<sup>84</sup>

The following week, after a private Republican caucus to decide upon final adjustments to the proposal, the amendment was passed by a vote of 33-11; the discussion was limited primarily to the continued Democratic objections to "the outrageous regime the Radicals would impose upon the country."<sup>85</sup>

Republicans in the Thirty-ninth Congress — radical, moderate and conservative alike<sup>86</sup> — expressed their understanding on other occasions as well

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83. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added). Senator Howard's comments were widely reported in the local and national press. See *infra* note 92. Senator Howard's comment that "to these [privileges and immunities] should be *added* the personal rights guaranteed and secured by the first eight amendments" would explain why the Fourteenth Amendment's proponents did not simply say: No State shall make or enforce any law which shall abridge the *Bill of Rights protections* of citizens of the United States. CONG. GLOBE, *supra*, at 2765 (emphasis added) Additionally, Howard cited *Corfield v. Coryell* to identify some of the privileges and immunities of Article IV, Section 2. *Id.*

84. CURTIS, *supra* note 29, at 89.

85. See FAIRMAN, *supra* note 73, at 1295-98.

86. CURTIS, *supra* note 29, at 34-35 (second omission in original). After the War, Republicans were united in their belief that the Bill of Rights should be applied to the states: "[T]here was much agreement among Republicans on fundamentals. Conservative Republicans tended to see Radical proposals not as wrong but as impractical. Radicals saw conservatives as overly influenced by practicality." *Id.* at 34. "The differences between Radical, moderate, and conservative Republicans were differences in 'timing, method and assessment of political reality' instead of differences in ideology or basic objectives." *Id.* at 34-35.

that the clause was intended to apply the Bill of Rights to the States.<sup>87</sup> Thaddeus Stevens, the leader of the House's delegation to the Committee on Reconstruction (the committee responsible for the official report of the Fourteenth Amendment to Congress), said, "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and 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."<sup>88</sup> Representative Baker asked,

[w]hat business is it of any State to do the things here forbidden? To rob the American citizen of rights thrown around him by the supreme law of the land? When we remember to what an extent this has been done in the past, we can appreciate the need of putting a stop to it in the future.<sup>89</sup>

All told, Amar observes, "the leading scholarly work counts no fewer than thirty Republican statements in the Thirty-eighth and Thirty-ninth Congresses voicing contrarian sentiments, and not one supporting *Barron*."<sup>90</sup> The comments of these Congressmen received broad media and public attention, yet "not a single [Republican] in either house spoke up to deny these men's interpretation of section I. Surely, if the words of section I meant something different, this was the time to stand up and say so."<sup>91</sup>

It is equally telling that Democrats, mostly opponents of the Fourteenth Amendment, also knew full well that the privileges or immunities clause would apply the Bill of Rights to the states, and they did not like it.<sup>92</sup> They

87. *Id.* at 68-69. Republican Congressman Higby said that the Fourteenth Amendment would "only have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument." *Id.* at 68.

88. CURTIS, *supra* note 29, at 85-87

89. *Id.* at 91.

Republican congressmen accepted an eighteenth-century view of the relation of man to government. Government existed . . . to protect natural rights of man – inalienable rights to life, liberty, and the pursuit of happiness. . . .

. . . [P]erhaps the most common Republican refrain in the Thirty-ninth Congress was that life, liberty, and property of American citizens must be *protected against denial by the states*.

Arguments by Democrats that the protection of fundamental rights would interfere with the legitimate rights of states struck Republicans as absurd. No state retained the legitimate authority to deprive citizens of their fundamental rights because government, at all levels, was designed to protect such rights.

*Id.* at 41 (emphasis added).

90. AMAR, *supra* note 35, at 186 (citing CURTIS, note 29, at 112).

91. *Id.* at 187.

92. CURTIS, *supra* note 29, at 151.

claimed, for example, that the amendment was “a dangerous infringement upon the rights and independence of the States,” and would provide power “substantially to annihilate the state judiciary.”<sup>93</sup>

Even several years after ratification, moreover, partisan opposition arguments still conceded the point that section one operated to apply at least the Bill of Rights to the States:

[we learn] what are the rights, privileges, and immunities of the people in their character of citizens of the United States. . . . by looking at the prohibitions contained in the Constitution against the infringement of certain rights, privileges, and immunities which belong to the people . . . and of which [they] cannot be deprived.<sup>94</sup>

Similarly, in arguing in 1874 that the Civil Rights Bill under consideration exceeded Congress’s power, “Kentucky Democrat James F. Beck read aloud the first ten amendments, to enumerate the privileges the Fourteenth Amendment required states not to abridge,”<sup>95</sup> none of which for Beck’s purposes contained protections the Civil Rights Bill sought to impose. “As Beck’s speech indicated, the doctrine of ‘incorporation’ — that the states were now required not to violate the Bill of Rights — had by 1874 become a virtually noncontroversial *minimum* Congressional interpretation of the Amendment’s purposes.”<sup>96</sup> In sum, these arguments “essentially relied on incorporation theory to limit the scope of Section 1.”<sup>97</sup>

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93. *Id.* at 151-52.

94. Earl M. Maltz, *The Concept of Incorporation*, 33 U. RICH. L. REV. 525, 526 (1999) (quoting Senator Thurman).

95. FONER, RECONSTRUCTION, *supra* note 58, at 533.

96. *Id.* See also Bryan 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, 1116-17 (2000). Even after *Slaughter-House*,

the most conservative and racist Democratic opponents of the [proposed Civil Rights Act of 1875] embraced with no apparent qualms the view that the Fourteenth Amendment totally incorporated the Bill of Rights. They advanced this reading as a conservative alternative to the even broader reading urged by Republican proponents of the bill, who believed that the Amendment authorized Congress to legislate equal access without regard to race to a wide range of accommodations and amenities in both the public and private sectors.

*Id.* at 1117. For a discussion of the *Slaughter-House Cases* see *infra* notes 111-26 and accompanying text.

97. Maltz, *supra* note 94, at 526.

## 2. Understandings of the Fourteenth Amendment in the Ratifying States

The Thirty-ninth Congress's understanding of the Fourteenth Amendment is only part of the story. What happened as ordinary Americans considered the amendment during the ratification process in the States is also of crucial importance, and the message there was the same as it had been in Congress: the amendment would require the States henceforth to observe the Bill of Rights. Consistent with the Republican National Committee's public statement in support of the amendment that "[a]ll persons born or naturalized in this country are henceforth citizens of the United States, and shall enjoy all the rights of citizens ever more; and no State shall have power to contravene this most righteous and necessary provision,"<sup>98</sup> statements of State and local politicians and newspapers of the day demonstrate that the meaning of the privileges or immunities clause was understood to include the Bill of Rights, and more.<sup>99</sup> The *Dubuque Daily Times* commented, for example, that the amendment "*prohibits any state* from making laws to abridge the privileges rightly conferred on every citizen by the federal constitution."<sup>100</sup> An Ohio Congressman commented in a speech to his constituents that section one "provides that the privileges and immunities of these citizens shall not be destroyed or impaired by state legislation."<sup>101</sup>

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98. CURTIS, *supra* note 29, at 131.

99. *See supra* note 83.

100. CURTIS, *supra* note 29, at 132 (*quoting* DUBUQUE DAILY TIMES, Nov. 21, 1866, at 2 (emphasis added)). During this era the protections of the Bill of Rights were commonly referred to as "privileges," "rights," and "immunities." *See* STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 117-23 (1984). Halbrook details widespread press coverage and public understandings of section one's intended broad meaning – and, specifically, application of the Second Amendment to the States. *Id.* at 115-18. He also discusses the major coverage given to Senator Howard's May 23, 1866, speech introducing the Fourteenth Amendment to the Senate *Id.* at 117-18. "By declarations of this kind, by giving extracts or digests of the principal speeches made in Congress, the people were kept informed as to the objects and purposes of the Amendment." HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 142 (1908).

101. CURTIS, *supra* note 29, at 138 Other speakers included a local judge in Ohio who explained to a "huge crowd" that "no state, as a matter of course, can pass any law abridging or enlarging their rights as citizens of the United States." *Id.* at 142-43. A speaker at a large meeting in Clinton County, Pennsylvania explained that section one

declares that citizens of the United States shall be clothed with the same rights, and entitled to the same protection in all the States of the Republic. . . . [and] that the majesty of the laws shall be exercised in the courts in their behalf. Is it not an extraordinary thing that, in a republican Government like this, we had to wait nearly a century before the rights of person



On the occasions when governors spoke on the proposed amendment, [a] common theme . . . was that the amendment would protect the “rights” or “liberty” of citizens of the United States. Several governors seem to have treated the word *rights* as equivalent to the words *privileges or immunities*. “Are not all persons born or naturalized in the United States subject to its jurisdiction rightly citizens,” asked the governor of Illinois, “and justly entitled to all the civil and political rights citizenship confers?”<sup>102</sup>

Similarly, the governor of Ohio “described the amendment as necessary to protect ‘immunities’ such as freedom of speech.”<sup>103</sup>

### 3. Understandings in the Fortieth and Forty-First Congresses

Republicans’ views in the succeeding Fortieth and Forty-first Congresses likewise held that section one’s reference to privileges and immunities was intended to apply the Bill of Rights to the States.<sup>104</sup> In a speech supporting the 1871 Enforcement Act, John Bingham said,

the privileges and 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. . . . These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment.<sup>105</sup>

Typical of Republicans’ comments during these early years following ratification is this by Rep. John B. Hawley of Illinois:

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and property in one of the most populous and flourishing sections of our country could be secured?

*Id.* at 139. Finally, a local judge at the Republican Union State Convention in Syracuse, New York, said that “[t]he first and most important of these [rights protected by section one] is the right of citizenship both of the United States and of the State, and to prevent the deprivation by States of the rights to life, liberty and property, and the denial of the equal protection of the laws.” *Id.* at 139-40.

102. *Id.* at 146-47.

103. *Id.* at 147.

104. *See, e.g., id.* at 156.

Congressmen had much to say because by the 1870s the meaning of the amendment was a critical issue.

. . . [T]he Ku Klux Klan had been organized and by 1871 it was using terrorism in an attempt to drive blacks and their Republican allies from power in the South. Its tactics consisted of political murders, whippings, and other outrages. . . . [I]n 1871 in Meridian, Mississippi, blacks who had made ‘inflammatory speeches’ were placed on trial in an atmosphere dominated by the Klan. Blacks who gathered to show support for their leaders were shot, and those accused of the inflammatory speeches were taken from jail and hanged.

*Id.* (footnote omitted).

105. CONG. GLOBE, 42nd Cong., 1st Sess. 84 app. (1871).

Sir, before the late war it is a matter well known to you and to every man born and reared in this land that throughout the southern States of the Union there was no freedom of speech, no freedom of person, no freedom to express the opinions which were entertained by freemen unless those opinions were in consonance and in conformity with the opinions of the dominant class of the southern States.

....

Sir we have in the Constitution of the United States, and have always had, sufficient guarantees, in my judgment, to protect the citizens of the United States in all parts of the great Republic. It was not necessary that we should amend the Constitution of the United States in order to give to the citizens of the United States the right to be protected throughout the length and breadth of the land. *But, sir, the Constitution of the United States was perverted, and those rights which were guaranteed by it were not executed in behalf of the citizens of the United States. But if these rights inhered in the Constitution before the war and before the adoption of the constitutional amendments, how much more do they now attach to every American citizen.*<sup>106</sup>

Senator John Sherman, speaking in 1872 in support of a bill guaranteeing equal access to public accommodations, held the view that the 14th amendment encompassed not only the Bill of Rights, but other privileges and immunities:

What are these privileges and immunities? Are they *only* those defined in the Constitution, the *rights secured by the amendments*? Not at all.... [To find the full extent of the privileges and immunities, the courts should look] first at the Constitution of the US as the primary foundation of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of Independence, to every scrap of American history, to the history of England, to the common law of England ... and so on back to the earliest recorded decisions of the common law.<sup>107</sup>

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106. *Id.* at 380 (emphasis added).

107. CURTIS, *supra* note 29, at 163-168. Representative George F. Hoar, stated in 1871 that section one "referred to 'all the privileges and immunities declared to belong to the citizen by the Constitution itself,' together with 'those privileges and immunities which all Republican writers of authority agree in declaring fundamental and essential to citizenship.'" CURTIS, *supra* note 29, at 162 (citations omitted). Many speakers referred to Justice Bushrod Washington's statement in *Corfield v. Coryell* in 1823 on the meaning of the same words as used within the Article IV Privileges and

In sum, government officials and ordinary Americans understood the purpose and scope of the Fourteenth Amendment to apply the Bill of Rights, at the very least, to the states. As Curtis observes, “[t]oday, the idea that states should obey the Bill of Rights is controversial. It was not controversial for Republicans in the Thirty-ninth Congress.”<sup>108</sup> “John Bingham, the author of the amendment, and Senator Howard, who managed it for the Joint Committee in the Senate, clearly said that the amendment would require the states to obey the Bill of Rights.”<sup>109</sup> Though some objected to the provision, “[n]ot a single senator or congressman [contradicted their interpretation]. No one complained that the amendment would allow the states to continue to deprive citizens of rights secured by the Bill of Rights.”<sup>110</sup> It is thus almost inconceivable that the United States Supreme Court, a mere five years after the Fourteenth Amendment’s ratification, effectively wrote one of its core provisions — the privileges or immunities clause of section one — out of existence.<sup>111</sup>

### *B. The Supreme Court’s Abdication: The Slaughter-House Cases and Cruikshank*

Just four years after the Fourteenth Amendment’s ratification, the Supreme Court nullified the privileges or immunities clause, holding in the *Slaughter-House Cases* that the clause protects only a certain very narrow list of privileges or immunities attending to *National* — as opposed to *State* —

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Immunities Clause to describe their meaning within section one of the Fourteenth Amendment. *See id.* at 66-67. Justice Washington had explained:

[W]hat are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states . . . . 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.

*Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823). To the extent that “[a] few Republicans did take positions that seem inconsistent with application of the Bill of Rights to the states[,] [m]ost, like Garfield, who have been read as disagreeing with Bingham, never said that they believed the amendment did not make the Bill of Rights a limitation on the states.” CURTIS, *supra* note 29, at 162.

108. CURTIS, *supra* note 29, at 91.

109. *Id.*

110. *Id.*

111. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

citizenship.<sup>112</sup> According to the Court, any protection of the broad fundamental rights of State citizenship would be left up to the States themselves to provide.<sup>113</sup> This interpretation of section one — almost-laughable, were it not so damaging — by effectively placing the fox in charge of the henhouse, “flew in the face of [the] legislative history. . . [and] turned the plan for the Fourteenth Amendment on its head.”<sup>114</sup> No matter that there was (or is) little evidence that the Republicans or Democrats in the proposing Congress or the conventions in the ratifying States had considered the distinction between State and National citizenship to be especially relevant; instead, in a neat bit of textual sophistry the Court gave meaning to the distinction,<sup>115</sup> thereby turning “what was meant [to be] bread into a stone,”<sup>116</sup> and causing grievous harm to Americans’ long-term prospects for freedom.<sup>117</sup>

112. *Id.* at 74.

113. *Id.* at 75.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

*Id.*

114. CURTIS, *supra* note 29, at 175-76. The *Slaughter-House* Court’s “studied distinction between the privileges deriving from state and national citizenship[] should have been seriously doubted by anyone who read the Congressional debates of the 1860s.” FONER, RECONSTRUCTION, *supra* note 58, at 530.

The obvious inadequacy of Miller’s opinion — on virtually any reading of the Fourteenth Amendment — powerfully reminds us that interpretations offered in 1873 can be highly unreliable evidence of what was in fact agreed to in 1866-68. . . . By 1873 some of the justices were ignoring some of the core commitments of the Fourteenth Amendment, ratified only five years earlier.

AMAR, *supra* note 35, at 213 n.\*. *Slaughter-House* “strang[ed] the privileges-or-immunities clause in its crib.” *Id.* at 213. Additionally, the *Slaughter-House Cases* “is probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court.” CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 55 (1997).

115. The Court explained,

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

*Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74.

116. *Id.* at 129 (Swayne, J., dissenting).

117. *Slaughter-House* did not explicitly address the particular question of incorporation of the Bill of Rights to the States through the Fourteenth Amendment, leaving resolution of that issue (ultimately decided in the negative) to *United States v. Cruik-*

Justices Swayne, Bradley, Field and Chase dissented. Justice Swayne's dissent is particularly important because it best echoes what was said on the floor of Congress:

[The majority opinion] defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. . . . [B]efore the war . . . little [protection] was given against wrong and oppression by the States. That want was intended to be supplied by this amendment.<sup>118</sup>

Specifically regarding the proper interpretation for section one, Swayne continued, "No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. . . . Every word employed has an established signification. . . . There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out."<sup>119</sup> Moreover, "This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it."<sup>120</sup> Finally, to those objecting to a broad reading of section one, Swayne answered that the restrictions imposed upon States are indeed "novel and large. . . . [but] the novelty was known and the measure deliberately adopted" nevertheless.<sup>121</sup>

For his part Justice Bradley added, [F]ormerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens, . . . [but] that cannot be said now . . . . [I]t was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.<sup>122</sup>

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*shank*, three years later. For a discussion involving *United States v. Cruikshank* see *infra* notes 146-50 and accompanying text.

118. *Slaughter-House*, 83 U.S. (16 Wall.) at 129 (Swayne, J., dissenting). Justice Swayne added,

These [post-Civil War] amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven. Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta.

*Id.* at 125 (footnote omitted).

119. *Id.* at 126. Justice Swayne commented further, "The language employed is unqualified in its scope. . . . By the language 'citizens of the United States' was meant *all* such citizens; and by 'any person' was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color." *Id.* at 128-29.

120. *Id.* at 129.

121. *Id.*

122. *Id.* at 121-22 (Bradley, J., dissenting).

Bradley explained that fundamental rights were found in, for example, Magna Charta, Blackstone's *Commentaries*, and Justice Washington's enumeration in *Corfield v. Coryell*,<sup>123</sup> and continued, "But 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."<sup>124</sup> Further, "citizenship is not an empty name, but . . . has connected with it certain incidental rights, privileges, and immunities of the greatest importance."<sup>125</sup> The privileges or immunities clause of the Fourteenth amendment was meant to protect all rights of citizens of the United States, including those listed in the Bill of Rights.

Justice Field agreed, commenting that if the majority's position that most rights remained under State control was indeed accurate, then the Fourteenth Amendment "was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."<sup>126</sup>

The *Slaughter-House* dissenters' strong comments highlight that the bare 5-4 majority's approach was not, contrary to long-held revisionist wisdom,<sup>127</sup> a foregone conclusion in 1873. Indeed, if anything, the foregone con-

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123. *Id.* at 115-17.

124. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting) (emphasis added).

125. *Id.* at 116.

126. *Id.* at 96 (Field, J., dissenting).

127. The perpetuation of the myth of *Slaughter-House*'s inevitability throughout much of the twentieth century can be traced to a few influential works. *See generally* Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 750 (1965); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989). *See also* RICHARD UVILLER AND WILLIAM MERKEL, *THE MILITIA AND THE RIGHT TO ARMS* 813 n.120 (2002) (citing "Raoul Berger, *Government by Judiciary* for a powerful counter-argument, presenting convincing evidence that Howard and Bingham spoke inconsistently, that they frequently contradicted themselves, that most members of Congress expressly rejected these views, and that Howard and Bingham did not command the respect of the mainstream of the Republican party." (citation omitted)); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1, 3 (1993) (stating, Akhil Amar "leaps like a mountain goat over such obstacles" as the Article V amendment process with his "refined incorporation" approach). *But see* AMAR, *supra* note 35. For example, "Though his work has drawn much praise, in my view Professor Fairman was unfair to Justice Black, and his unfair substance and tone put almost an entire generation of lawyers, judges, and law professors off track." *Id.* at 188 n.\*. Also, "Berger's misstatements, distortions, and non sequiturs are legion. . . ." *Id.* at 197 n.\* Finally, "[i]n light of all of this [Republican speechmaking in the Thirty-ninth Congress], it is astonishing that some scholars, most notably Charles Fairman and Raoul Berger, have suggested that when Bingham invoked 'the bill of

clusion at the time was that the Fourteenth Amendment applied *all* rights, privileges, liberties, and immunities — those enumerated within the Bill of Rights and elsewhere, as well as those unenumerated — to the States. As an 1879 law review article put it,

[i]t must be admitted that the construction put upon the language of the first section of this amendment by the majority of the [*Slaughter-House*] [C]ourt is not its primary and most obvious signification. Ninety nine out of every hundred educated men, upon reading this section over, would at first say that *it forbade a state to make or enforce a law which abridged any privilege or immunity whatever* of one who was a citizen of the United States; and it is only by an effort of ingenuity that any other sense can be discovered that it can be forced to bear.<sup>128</sup>

Those ninety-nine educated men would have based their natural conclusions upon the many statements of numerous members of Congress and others,<sup>129</sup> as well as upon the teachings of a number of leading legal treatises of the day: for example,

John Norton Pomeroy viewed section I as “a remedy” for *Barron*’s rule concerning “the immunities and privileges guarded by the Bill of Rights”; similarly, Timothy Farrar carefully elaborated the declaratory theory of the federal Bill – indeed, in a later, 1872 edition of his treatise, Farrar noted that the amendment had “swept away”

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rights,’ he didn’t mean what he said.” *Id.* at 183. Richard Aynes, reveals something of an unholy alliance between Justice Felix Frankfurter (primary Court opponent of Justice Black’s total incorporation approach) and Charles Fairman (primary scholarly opponent of same) in a series of letters over the course of eight years between the two men. Richard Aynes, *Charles Fairman, Felix Frankfurter and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1258 (1995). Aynes states delicately, “[The work] of Justice Frankfurter and Charles Fairman was one of mutual support and encouragement.” *Id.* He adds that “Justice Black later told biographer Roger K. Newman that he ‘believed Frankfurter “got” Fairman to write [his 1949 Stanford] article and that Fairman did it “to get the job at Harvard””’ *Id.* at 1258 (alteration in original). According to Aynes, this last charge now appears false. *Id.* at 1259.

128. William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S. L. REV. 558, 563 (1879) (emphasis added). Further,

[i]t is a little remarkable that, so far as the reports disclose, no one of the distinguished counsel who argued this great case (the Slaughter-House Cases), nor any one of the judges who sat in it, appears to have thought it worth while to consult the proceedings of the Congress which proposed this amendment to ascertain what it was that they were seeking to accomplish. Nothing is more common than this. There is hardly a question raised as to the true meaning of a provision of the old, original Constitution that resort is not had to Elliott’s Debates, to ascertain what the framers of the instrument declared at the time that they intended to accomplish.

*Id.*

129. *See supra* Part III.A.

*Barron* and its progeny. Finally, in an 1868 treatise, George Paschal noted in passing — as if the issue were obvious — that “the general principles which had been construed to apply only to the national government, are thus imposed [by the Fourteenth Amendment] upon the States. Most of the States, in general terms, had adopted the same bill of rights in their own constitutions.”<sup>130</sup>

An 1871 circuit court opinion, *United States v. Hall*, validated the accuracy of these viewpoints. Writing for the Fifth Circuit, then-future Supreme Court Justice William Burnham Woods stated that the “rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States . . . .”<sup>131</sup>

[T]he privileges and immunities of citizens of the United States here referred to [in section one’s privileges or immunities clause]. . . . are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by citizens of the several states which compose this Union. . . . Among these *we are safe in including those which in the constitution are expressly secured to the people [i.e., in the Bill of Rights], either as against the action of the federal or state governments.*<sup>132</sup>

Numerous Reconstruction-era prosecutors and state court judges apparently agreed with these views as well.<sup>133</sup>

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130. AMAR, *supra* note 35, at 210 (footnotes omitted).

131. *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15, 282).

132. *Id.* at 81 (emphasis added).

133. AMAR, *supra* note 35, at 374 n.98.



Surprisingly, then, the Court held otherwise in *Slaughter-House*.<sup>134</sup> From the beginning, *Slaughter-House* was intensely criticized. One Senator involved in the framing of the amendment, Senator George Franklin Edmunds, said that the opinion “radically differed” from what the framers had intended for section one.<sup>135</sup> Political scientist John W. Burgess reflected in 1890 that *Slaughter-House* eviscerated “the great gain in the domain of civil liberty won by the terrible exertions of the nation in the appeal to arms. I have perfect confidence that the day will come when it will be seen to be intensely reactionary and will be overturned.”<sup>136</sup>

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134. See *supra* notes 111-126 and accompanying text. Digging deeper into the nature of the 5-4 split, Richard L. Aynes explains:

An examination of Miller’s background suggests that Miller was hostile to the Fourteenth Amendment and the Congress which proposed it. He had the personality to purposely negate an amendment he felt was unwise.

Miller, of course, had to obtain four other votes to accomplish his result. But in examining the background and views of the other Justices, we find that staunch conservative Democratic Clifford and anti-emancipationist Davis had the background and temperament to join Miller in such an enterprise. The data on Hunt and Strong is much more ambivalent, but Strong had been a Democrat most of his life and no evidence exists suggesting his support for the Fourteenth Amendment. Hunt had been on the Supreme Court bench for less than a month when the decision was argued and only three months when the decision was announced.

On the other hand, Chase, Bradley, Field and Swayne were all part of the “Union” coalition. Field, Chase, and Swayne all welcomed the Fourteenth Amendment and, while Bradley’s views on the adoption of the amendment are unknown, his personal and family background no doubt gave him an added sensitivity to the arguments advanced in support of the amendment.

Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 686-87 (1994). Aynes makes the deeper point that we are much more likely to obtain the correct meaning of a disputed constitutional provision by looking to the view of its proponents (who did, after all, prevail) than we are by looking to the views of its opponents.

135. CURTIS, *supra* note 29, at 175.

136. 1 JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 228 (Boston, Ginn & Co. 1890). Burgess’s comment is especially noteworthy given the fact he was himself a southerner and a colleague of Dunning – and thus not inclined to look favorably upon Reconstruction. More recently, a number of scholars have called on the Court to overrule, or distinguish *Slaughter-House*. See, e.g., DAVID A. J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* 216 (1993); 1TRIBE, *supra* note 5, at 1321-24,1331; Aynes, *supra* note 127, at 687;

Although over a hundred years has passed since Burgess's prediction, we still await that day. Only once has the Court struck down a statute on grounds that it violated the privileges or immunities clause, and even then the Court reversed itself just five years later.<sup>137</sup> In short, despite the virtually unanimous agreement by leading commentaries following *Slaughter-House* that Justice Miller had interpreted the Fourteenth Amendment in a manner contrary to its intent,<sup>138</sup> the Supreme Court's treatment of the privileges or immunities clause has been, in Amar's words, "impoverished":

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Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 102-05 (1996); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughterhouse-Cases*, 109 YALE L.J. 643, 648-49 (2000). See generally PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION 11-12, 38, 61-62 (1999) (discussing *Slaughter-House* as vindicating northern Democratic perspectives on slavery); MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS 199-210 (2003) (justifying Justice Miller's *Slaughter-House* opinion). One recent work characterizes the *Slaughter-House Cases* as being unfairly scapegoated. RONALD M. LABBE & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES, REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* 251 (2003). Labbe and Lurie conclude that

expressions of anguish over [the privileges or immunities clause of the Fourteenth Amendment] are premature. Like its sister the contracts clause, ... [it] remains part of the living Constitution, readily available whenever the Court wishes to employ it.... More than a century later, blaming Miller for current judicial disinclination to apply the clause is unwarranted. When the Court desires to utilize it, the clause is there.

*Id.*

137. *Colgate v. Harvey*, 296 U.S. 404, 435 (1935), *overruled by* *Madden v. Kentucky*, 309 U.S. 83 (1940). The *Madden* court cited with approval *Slaughter-House* and progeny, stating "In view of our conclusions, we look upon the decision in [*Colgate*] as repugnant to the line of reasoning adopted here." *Madden*, 309 U.S. at 93. Within the last decade, though, the Court has observed that a State statute impinging the right to travel violates the privileges or immunities clause. See *Saenz v. Roe*, 526 U.S. 489 (1999).

138. Aynes, *supra* note 127, at 681-86. Aynes quotes numerous authorities, including, for example, "Justice Moody, who refused to follow the intent of the Amendment, admitted that '[u]ndoubtedly, [the *Slaughter-House Cases*] gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended,'" and Charles Warren, who

in his classic *The Supreme Court in United States History, 1836-1919*, . . . noted that Miller's opinion was "directly contrary" to the intent of the framers of the Amendment and that in its history the Court had, with "very little variation" acted to "controvert the purpose of the Amendment [and] to belittle its effect."

*Id.*, at 685-86 (alterations in original) (footnotes omitted).

[I]f we are looking for reasons, for analysis of the letter and spirit of the privileges-or-immunities clause, we find next to nothing in the High Court between [Bradley's dissent in] *Slaughter-House* and Hugo Black's heroic reexamination and resurrection of the clause in his famous 1947 dissent in *Adamson v. California*. In the vast wasteland between Bradley and Black, only three Supreme Court landmarks stand out: John Randolph Tucker's celebrated oral argument in *Spies v. Illinois* in 1887; Justice Field's eventual decision (joined by the first Justice Harlan and Justice Brewer) to embrace Tucker's analysis in the 1892 case, *O'Neil v. Vermont*; and Justice Harlan's subsequent reaffirmations of this approach in a series of cases in the early 1900s.<sup>139</sup>

And while Justice Black's 1947 *Adamson* dissent ultimately (largely) prevailed for purposes of applying the Bill of Rights to the States through the due process clause, his argument advancing incorporation through the privileges or immunities clause has continued to this day to fall upon deaf Supreme Court ears.

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139. AMAR, *supra* note 35, at 213-14.

In *Adamson v. California*, Justice Black said, "My study of the historical events . . . persuades me that one of the chief objects that the provisions of [section one] . . . were intended to accomplish was to make the Bill of Rights applicable to the states." *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

In *Spies v. Illinois*,

for the first time an attorney before the Court clearly argued for incorporation on the basis of the privileges-or-immunities clause. . . . Tucker included in his catalogue of privileges and immunities those rights "declare[d]" in the original Constitution, as well as the Bill, including "the security for habeas corpus [and] the limits imposed on Federal power in the Amendments and in the original Constitution as to trial by jury . . . ."

"Though originally the first ten Amendments were adopted as limitations on the Federal power, . . . [those privileges] cannot now be abridged by a State under the Fourteenth Amendment."

AMAR, *supra* note 35, at 227-28 (alternations in original) (emphasis added) (quoting *Spies v. Illinois*, 123 U.S. 131, 151 (1887)) (emphasis added).

In *O'Neil v. Vermont*, Justice Field concluded that "after much reflection, I think the definition given at one time before this court by a distinguished advocate – Mr. John Randolph Tucker, of Virginia – is correct." *O'Neil v. Vermont*, 144 U.S. 323, 361 (1892) (Field, J., dissenting).

In *Twining v. New Jersey*, Justice Harlan commented that rights claimed "in the name of the people of the United States" by the original Bill of Rights *became applicable against the states* via the Fourteenth Amendment. *Twining v. New Jersey*, 211 U.S. 78, 117-18, 122 (1908) (Harlan, J., dissenting).

### C. A Loss of National Will

Once it became clear that the Fourteenth Amendment was not going to be enforced to its full-intended effect by the Supreme Court, the national will to follow the course of liberty and freedom charted by the Fourteenth Amendment was lost. As Curtis puts it,

[f]or a brief shining moment during and after the Civil War, protection of blacks had been associated with the cause of the Union. By the mid-1870s [however,] protection of blacks seemed to disrupt national unity, and the commitment to protection of their rights faded away as quickly as it had come.<sup>140</sup>

Why did this happen? As Foner explains, during President Ulysses Grant's second term (1872-76) there was "a pronounced shift in Northern attitudes toward the South . . . . As evidence multiplied of a growing spirit of sectional reconciliation, Reconstruction's defenders found themselves on the losing side in what one Southern Democrat called 'the war of words which has followed the battles of the rebellion.'"<sup>141</sup> This shift in attitude was reflected in the election of 1874 in which Reconstruction-minded Republicans were replaced in record numbers by reconciliation-minded Democrats.<sup>142</sup> It is perhaps not surprising, in light of the truism that nothing quite concentrates a politician's mind like the prospect of losing reelection, that many of the congressional Republicans who survived the 1874 election-disaster chose to take a more pragmatic approach by jettisoning their commitment to antislavery ideology.<sup>143</sup> With the bloody war a decade past, the U.S. Congress — now the Forty-third — took on a decidedly different approach from that of the transcendent Thirty-ninth. Whereas Congress and the Grant Administration had

140. CURTIS, *supra* note 29, at 180.

141. FONER, RECONSTRUCTION, *supra* note 56, at 524.

142. *Id.* at 523. "In the greatest reversal of partisan alignments in the entire nineteenth century, . . . [the 1874 election] erased the massive Congressional majority Republicans had enjoyed since the South's secession, transforming the party's 110-vote margin in the House into a Democratic majority of sixty seats." *Id.* Republicans' losses in 1874 are at least partly explainable by the economic depression of 1873-1878, "the longest period of uninterrupted economic contraction in American history." *Id.* at 512-13. See also, generally HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION (2001) (discussing the role economics played in the retreat from Reconstruction).

143. See, e.g., CURTIS, *supra* note 29, at 177-78.

As antislavery stalwarts grew old, died off, or were defeated at the polls, more and "more Republicans began to emphasize the issue of states' rights." President Grant, a defender of the rights of blacks, found himself increasingly isolated. Blacks could be protected only by federal "force," and each new application of force brought defections.

*Id.* (footnotes omitted).

earlier aggressively protected the freedmen and their supporters,<sup>144</sup> by 1875 Congress's resolve for securing liberty had waned into dormancy.

Even so, it was still commonly believed among many in the mid-1870s — including the Fourteenth Amendment's opponents — that the Fourteenth Amendment applied the Bill of Rights, but nothing more, to the States.<sup>145</sup> Any lingering uncertainty regarding the judiciary's view on this issue was settled in 1875, however, when the Court held in *United States v. Cruikshank* that the “amendments proposed and adopted . . . [in 1791 were] not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.”<sup>146</sup> The Court cited eight cases in support of the same conclusion reached by Chief Justice Marshall in *Barron* forty-odd years earlier, commenting that “[i]t is now too late to question the correctness of this construction.”<sup>147</sup> Notably, all but two of the cases cited in *Cruikshank* were decided *before* the Fourteenth Amendment's proposal and ratification, and the two that were not, *Twitchell v. Pennsylvania*<sup>148</sup>

144. *Id.* at 178.

Grant suspended the writ of habeas corpus in nine South Carolina counties [in response to the increased incidence of assassination of black leaders and Republicans]. A number of Klansmen were tried under federal anti-Klan statutes, and fifty-five were found guilty of violating civil rights. According to historian Page Smith more than five thousand Klansmen were arrested under the federal acts, and for a time the Klan was suppressed.

*Id.*

145. *See supra* notes 86-94 and accompanying text.

146. *United States v. Cruikshank*, 92 U.S. at 542, 552 (1875). The Court refused to extend the Second Amendment to the States, stating, “[f]or their protection in . . . enjoyment [of rights guaranteed in the Bill of Rights], the people must look to the States.” *Id.*

147. *Id.*

148. 74 U.S. (7 Wall.) 321 (1868).

[T]he scope and application of these amendments are no longer subjects of discussion here.

In the case of *Barron v. The City of Baltimore*, the whole question was fully considered . . . and Chief Justice Marshall, declaring the unanimous judgment of the court, said: . . .

“These [Bill of Rights] amendments contain no expression indicating an intention to apply them to State governments. This court cannot so apply them.”

And this judgment has since been frequently reiterated, and always without dissent. . . .

....

In the views thus stated and supported we entirely concur.

*Id.* at 325-27 (footnotes omitted).

and *Edwards v. Elliott*,<sup>149</sup> themselves simply cited back to the earlier six cases without acknowledging the Fourteenth Amendment. In other words, the *Cruikshank* Court, with two feet firmly planted in the past, utterly ignored the possibility that the Fourteenth Amendment might have effected a change from that which existed before the Amendment's ratification.

Whereas before *Cruikshank* even the Fourteenth Amendment's critics assumed it applied the Bill of Rights, at the minimum, to the States,<sup>150</sup> after the opinion "incorporationists were [and to this day continue to be] almost invariably cast as defenders of an expansive view of Section 1 and a concomitant aggrandizement of federal power at the expense of state independence."<sup>151</sup>

After witnessing the Court hammer the nail begun in *Slaughter-House* fully into the privileges or immunities clause's coffin in *Cruikshank*, "it is not surprising," suggests Curtis, "that congressmen did not repeat the earlier broad belief that the privileges or immunities clause of the Fourteenth Amendment protected at least the Bill of Rights. . . . After [these] rulings by the high Court, . . . [t]he true and intended meaning of the Fourteenth Amendment was . . . of only academic interest."<sup>152</sup> In sum, the privileges or immunities clause has never recovered from the fatal first blows dealt in *Slaughter-House* and *Cruikshank*.

All of this begs two questions: one, why did the Court in these cases, against the seemingly-clear purpose and contemporaneous understanding of section one, nonetheless "contort the Constitution in such an unjust and unsupported manner";<sup>153</sup> and two, more pointedly for our purposes today, why has it so obstinately failed to correct its mistake in the intervening 130 years?

Regarding the first, 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.<sup>154</sup> No matter that the Court is supposed to be above ordinary politics; it seems unavoidable that the "resurgence of overt racism [in American society] that undermined support for Reconstruction,"<sup>155</sup> together with the great desire of many for reconciliation, somehow influenced the Court in these and other cases, which themselves then played a crucial role in enabling continued governmental infringements for the next century-plus. As Professor Elizabeth Price-Foley says,

[T]he ineluctable [explanation] is slavery. Although slavery had been officially abolished by the Thirteenth Amendment, the former

149. 88 U.S. (21 Wall.) 557 (1874) (stating that the right to trial by jury "does not apply to trials in state courts").

150. See *supra* notes 86-93 and accompanying text.

151. Maltz, *supra* note 94, at 533.

152. CURTIS, *supra* note 29, at 170.

153. FOLEY, *supra* note 22, at 36.

154. See *supra* notes 132-36 and accompanying text.

155. FONER, RECONSTRUCTION, *supra* note 58, at 525.

slave states were far from accepting African-Americans as equal citizens. . . . If either *Slaughterhouse* Court had interpreted the Privileges or Immunities Clause of the Fourteenth Amendment as making the federal Bill of Rights applicable to the states, the southern states could not have continued to enact legislation that denied the Bill's liberties to African-Americans. And if the former slave states had been forced by the Court to grant equal liberty to African-Americans, the tenuously reconstructed Union might have collapsed.<sup>156</sup>

The second question — why the Court has failed in the intervening 130 years to correct the mistakes it made in *Slaughter-House* and *Cruikshank* — is a real head-scratcher. In a way, the Court has “covered” itself by subsequently developing a plausible, though tortured, substantive due-process and equal protection jurisprudence,<sup>157</sup> which for practical purposes has provided some of the same protections as if the Fourteenth Amendment had been properly recognized from the beginning<sup>158</sup>

Moreover, the longer a particular holding is on the books, the more firmly entrenched it becomes in the judiciary's lexicon, and accordingly, under *stare decisis*, the more difficult it is to overcome.<sup>159</sup> Another possible explanation, more basic still and no doubt better left to the work of behavioral scientists, may be found in human nature itself. One of the first things one will notice upon observing behavior on any grade-school playground is the

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156. FOLEY, *supra* note 22, at 36.

157. The suggestion that the proper case simply has never come before the Court is implausible; any number of cases decided on due process and equal protection grounds could easily have been decided on privileges or immunities grounds. *See infra* notes 205-09. In any event, the issue of Second Amendment incorporation now presents a means for the Court to address the issue.

158. *See generally* AMAR, *supra* note 35.

159. There is always a place within the doctrine of *stare decisis* not to abide by earlier opinions that are themselves fundamentally flawed. *See also* 1 TRIBE, *supra* note 5, at 1320-31. For example,

It would have been perfectly proper in 1953 to argue that because the Supreme Court had not recognized the right to integrated schools, such a right did not exist, at least as a legally enforceable matter [after *Plessy*, b]ut such an argument would hardly have stated an eternal truth about the Constitution, or even (as the following year proved) about the Supreme Court's view of the question.

Glenn Harland Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464 (1995) (footnotes omitted). That said, interpreting the privileges or immunities clause anew according to its originally-intended expansive terms would force a massive change to the *status quo* in the common law regarding the government's role *vis-à-vis* the individual. *See infra* notes 199-202 and accompanying text. *See also, e.g.*, William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1254-55 (1994).

tendency of some children to want to make the rules and control the behavior of others. As personality traits demonstrably carry through into adulthood,<sup>160</sup> one may surmise that these particular desire-for-control characteristics may manifest themselves among politicians and jurists whose legislation and jurisprudence may seek excessively to control others' lives.<sup>161</sup>

Unsubstantiated pop psychology aside, the views of the Supreme Court are not ultimately dispositive.<sup>162</sup> While the Court decides the law<sup>163</sup> and thus exerts profound practical influence, in the larger sense the final word is found *only* in the Constitution.<sup>164</sup> In this regard, Supreme Court holdings contradicting the dictates of the Constitution are, paradoxically, themselves unconstitutional.

In sum, by the mid 1870s the brief shining moment of governmental recommitment to the ideals of the Declaration of Independence, the Preamble and Bill of Rights had passed, and the nation was now well positioned for another 100-plus years of governmental (judicial, legislative, and executive alike) curtailment of liberty. It is a curtailment that lasts to this day.<sup>165</sup> But

160. See, e.g., Avshalom Caspi & Brent W. Roberts, *Personality Development Across the Life Course: The Argument for Change and Continuity*, 12 PSYCHOL. INQUIRY 49 (2001) (demonstrating some continuity of personality from childhood to adulthood).

161. Naturally some number of grade-school playground-controllers grow into legislators, government officials, and jurists — including Supreme Court justices — who continue to scratch their control-itch by enacting laws, developing policies, and handing down decisions that direct the behavior of others.

162. Curtis comments that

unless one surrenders entirely to positivism, the Constitution is not simply what the judges say it is. The law in a particular case is what the judges say it is. The Constitution is a different matter. The document has a text, history, and tradition of its own. There is nothing anomalous about the argument that the judges were misreading it.

The argument that the Supreme Court had misread and perverted the Constitution was made by leading Republicans [before the Civil War]. Probably the most notable case was Abraham Lincoln's response to the *Dred Scott* decision. Lincoln thought the decision was wrong and refused to accept it as a rule of political action. "We propose," he said, "so resisting it as to have it reversed if we can, and a new judicial rule established in its place."

CURTIS, *supra* note 29, at 215.

163. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

164. *Id.* at 178 ("[T]he constitution is to be considered, in court, as a paramount law."). See also *supra* note 14 and accompanying text.

165. To be sure, the Court started to hold States accountable to observe Bill of Rights protections on a selective basis as early as 1925, but it wasn't until the middle of the twentieth century, starting with the Warren Court's abolishment of the offensive *Plessy v. Ferguson* "separate but equal" doctrine in *Brown v. Board of Education* in 1954 and Congress's subsequent Civil Rights legislation of the 1960s that an effec-



that moment created in the Thirty-ninth Congress and continued by the States in the late 1860s left the ultimate lasting legacy: an amendment to the Constitution in the form of section one,<sup>166</sup> including the privileges or immunities clause, which despite being ignored by the Supreme Court for 130 years and counting, has not itself been amended or repealed by the people, and so *must* — if American constitutionalism is to mean anything — be given effect by the Court.

*D. Second Amendment Incorporation Through the Privileges or Immunities Clause*

Jurists and legal theorists claiming the importance of fidelity to a written Constitution must, if they are to retain intellectual credibility, sooner or later give effect to the privileges or immunities clause. It simply is not an acceptable option for thoughtful constitutionalists favoring *any* interpretive method<sup>167</sup> to accept only those provisions squaring with their own personal ideologies, while ignoring others. Just as those dynamic interpretivists who believe it would be acceptable to address the problem of gun violence in America by allowing States to ban guns are constitutionally misguided;<sup>168</sup> so too are those originalists who believe that government may regulate in ways that prohibit or unacceptably infringe upon other rights, privileges, liberties, and immunities originally protected by the privileges or immunities clause. The Constitution is a package deal; one cannot pick and choose from among its provisions.<sup>169</sup>

In short, the shell game cannot continue. Sophistry can deter or delay the inevitable for a time, as it has for over 130 years with the privileges or immunities clause, but dissembling cannot ultimately defeat the will of the people as expressed in the Fourteenth Amendment. Like it or not, the Second Amendment protects the people's<sup>170</sup> right to keep and bear arms — as well as

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tive effort was mounted to stem the tide of governmental intrusions into individual liberty, but there has been a regrettable backsliding since then.

166. See also FONER, FREEDOM, *supra* note 61, at 112.

[T]he Reconstruction amendments remain[] embedded in the Constitution, sleeping giants to be awakened by the efforts of subsequent generations to redeem the promise of freedom . . . . The importance of this accomplishment ought not to be underestimated: repudiating the racialized definition of democracy that had emerged in the first half of the nineteenth century was a major step toward reinvigorating the idea of freedom as a universal entitlement.

*Id.* at 113.

167. See *supra* notes 17-19 and accompanying text.

168. See *supra* notes 45-52 and accompanying text.

169. See generally Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

170. See *supra* notes 22-25 and accompanying text.

other enumerated and unenumerated rights, privileges, liberties and immunities — from infringements by American government, federal *and* state alike.

### 1. Justice Black's *Adamson v. California* dissent

Justice Hugo Black<sup>171</sup> fought this battle for decades on the Court. Arguing in favor of the “total incorporation” of the Bill of Rights, Justice Black said,

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.<sup>172</sup>

Justice Black points out that in construing section one on the issue of incorporation, over time the Court had unexplainedly departed from its almost uniform “salutary practice” of “plac[ing] [itself] as nearly as possible in the condition of the men who framed” the Constitution;<sup>173</sup> and observed that none of the briefs or opinions in any of the cases, except one, used to support the Court's refusal to apply the Bill of Rights to the States, consider at all the Fourteenth Amendment's legislative or contemporaneous history.<sup>174</sup>

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171.

[Justice Black] was a textualist, and he took his text from the Constitution, particularly the Bill of Rights. He often read the provisions with a literalism that was disarming or infuriating, depending on one's views. For Black, precedent occupied a secondary position. His approach to application of the Bill of Rights to the states is an example. The fact that case after case had rejected total application of the Bill of Rights to the states did not deter Justice Black.

CURTIS, *supra* note 29, at 201.

172. *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (footnote omitted). Although Justice Black's “total incorporation” approach has never been vindicated by the Court, the practical effect has been *almost* the same, with most (but *not* all — hence, this article) of the Bill of Rights applied to the states through the Court's due process “selective” incorporation approach.

173. *Id.* at 72-73 (Black, J., dissenting).

174. *Id.* at 73.

In *Maxwell v. Dow*,<sup>175</sup> which, according to Justice Black, was the one case that *did* that acknowledge contemporary history,<sup>176</sup> the Court merely “acknowledged that counsel had ‘cited from the speech of one of the Senators,’ but indicated that it was not advised what other speeches were made in the Senate or in the House.”<sup>177</sup>

Justice Black adds,

[t]he *Maxwell* Court considered, moreover, that “[w]hat individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it.”<sup>178</sup>

Justice Black further notes “[t]he [*Twining*] Court admitted that its action had resulted in giving ‘much less effect to the 14th Amendment than some of the public men active in framing it’ had intended it to have,”<sup>179</sup> in holding that the question of whether section one was intended to apply the Bill of Rights to the states was “‘no longer open’ because of previous decisions of this Court which, however, had not appraised the historical evidence on that subject.”<sup>180</sup>

Well, as Justice Black implies, the Court’s position on these points is unsupportable.<sup>181</sup> The approach runs counter to common-sense principles of construction that, in seeking to interpret the intended scope of a writing, one should look first to the text, then to the meaning expressed and assigned to it by the person(s) who actually did the writing in order to illuminate the text. For the Court thus to ignore, in case after case, decade after decade,<sup>182</sup> the relevant official statements of numerous members of Congress involved in

175. 176 U.S. 581 (1900).

176. Specifically, counsel for the appellant in *Maxwell* cited the speech by Senator Jacob Howard which “so emphatically stated the understanding of the framers of the Amendment . . . that the Bill of Rights was to be made applicable to the states by the Amendment’s first section.” *Adamson*, 332 U.S. at 73 (Black, J., dissenting).

177. *Id.*

178. *Id.*

179. *Id.* at 74 (quoting *Twining v. New Jersey*, 211 U.S. 78, 96 (1908)).

180. *Id.* (quoting *Twining*, 211 U.S. at 98).

181. *See supra* note 66 and accompanying text.

182. Curtis notes that

[b]y 1892 six people who sat as Justices on the Supreme Court had concluded that the privileges or immunities clause of the Fourteenth Amendment applied the Bill of Rights to the states: Justice Woods, before his elevation to the Court; Justices Bradley and Swayne in the *Slaughter-House Cases* [dissent]; and Justices Field, Brewer, and Harlan in the case of *O’Neil v. Vermont*. Unfortunately, they did not sit and reach their conclusions at the same time.

CURTIS, *supra* note 29, at 191 (footnotes omitted).

drafting and passing the Fourteenth Amendment<sup>183</sup> is simply a failure of the Court's institutional responsibility to interpret faithfully the Constitution. Moreover, it is a failure of the individual justices' sworn commitment to "faithfully . . . discharge . . . duties . . . under the Constitution."<sup>184</sup>

## 2. The Supreme Court's Way Forward

The important point is that it is never too late for the Court to correct itself. And the issue of Second Amendment incorporation offers a useful mechanism through which the necessary privileges or immunities clause restoration work can begin. Here is how: as of 2006, the Court has explicitly incorporated twenty of twenty-five<sup>185</sup> Bill of Rights provisions to apply to the States through its due process clause "selective incorporation" doctrine. While selective incorporation has been enormously important in extending previously-unavailable substantive and procedural protections of the Bill of Rights to millions of Americans on a daily basis,<sup>186</sup> it still fails to extend the full range of protection provided for in the Bill of Rights, including the right of individual citizens to keep and bear arms.

Justice Black was only partially correct in claiming that section one of the Fourteenth Amendment "totally incorporates" the Bill of Rights to the States.<sup>187</sup> In fact, section one as originally conceived, proposed and ratified, protects from State infringement not only the rights and liberties detailed in the Bill of Rights, but also rights and liberties enumerated elsewhere in the

183. These statements include those of Representative John Bingham, who, as Justice Black says, "may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment." *Adamson*, 332 U.S. at 74 (Black, J., dissenting).

184. The oath administered to federal judges reads,

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [judge/justice] under the Constitution and laws of the United States. So help me God.

28 U.S.C § 453 (2000).

185. *See infra* Part III.

186. The great majority of criminal and civil laws are, after all, state and local. *See generally* Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982). *See also* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 483 (2d ed. 2002) (noting, "what is particularly striking is the relative recency of incorporation of most of these provisions. It was not until 1963, in *Gideon v. Wainwright*, that the right to counsel was required in all cases where there [was] a possible prison sentence. It was not until 1964, in *Malloy v. Hogan*, that the privilege against self-incrimination was incorporated. Indeed, most of the Bill of Rights provisions concerning criminal procedure were not incorporated until the Warren Court decisions of the 1960s.").

187. *See supra* note 166 and accompanying text.

Constitution,<sup>188</sup> as well as other *unenumerated* rights and liberties,<sup>189</sup> pursuant to the Ninth Amendment.<sup>190</sup> Black's conception of section one, then, was more cramped than its framers and ratifiers had intended.

As Chair of the Joint Committee on Reconstruction, Senator Jacob Howard said in a speech before the Thirty-ninth Congress where he described the scope of section one. "[Regarding] these privileges and immunities, whatever they may be — for they are not and cannot be fully defined in their entire extent and precise nature — to these should be *added* the personal rights guaranteed and secured by the first eight amendments."<sup>191</sup>

Howard's comment reflected the views of Republicans in Congress who understood that the terms "privileges" and "immunities" included not only the rights stated in the Bill of Rights, but also other fundamental individual rights embedded within the original Articles or otherwise unenumerated in the Constitution. Senator John Sherman of Ohio, for example, emphasized that under the "ninth article of amendment . . . *there are other rights* [applicable to the States] beyond those recognized" and "as the *Constitution itself did not enu-*

188. For example, Article I, section nine protects against government denial of the writ of habeas corpus and against ex post facto laws and bills of attainder; and Article I section ten protects against States' passage of ex post facto laws and bills of attainder.

189. See, e.g., AMAR, CONSTITUTION, *supra* note 78, at 389-92.

Although "privileges or immunities" of citizens paradigmatically included the rights and freedoms in the federal Bill, these were not the *only* fundamental rights that henceforth no state could abridge. [Individual civil rights protected] elsewhere in the Constitution — for example the "privilege" of habeas corpus protected against the federal government in Article I, section 9 — defined additional core privileges that should be applied against states. Still other eligible candidates for inclusion in the civil-rights pantheon included fundamental freedoms affirmed by canonical legal texts, such as the American Declaration of Independence or the English Bill of Rights, or declared in various state constitutions, or promulgated by Congress in landmark civil-rights legislation (like the Civil Rights Act of 1866).

*Id.* at 389-90. However, "[c]itizenship itself did not imply voting or other political rights." *Id.* at 391.

190. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S CONST. amend. IX. See also, generally Randy Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1 (2006); FOLEY, *supra* note 22.

191. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (emphasis added). Howard cited and quoted Justice Bushrod Washington's 1823 description in *Corfield v. Coryell* regarding the scope of the terms "privileges" and "immunities" in Art IV section 2 — a description which many Republicans in the Thirty-ninth Congress viewed as definitive for purposes of understanding the scope of the same terms in section one of the Fourteenth Amendment.

merate all the rights of citizens we look to the Declaration of Independence and the common law of England.”<sup>192</sup> Another asked incredulously:

“[T]he enumeration of personal rights in the Constitution to be protected, prescribes the kind and quality of the governments that are to be established and maintained in the States. . . .

. . . and then, lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that ‘the enumeration in the Constitution of certain rights should not be construed to deny or disparage other[s] [retained by the people].’

*Will it be contended, sir, at this day, that any State has the power to subvert or impair the natural and personal rights of the citizen? Will it be contended that the doctrine of ‘State sovereignty’ has so far survived the wreck of its progenitor, slavery, that we are yet aloof from the true construction of the Constitution?*

While slavery existed as a political power, it was not possible to adopt a true construction of the fundamental law.”<sup>193</sup>

Occasional voices in the judicial wilderness implicitly have recognized the expansiveness of the privilege or immunities clause. Justices Murphy and Rutledge, for example, dissenting separately from Justice Black in *Adamson v. California*, wrote “I agree [with Justice Black] that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights.”<sup>194</sup> Similarly, Justice Douglas

192. Maltz, *supra* note 94, at 527 (emphasis added) (quoting CONG. GLOBE, 42nd Cong., 2d Sess. app. at 26 (1872)).

193. CURTIS, *supra* note 29, at 53-54 (emphasis added) (quoting Sen. Nye). Comments in the preceding Thirty-eighth Congress, which had proposed the Thirteenth Amendment, illustrate the broad scope of the terms “privileges” and “immunities.” “Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor; wherever he may be within the jurisdiction of the United States. With these rights no State may interfere . . . .” *Id.* at 37-38. “‘Sir I might enumerate many other constitutional rights of the citizen, which slavery has disregarded and practically destroyed, but I have [said] enough to illustrate my proposition: that slavery . . . denies to the citizens of each State the privileges and immunities of citizens . . . .’” *Id.* at 49-50 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1202-03 (1864)).

194. *Adamson v. California*, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting). Justice Murphy’s view located the additional rights as falling within the due process clause, however, not the privileges or immunities clause: “Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as

has commented, “[s]ince the adoption of th[e Fourteenth] Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights. . . . Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open.”<sup>195</sup>

Current justice Clarence Thomas commented in a law review article before his elevation to the Supreme Court,

the natural rights and higher law arguments [embodied in the privileges or immunities clause] are the best defense of liberty and of limited government. Moreover, without recourse to higher law, we abandon our best defense of judicial review – a judiciary active in defending the Constitution, but judicious in its restraint and moderation.<sup>196</sup>

Justice Thomas has recently expressed a willingness to reexamine section one. Dissenting in *Saenz v. Roe*<sup>197</sup> in 1999 on his view that the majority “attributes a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified,”<sup>198</sup> Justice Thomas said he “would be open to reevaluating [the Clause’s] meaning in an appropriate case.”<sup>199</sup> Furthermore, he promisingly continued, “we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.”<sup>200</sup>

*Saenz* broke no new ground doctrinally, in that it merely identified the “right to travel” as one of those privileges or immunities of National, as opposed to State, citizenship first identified in *Slaughter-House*,<sup>201</sup> but the case is encouraging nonetheless because it cracks open the door long-closed on the privileges or immunities clause in the Supreme Court. The fact that the privileges or immunities clause was acknowledged by the Court at *all*, in any form, is a positive sign that the Court may not continue forever to sweep the clause completely under the rug, thinking perhaps that the clause will just go away if the Court pretends it does not exist. Perhaps the Court understands, at

to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.” *Id.*

195. *Gideon v. Wainwright*, 372 U.S. 335, 345-46 (1963) (Douglas, J., concurring).

196. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POLY. 63, 64 (1989).

197. 526 U.S. 489 (1999).

198. *Id.* at 521 (Thomas, J., dissenting).

199. *Id.* at 528.

200. *Id.* (emphasis added). Given his cramped views of liberty expressed elsewhere, however, it is an open question how Justice Thomas would in fact interpret a re-opened privileges or immunities clause.

201. See *Saenz*, 526 U.S. at 502-03.

least implicitly, that individual provisions of the Constitution — even those long-ignored ones like the privileges or immunities clause — can never be completely banished. Like a black-sheep uncle, they keep coming back; blood, or, in this case, the Constitution, is thicker than water.

As Professor Erwin Chemerinsky points out, “for essentially the first time in American history, [in *Saenz*] . . . the [Supreme] Court used the privileges or immunities clause to invalidate a state law,”<sup>202</sup> so it is at least possible that the tiny pebble of *Saenz* could portend a sea change in how the Court henceforth may view the long-dormant privileges or immunities clause.

It is not as if the principles underlying the framers’ intent for the privileges or immunities clause are unfamiliar to the Court. In fact it would be impossible for the Court to be so unaware, for the clause itself is nothing more than the clearest, most direct and unadorned manifestation of the very core *idea* that radiates from the Declaration, the Constitution, and the concept of America itself: namely, Freedom.<sup>203</sup> Freedom positively permeates the founding documents, and the Court could no more eliminate the idea of Freedom envisioned by the clause by closing the privileges or immunities window for 130 years than by scrapping America itself.<sup>204</sup>

Some of the most laudable Court opinions over the decades reflect the sort of expansive view for individual freedom originally intended for the privileges or immunities clause. Just listen:

in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. *The law regards man as man, and takes no account of his surroundings or of his color when [guaranteeing] his civil rights . . .*<sup>205</sup>

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202. CHEMERINSKY, *supra* note 32, at 547 n.9.

203. *See, e.g.*, FONER, FREEDOM, *supra* note 58, at xiii.

No idea is more fundamental to Americans’ sense of themselves as individuals and as a nation than freedom. . . . or “liberty,” with which it is almost always used interchangeably . . . . The Declaration of Independence lists liberty among mankind’s inalienable rights; the Constitution announces as its purpose to secure liberty’s blessings. . . . If asked to explain or justify their actions, public or private, Americans are likely to respond, “It’s a free country.” “Every man in the street, white, black, red or yellow,” wrote the educator and statesman Ralph Bunche in 1940, “knows that this is ‘the land of the free’ . . . ‘the cradle of liberty.’”

*Id.* (fourth omission in original).

204. The very foundation of the Founders’ and Framers’ political theory was to “free the individual from the oppressive misuse of power, [and] from the tyranny of the state.” BAILY, *supra* note 7, at vi.

205. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (emphasis added).



“This [right to counsel] seems to us to be an obvious truth. . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure *fair trials before impartial tribunals in which every defendant stands equal before the law*”;<sup>206</sup> “specific guarantees in the Bill of Rights have penumbras . . . . [including] zones of privacy.”<sup>207</sup> *protecting certain liberties “older than the Bill of Rights – older than our political parties, older than our school system”*;<sup>208</sup> and “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places . . . . Freedom extends beyond spatial bounds. *Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.*”<sup>209</sup> *That is what we are talking about.*

The point is, on one hand it would not be a stretch for the Court to hold similarly in future cases, but then to place its reasoning squarely within the privileges or immunities clause instead of the due process and equal protection clauses.<sup>210</sup> On the other, there can be little doubt that interpreting the privileges or immunities clause according to its originally-intended expansive terms would force a radical change in American conceptions of the proper role of government *vis-à-vis* the individual. The American people and the federal, state, and local governments that are supposed to serve them have long-since forgotten that the core Enlightenment-inspired freedom-principles embraced in the founding documents lay in protecting the people from overbearing government.<sup>211</sup> Simply put, if the privileges or immunities clause were given its intended effect, no longer would government be allowed to control private individual behavior causing no harm to others.<sup>212</sup> Courts

206. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (emphasis added).

207. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

208. *Id.* at 486 (emphasis added).

209. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (emphasis added).

210. To so allow the privileges or immunities clause to do the heavy lifting for which it was originally designed would have the added benefit of resolving more than a century of doctrinal contortions. It is true that placing the proper value upon the privileges or immunities would naturally result in incrementally greater protection for citizens than non-citizens, since by its terms the privileges or immunities clause protects “citizens,” while the due process and equal protection clauses protect all “persons.” As the present-day credit-card advertisement puts it, “membership has its privileges.”

211. *See generally* BARNETT, *supra* note 1.

212. *See generally* Michael Anthony Lawrence, *Reviving a Natural Right: The Freedom of Autonomy*, 42 WILLAMETTE L. REV. 123 (2006).

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . In the part [of his conduct] which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

JOHN STUART MILL, ON LIBERTY 14-15 (Filiquarian Publ’g 2006) (1859).

would necessarily be forced to curtail government power by reining in both the expansive “police” powers currently exercised by States<sup>213</sup> and “necessary and proper” powers exercised by the feds, to the extent either one of them abridges citizens’ privileges or immunities, expansively defined. In short, a “presumption of liberty”<sup>214</sup> would be reinstated. No doubt, hundreds if not thousands of laws and government practices would be invalidated as exceeding allowable limits on abridging individual freedom.

If this sounds crazy, it is so only because we have become so accustomed over time to a *status quo*<sup>215</sup> of governmental paternalism that we are anesthetized to other possibilities. In fact, the founding documents promise a nation where all citizens are truly free to live in a way as closely approximating a state of nature (that is, free of government interference) as they might desire, understanding all the while the vital, though, subservient, role of a limited government.

In sum, the mold is cast, the stage is set, and the planets are aligned. It is up to the Supreme Court now to take the next step to re-invigorate the privileges and immunities clause to its intended civil libertarian glory.

#### IV. APPLICATION OF THE SECOND AMENDMENT TO THE STATES THROUGH THE SUPREME COURT’S EXISTING DUE PROCESS SELECTIVE INCORPORATION DOCTRINE

Notwithstanding the Supreme Court’s 1870s abdication of the privileges or immunities clause, the people’s Fourteenth Amendment move to extend the Bill of Rights protections to the States has not entirely eluded the Court. In the early- mid-twentieth century the Court gradually developed an alternative constitutional mechanism — so-called “selective incorporation” of individual Bill of Rights provisions through the due process clause — to give

213. See, e.g., BARNETT, *supra* note 1; see also text accompanying note 4.

That the reasonable regulation of natural rights is essential to their efficacious exercise and enforcement in civil society does not entail that these rights are surrendered completely to the government. . . . The [unwritten] “police power” to enforce or regulate a retained right is not the power to confiscate, prohibit, infringe, abridge its exercise.

BARNETT, *supra* note 1, at 74-75.

214. See BARNETT, *supra* note 1, at 219.

215. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION 133 (2003). According to Dahl, Alexis de Tocqueville warned that

“[a]mong citizens all equal and alike, the supreme power, the democratic government, acting in response to the will of the majority, will create a society with a network of small complicated rules, minute and uniform, that none can escape. Ultimately, then, the citizens of a democratic country will be reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.”

*Id.*

effect to some of the intended protections, to the point where, by the time of the 100-year anniversary of *Slaughter-House* and *Cruikshank* in the mid 1970s, the Court had applied virtually all of the Bill of Rights to the States.<sup>216</sup>

The Court has not, however, selectively incorporated the Second Amendment. Only rarely has the Court even considered the question; the last time it did so, in fact, was more than 65 years ago, long before the full development of its modern selective incorporation doctrine; and even then the case was not well on point.<sup>217</sup> It is past time for the Court again to consider the question. When it does, short of the vastly preferable result of declaring that the Second Amendment is incorporated through the Fourteenth Amendment privileges or immunities clause,<sup>218</sup> the Court should hold that the Second Amendment is selectively incorporated to apply to the States.

#### A. Evolution of the Court's Incorporation Doctrine

In the early decades following the *Slaughter-House Cases* and *Cruikshank*,<sup>219</sup> the Court held true with its unnatural and narrow reading of section one. In *Hurtado v. California*<sup>220</sup> for example, the Court explained that because the Fifth Amendment right to grand jury indictment in criminal cases

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216. Only five of twenty-five separate provisions (by one count) in the Bill of Rights have not been incorporated. One example of an unincorporated Bill of Rights provision is the Third Amendment prohibitions against peacetime quartering of soldiers "in any house, without the consent of the Owner," U.S. CONST. amend. III, and wartime quartering of soldiers "in any house . . . but in a manner to be prescribed by law." *Id.* Neither the peacetime nor wartime provision has been addressed by the Supreme Court, but the former was incorporated by the Second Circuit Court of Appeals in *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982). Other examples include the Fifth Amendment right to grand jury indictment (held repeatedly by the Supreme Court to be unincorporated, most recently in *Picard v. Connor*, 404 U.S. 270 (1971)); the Seventh Amendment right to jury trial in civil cases (also held to be unincorporated, most recently in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999)); and the Eighth Amendment prohibition against excessive fines. Although the Court has never addressed this issue, the Court "has strongly indicated that at least the Eighth Amendment prohibitions will be deemed fundamental (and incorporated) when that issue is squarely presented in an appropriate case." See Jerrold Israel, *Selective Incorporation, Revisited*, 71 GEORGETOWN L.J. 253 (1983).

The number of unincorporated provisions might be six or seven, if one counts (1) the sixth amendment vicinage provision requiring a criminal jury be "of the State and district wherein the crime shall have been committed," see, e.g., Israel, *supra*; (2) the third amendment as having two distinct provisions (quartering of soldiers in (a) time of peace; and (b) time of war).

217. See *infra* notes 250-51 and accompanying text.

218. See *supra* Part III (advocating incorporation of the Second Amendment through the Fourteenth Amendment privileges or immunities clause).

219. See *supra* notes 1111-26, 1146-50 and accompanying text.

220. 110 U.S. 516, 534 (1884).

exists independently of the Fifth Amendment due process clause, “‘due process of law’ was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case.” Regarding what ‘due process of law’ was meant to include, the Court commented, “any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the public good, which regards and preserves [certain basic] principles of liberty and justice, must be held to be due process of law.”<sup>221</sup> In other words, says Curtis, “[w]hat was acceptable would be determined not by what Coke thought, or by what the framers thought . . . or by procedure specified in the Bill of Rights but by what the Justices thought . . . .”<sup>222</sup>

Two years later, the Court in *Presser v. Illinois* directly applied the rules it had invented in *Slaughter-House* and *Cruikshank*, in upholding an Illinois statute banning unlicensed parades of voluntary arms-bearing associations.<sup>223</sup>

The first time the Court held that the Fourteenth Amendment due process prohibits a state from abridging a right that also happens to be protected in the Bill of Rights (in this case, the Fifth Amendment takings clause) was in 1897 in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*,<sup>224</sup> although the Court did not expressly say it was incorporating the Fifth Amendment.<sup>225</sup> About a decade later in 1908, the Court acknowledged in *Twining v. New Jersey* that the Fourteenth Amendment’s due process clause might independently be used to impose certain restrictions on the states: “[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law.”<sup>226</sup> The Court stressed, however, that “[i]f this is so, it is not because those rights are enumerated in the first eight Amendment[s], but because they are of such a nature that they are included in the conception of due process of law.”<sup>227</sup>

221. *Id.* at 537.

222. CURTIS, *supra* note 29, at 183.

223. *Presser v. Illinois*, 116 U.S. 252, 253, 269 (1886). The Court held, “The right voluntarily to associate together as a military company or organization, or to drill or parade with arms . . . is not an attribute of national citizenship” and is hence protected, if at all, by the State. *Id.* at 267. The Court also explained, “[T]he [second] amendment is a limitation only upon the power of congress and the national government, and not upon that of the state.” *Id.* at 265.

224. 166 U.S. 226 (1897).

225. *Id.* at 241.

226. *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

227. *Id.* It was on this basis the Court three years earlier had struck down a New York law capping the number of hours bakers could work per week, reasoning that the law infringed the liberty of contract protected by the due process clause. *See Lochner v. New York*, 198 U.S. 45 (1905).

The first time the Court applied a Bill of Rights provision to the States through the due process clause was in the 1925 case *Gitlow v. New York*.<sup>228</sup> Disregarding an “incidental statement in [an earlier case] that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech,”<sup>229</sup> the Court explained,

For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States.<sup>230</sup>

The period following the Court’s first acknowledgment in 1925 of the due process clause’s role in applying individual Bill of Rights provisions to the States, up until the Court’s explicit adoption in 1968 of what has come to be known as “selective incorporation,” may be characterized as a battle for the doctrinal high ground in determining the proper approach. The “fundamental fairness” view prevailed in the early years, later giving way to a closer approximation of the “total incorporation” approach first raised by Justice Black in his *Adamson* dissent.<sup>231</sup>

The earlier approach is epitomized by *Palko v. Connecticut*,<sup>232</sup> a 1937 case in which the Court upheld a Connecticut statute subjecting a defendant previously tried for murder to a second trial, because it neither “subjected him [to] a hardship so acute and shocking that our policy will not endure it. . . . [nor] violate[d] those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’”<sup>233</sup> Justice Cardozo explained, the process of Fourteenth Amendment “absorption” of certain Bill of Rights provisions “has had its source in the belief that neither liberty nor justice would exist if they were sacrificed”,<sup>234</sup> and since, as with jury trials and indictments, “[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [the

228. 268 U.S. 652 (1925).

229. *Id.* at 666 (citation omitted).

230. *Id.* The Court essentially employed “rational basis” review: “Every presumption is to be indulged in favor of the validity of the statute. . . . [and] ‘may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority.’” *Id.* at 668-69 (citation omitted).

231. *See supra* notes 172-81 and accompanying text. Justice Felix Frankfurter was dismissive of Black’s approach when first introduced: “The notion that the ‘due process of law’ guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration.” *Wolf v. Colorado*, 338 U.S. 25, 26 (1949).

232. 302 U.S. 319 (1937).

233. *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

234. *Id.* at 326.

double-jeopardy clause,]"<sup>235</sup> the defendant was re-tried and this time convicted and sentenced to death. Under *Palko*, whether a particular Bill of Rights protection will be held to apply to the States depends on the belief of five Justices at any given time of the importance of the right to the very survival of "liberty" or "justice."

The incorporation debate on the Court spilled into academic circles as well, with both sides mirroring in some ways the larger scholarly debate concerning the enduring legacy of the post-Civil War Reconstruction.<sup>236</sup> Foner explains,

By the turn of the century . . . Reconstruction was widely viewed as little more than a regrettable detour on the road to reunion. To the bulk of the white South, it had become axiomatic that Reconstruction had been a time of "savage tyranny" that "accomplished not one useful result, and left behind it, not one pleasant recollection."<sup>237</sup>

"This rewriting of Reconstruction's history was accorded scholarly legitimacy — to its everlasting shame — by the nation's fraternity of professional historians. . . . [and] shaped historical writing for generations."<sup>238</sup> Further,

[f]ew interpretations of history have had such far-reaching consequences as this image of Reconstruction. . . . [which] did much to

235. *Id.* at 325. Cardozo added, ironically, "We reach a different plane of social and moral values when we pass to the *privileges and immunities* that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption." *Id.* at 326 (emphasis added). According to Curtis, "Why the states should be permitted to disregard some privileges and immunities of citizens of the United States set out in the Bill of Rights when [section one] said that 'no state shall abridge the privileges or immunities of citizens of the United States' Cardozo did not explain." CURTIS, *supra* note 29, at 200.

236. *See infra* note 237.

237. FONER, RECONSTRUCTION, *supra* note 58, at 608-09.

238. *Id.* at 609. In the early twentieth-century a group of young scholars from the South studying the Reconstruction at Columbia University were taught that Blacks were "children" utterly incapable of appreciating the freedom that had been thrust upon them. The North did "a monstrous thing" in granting them suffrage, for "a black skin means membership in a race of men which has never of itself succeeded in subjecting passion to reason, has never, therefore, created any civilization of any kind."

*Id.* These "Dunning School" views

achieved wide popularity through D.W. Griffith's film, *Birth of a Nation* (which glorified the Ku Klux Klan and had its premiere at the White House during Woodrow Wilson's Presidency) . . . Southern whites, [it was said,] "literally were put to the torture" by "emissaries of hate" who inflamed "the negroes' egotism" and even inspired "lustful assaults" by blacks upon white womanhood.

*Id.* at 609-10.

freeze the mind of the white South in unalterable opposition to outside pressures for social change and to any thought of . . . eliminating segregation, or restoring suffrage to disenfranchised blacks. *They also justified Northern indifference to the nullification of the Fourteenth and Fifteenth Amendments.*<sup>239</sup>

This nullification consists for our purposes of the Court's sustained failure to give effect to section one's seemingly-clear mandate applying the Bill of Rights and other enumerated and unenumerated privileges and immunities to the States. Notably, at about the same time as the Dunning School came under increasing criticism, leading to its ultimate demise by the end of the 1960s,<sup>240</sup> the Warren Court began its move toward applying increasing numbers of the Bill of Rights provisions to the states through its "selective incorporation" doctrine, which itself took a relatively more objective, searching look at the history of Reconstruction and the Fourteenth Amendment than taken under its earlier approach.

Selective incorporation, ultimately enunciated in *Duncan v. Louisiana* in 1968, posed as the proper question for analysis whether a particular right "is fundamental — whether, that is, [it] . . . is necessary to an Anglo-American regime of ordered liberty."<sup>241</sup> On the *Duncan* facts, the Court said, "it might be said that [trial by jury in criminal cases] is not necessarily fundamental to fairness in every criminal system that might be imagined but [it] is fundamental in the context of the criminal processes maintained by the American States"; hence, the right is incorporated.<sup>242</sup>

In the Court's view this approach provided a more principled approach to the process of applying the Bill of Rights to the States: "[i]t is this sort of inquiry that can justify the conclusions that state courts must" abide by all of the Bill of Rights protections previously incorporated.<sup>243</sup> This was in contrast, the Court explained, to the earlier approach, under which judges were required to make a subjective determination at any given time of whether "fundamental fairness" required a state to observe the particular Bill of Rights limitation.<sup>244</sup> The Court discussed, by way of contrast, how the question would have been approached "in the older cases opining that States might abolish jury trial. A criminal process which was fair and equitable but used no

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239. *Id.* at 610 (emphasis added).

240. *See, e.g., id.* at xxi, xxii. "Despite its remarkable longevity, . . . the demise of the traditional interpretation was inevitable. Once objective scholarship and modern experience rendered its racist assumptions untenable, familiar evidence read very differently, new questions suddenly came into prominence, and the entire edifice of the Dunning School had to fall." *Id.* at xxi.

241. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

242. *Id.*

243. *Id.*

244. *Id.*

juries is easy to *imagine*. . . . Yet no American State has undertaken to construct such a system."<sup>245</sup>

*B. The Selective Incorporation Doctrine as Applied to the Second Amendment*

The modern Supreme Court has never squarely addressed the question of whether the Second Amendment applies to the States, so we lack precedent on how the Court might decide the issue in a proper case. As previously noted,<sup>246</sup> the Court held in *United States v. Cruikshank*<sup>247</sup> and again a few years later in *Presser v. Illinois*<sup>248</sup> that the Second Amendment does not apply to the States, but since both of these cases are from the Court's pre-incorporation era they cannot be considered relevant.<sup>249</sup>

Since the late nineteenth-century, the Court has decided precisely *one* case, *United States v. Miller*<sup>250</sup> in 1939, involving the Second Amendment. And there, because the issue was whether a *federal* statute infringed the right to bear arms,<sup>251</sup> the Court unsurprisingly did not address the question of

245. *Id.* at 150.

246. *See supra* notes 146-50 and accompanying text.

247. 92 U.S. 542 (1875).

248. 116 U.S. 252 (1886).

249. *See, e.g.*, Levinson, *supra* note 169, at 652 (“[G]iven the modern legal reality of the incorporation, . . . [w]hy . . . should *Cruikshank* and *Presser* be regarded as binding precedent any more than any of the other ‘pre-incorporation’ decisions refusing to apply given aspects of the Bill of Rights against the states?”); Van Alstyne, *supra* note 159, at 1239 n.10 (*Presser* and *Cruikshank* “merely mimicked others of the same era in holding that none of the rights or freedoms enumerated in the Bill of Rights were made applicable by the Fourteenth Amendment to the states.”); McAfee & Quinlan, *supra* note 2, at 880 (“*Cruikshank*, *Presser*, and *Miller* . . . have no modern relevance to the issue of incorporation as it relates to the Second Amendment.” (emphasis added)); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 253 (1983) (“[T]he attitude toward federalism which led the nineteenth-century Court to reject privileges and immunities incorporation would equally have led it to reject due process incorporation, if anyone had then imagined it. . . . However logical that [position] might have seemed in 1886, it is absurd today when the result would be to contradict the entire doctrinal basis of modern incorporation . . .”).

250. 307 U.S. 174 (1939).

251. *Id.* at 178. In upholding a federal statute that limited the possession of sawed-off shotguns, the Court found that “[i]n the absence of any evidence tending to show that [the asserted right] . . . at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” *Id.* Conventional wisdom among many courts and commentators in reading *Miller* is that the Second Amendment protects a collective, not an individual, right – a conclusion since called into serious question.



whether the amendment applies to the States. Despite, or perhaps because of the utter *lack* of contemporary guidance from the Supreme Court, state and lower federal courts throughout the twentieth- and early twenty-first century have virtually always upheld state and local gun control laws, typically citing *Presser*, *Cruikshank*, and *Miller*<sup>252</sup> and adopting the “states’/collective-right” theory<sup>253</sup> as rationale for the proposition that the Second Amendment does not apply to the States.<sup>254</sup> The states’/collective-right approach is useful for one seeking to prevent Second Amendment protection from being used against a State; after all, how can the Amendment be applied against a State to prevent the State from infringing a right that it already possesses?<sup>255</sup> But like the Court’s interpretation of the privileges or immunities clause in *Slaughter-House* and *Cruikshank*,<sup>256</sup> it too fails to withstand scrutiny.<sup>257</sup>

Our purpose is not to re-visit the individual-versus states’/collective-right debate. Suffice it to say that the historical evidence so heavily favors a non-State-centric — either an individual-rights or standard-model — ap-

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252. See, e.g., *Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137 (Md. Ct. Spec. App. 2005); *King v. Wyo. Div. of Crim. Investigation*, 89 P.3d 341 (Wyo. 2004); *Peoples Rights Org., Inc. v. Montgomery*, 756 N.E.2d 127 (Ohio Ct. App. 2001); *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005); *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

253. The states’/collective-right theory holds that the Second Amendment, by virtue of its “well regulated militia” and “security of a free State” language, protects a right actually possessed by the *State*, on behalf of the people-as-collective, as opposed to a right held by the people-as-individuals (individual-right approach or “Standard Model” approach). See Reynolds, *supra* note 159 (coining term “Standard Model” for the right belonging to people-as-collective, but *independent* of state).

254. See, e.g., *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *Hickman v. Block*, 81 F.3d 98, 101-02 (9th Cir. 1996); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995). The point is not whether these and other courts have correctly upheld particular gun-control laws — indeed, government may impose reasonable restrictions — rather, it is *how* the courts have been upholding the laws by using obsolete or historically unsupported reasoning. See *supra* note 5.

255. See, e.g., L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV 1311, 1374 (1997). Powe argues that “[i]f the ‘right’ exists in the State, incorporation against state interference is utterly incomprehensible.” *Id.* Further, “[t]he Establishment Clause posed an identical problem and this was part of the reason for [the Court] recognizing that it must create an individual right.” *Id.* at 1374 n.462. See, e.g., *Kates*, *supra* note 249, at 257 (“[T]he only viable justification for denying incorporation of the second amendment against the states today is the exclusively state’s right view that the amendment does not confer an individual right.”); John Bissell, *Bench Opinion on the Second Amendment*, 10 SETON HALL CONST. L.J. 807, 811 (2000).

256. See *supra* notes 111-26, 146-50.

257. See *infra* notes 259-91 and accompanying text.

proach, as reflected in the recent scholarship,<sup>258</sup> that courts and others cannot help but conclude that the Second Amendment protects a right of the people that may be incorporated to apply to the States.

Once freed of the threshold barrier presented by the states'/collective-right theory, it becomes possible to ask whether the selective incorporation doctrine should apply the Second Amendment to the States. Applying the Court's standard — *i.e.*, whether the right protected “is fundamental — whether, that is, [it] is necessary to an Anglo-American regime of ordered liberty”<sup>259</sup> — the inescapable conclusion, as demonstrated below, is that the Second Amendment *does* indeed satisfy this test.

*English Conceptions.* The right to have arms for self-defense and self-preservation was one of thirteen “true, ancient, and indubitable” liberties protected in the 1689 English Bill of Rights,<sup>260</sup> with origins extending back to Magna Carta and even earlier.<sup>261</sup> As William Blackstone explained in *Com-*

258. *See, e.g.*, 1 TRIBE, *supra* note 5, at 896-97 (“In recent years, as Justice Thomas noted, a growing array of scholars have argued that the Second Amendment should be interpreted as creating a more expansive right to private gun ownership that may not be abridged by Congress or perhaps even by state and local governments.”). *See also* Printz v. United States, 521 U.S. 898, 939 n.2 (1997). (“Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.” (Thomas, J., concurring)). Levinson states,

I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar . . . is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even “winning,” interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.

Levinson, *supra* note 169, at 642. Scholars long “hid[] what was scandalous in the closet . . . [with] a heavy element of denial . . . . While the period of [scholarly] denial is gradually ending . . . [about this black sheep of the constitutional family] it appears to be alive and well in the federal judiciary.” McAfee & Quinlan, *supra* note 3, at 783-84.

259. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (emphasis added).

260. JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 115 (1994). *See also* HALBROOK, *supra* note 100, at 39 (citing S. THORNE ET AL., *THE GREAT CHARTER* 137-41 (1965)); DAVID T. HARDY, *ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT* 24-40 (1986) (describing the events of “The Crucial Half-Century: 1639-1689,” citing various ordinances and documents).

261. HALBROOK, *supra* note 100, at 37-39. “The laws of the ancient English kings [such as the laws of Alfred and the Laws of Cnut] proscribed violent acts with arms . . . but recognized as rightful the mere possession and carrying of arms.” *Id.* at 37. Later, in the twelfth century, because “of the preference that an armed people, rather than a standing army, be entrusted with the power of defense, the keeping and bearing of arms came to be considered as not simply a right but a duty.” *Id.* at 38. Leonard Levy explains:

*mentaries on the Laws of England*, the King's English subjects possessed a constitutional right to bear arms, opining that the "three great and primary [constitutional] rights, of personal security, personal liberty, and private property,"<sup>262</sup> would be "in vain" if not for the existence of a set of "auxiliary subordinate rights" to protect them:

The fifth and last auxiliary right . . . is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. . . .<sup>263</sup> [I]t is indeed a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

. . . [T]o vindicate these rights, . . . the subjects of England are entitled . . . to the right of having and using arms for self-preservation and defence.<sup>264</sup>

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In the twelfth century Henry II had obligated all freemen to possess certain arms, and in the next century Henry III required every subject aged fifteen to fifty, including landless farmers, to own a weapon other than a knife. . . . [I]n the absence of a regular army and a police force, . . . every man had to do his duty at watch and ward . . . . Every subject also had an obligation to protect the king's peace and assist in the suppression of riots. In the event of a crime, every man had to join in the "hue and cry" – summoning aid and joining the pursuit of anyone who resisted arrest or escaped from custody.

LEVY, *ORIGINS OF THE BILL OF RIGHTS* 136 (1999). *See also* HARDY, *supra* note 260, at 12-14; MALCOLM, *supra* note 260, at x.

262. WILLIAM BLACKSTONE, 1 *COMMENTARIES* \*141.

263. Blackstone explained,

Referring to the words "suitable to their condition and such as are allowed by law," St. George Tucker distinguished the Second Amendment of the U.S. Constitution, whereby the right of the people to keep arms exists "without any qualification as to their condition or degree, as in the case of the British government."

HALBROOK, *supra* note 100, at 45, n.56.

264. BLACKSTONE, *supra* note 261, at \*143-44. *See also* MICHAEL DALTON, *THE COUNTRY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS* 308, 356 (1697) (quoting virtually the same language as Blackstone). *See also* MALCOLM, *supra* note 260, at 142 (noting that Blackstone's impact on revolutionary-era Americans was profound); LEVY, *supra* note 261, at 138. Levy notes that another influential English book with Americans in 1774 was *Political Disquisitions* by James Burgh, who

wrote most elaborately about the right to be armed. . . . focus[ing] on the history and values of an armed public in preference to a standing army. . . . "A militia-man," he observed, "is a free citizen; a soldier, a

As Thomas Macaulay put it, “[t]he Englishman’s ultimate security. . . depended not upon the Magna Carta or Parliament, but upon the power of the sword. . . . [To the Englishman,] the legal check was secondary and auxiliary to that which the nation held in its own hands . . . the security without which every other is insufficient.”<sup>265</sup> By the end of the eighteenth century, English “judicial construction . . . consistently supported the right of all Englishmen to have guns despite the game laws.”<sup>266</sup> “[L]egislation . . . passed in the eighteenth century to disarm the Irish and the Scots, exempting only those who could be expected to support English domination.”<sup>267</sup>

*American Conceptions.* The rights possessed by early American colonists were summed up by one official, “Let an Englishman go where he will . . . he carries as much of law and liberty with him as the nature of things will bear.”<sup>268</sup> Because the colonies posed special challenges and dangers, how-

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slave for life. . . .” [and] arms, he wrote, “are the only true badges of liberty.”

*Id.*

265. THOMAS B. MACAULAY, 1 CRITICAL AND HISTORICAL ESSAYS, CONTRIBUTED TO THE EDINBURGH REVIEW 154, 162 (Adamant Media Corp. 2001) (1850).

266. HALBROOK, *supra* note 100, at 53.

267. *Id.* at 54. For example,

homes were searched for arms and offenders [of the legislation were] shot on sight . . . . When the British monarch adopted similar [“search and shoot”] policies against the Americans who believed they were guaranteed common-law rights, including the right to keep and carry arms, the Americans sought to preserve their ancient liberties through the armed overthrow of British colonialism.

*Id.* According to Malcolm, London’s legal advisor’s commented immediately following riots in London in 1780 where some 450 people were killed that

“[t]he right of his majesty’s Protestant subjects, to have arms for their own defence, and to use them for lawful purposes . . . . [is] a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.”

MALCOLM, *supra* note 260, at 133-34.

268. MALCOLM, *supra* note 260, at 138.

The English government’s great success in luring Englishmen to America’s wild shores was due in part to pledges that the emigrants and their children would continue to possess “all the rights of natural subjects . . . .” A guarantee of these rights, for example, was incorporated into the charters of Virginia, Connecticut, and Massachusetts, and fundamental principles of English jurisprudence, with their protection of personal liberty and private property, were specifically incorporated into the laws of the Maryland General Assembly in 1639, the Massachusetts Body of Liberties in 1641, the West New Jersey Charter of Fundamental Laws in 1676, and the New York “Charter of Liberties and Priviledges” in 1683.

*Id.* at 138 (footnotes omitted).

ever, *all* householders, not only just militiamen as under English Law, were required by laws to carry weapons.<sup>269</sup>

Influential writers of old and of the contemporary day alike emphasized the importance of an armed populace.<sup>270</sup> Sir Walter Raleigh, for example, whose writings were in Jefferson's and Madison's libraries and in many public libraries in the colonies, included the following in his Machiavellian "Maxims of State" for tyrannical governments:

"Sophisms of a barbarous and professed tyranny: . . .

. . . .

3. To unarm his people of weapons, money and all things whereby they may resist his powers. . . .

Sophisms of the Sophistical or Subtle Tyrant, to hold up his State: . . .

8. To unarm his people, and store up their weapons, under pretence of keeping them safe, and having them ready when service requireth, and then to arm . . . such as he shall think sure men. . . .

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269. *Id.* at 139. For example,

A 1623 law of Plymouth colony . . . "ordered that every freeman or other inhabitant of this colony provide for himselfe and each under him able to beare armes a sufficient musket and other serviceable peece for war . . . with what speede may be." A similar Virginia statute of 1640 required "all masters of families" to furnish themselves and "all those of their families which shall be capable of arms . . . with arms . . ."

. . . A Newport law of 1639 provided that "noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon." Early Virginia laws required "that no man go or send abroad without a sufficient partie well armed," and "that men go not to worke in the ground without their arms . . ." *Id.* (second omission in original) (footnotes omitted).

See also HARDY, *supra* note 260, at 41-44 (quoting other laws of New Plymouth, Virginia, and New Jersey colonies).

270. See HALBROOK, *supra* note 100, at 8-9.

Those who drafted and supported the Bill of Rights followed the libertarian tradition of Aristotle, Cicero, and Sidney, and they rejected the authoritarian, if not totalitarian, tradition of Plato, Caesar, and Filmer. These two basic traditions in political philosophy have consistently enunciated opposing approaches to the question of people and arms, with the authoritarians rejecting the idea of an armed populace in favor of a helpless and obedient populace and the libertarian republicans accepting the armed populace and limiting the government by the consent of that armed populace.

*Id.*

These rules of hypocritical tyrants are to be known, that they may be avoided, and met withal, and not drawn into imitation.”<sup>271</sup>

Roger Molesworth, whose works were in Jefferson’s and John Adams’s libraries and also in a number of colonial public libraries, commented:

“A Whig [*i.e.*, one who ultimately sided with the rights of colonies *vis-à-vis* Tories and the British government] is against the raising or keeping up a standing army in time of peace. . . . And therefore the arming and training of all the freeholders (landowners) of England, as is our undoubted ancient constitution, and consequently is our right. . . . Were our militia well regulated, and fire-arms [provided,] . . . we’d need not fear a hundred thousand enemies, were it possible to land so many among us . . . .”<sup>272</sup>

James Harrington, whose writings profoundly influenced John Adams (who owned two sets of his works) and were also found in the libraries of Benjamin Rush, William Byrd, and other colonists, said:

“For the government of citizens . . . the reasons why it . . . is hardest to be conquered is that the invader of such a society must not only trust unto his own strength . . . but in regard that such citizens, being all soldiers or trained up unto their arms, which they use not for the defence of slavery but of liberty (a condition not in this world to be bettered) they have more especially on this occasion the highest soul of courage . . . that is possible in nature. Wherefore, an example of such a one overcome by the arms of a monarch, is not to be found in the world . . . .

. . . .

. . . [F]or the reasons why a government of citizens . . . is the hardest to be held (in subjugation) there needs no more than that men accustomed to their arms and their liberties will never endure the yoke.”<sup>273</sup>

About the same time as Charles II passed legislation to disarm Englishmen in 1671, an act which led ultimately to the Glorious Revolution of 1688

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271. HARDY, *supra* note 260, at 45 (omissions in original) (quoting 8 WALTER RALEIGH, THE WORKS OF SIR WALTER RALEIGH, KNIGHT 22, 25 (Oxford Univ. 1829)).

272. *Id.* at 46 (first and fourth omission in original) (quoting ROGER MOLESWORTH, INTRODUCTION, FRANCO-GALLIA xxviii (London 1721)).

273. *Id.* at 47 (sixth and seventh omission in original) (quoting JAMES HARRINGTON, OCEANA AND THE PREROGATIVE OF POPULAR GOVERNMENT (1656)).

and the 1689 English Bill of Rights, Bacon's rebellion in Virginia responded to royal governor Sir William Berkeley's similar legislation to disarm indigenous Americans. Bacon's rebellion prompted Berkeley's memorable comment, "[h]ow miserable that man who governs a people when six parts of seven at least are Poore Endebted Discontented and Armed."<sup>274</sup> Halbrook reports,

While Berkeley eventually crushed Bacon's Rebellion, he passed only feeble legislation restricting the right to bear arms. . . . [S]o fundamental was the right to have arms that to assemble with arms in numbers of five persons or more was the only offense decreed.

. . . .

. . . [S]o fundamental were firearms to the lives and livelihoods of the individual subjects that the royal administration conceded the right of every man to possess arms as an individual.<sup>275</sup>

Nearly one hundred years later, several newspapers, responding to English charges of sedition for the colonials' call to arms, wrote:

"[f]or it is certainly beyond human art and sophistry to prove the British subjects, to whom the *privilege* of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip'd with *arms*, etc. are guilty of an *illegal act*, in calling upon one another to be provided with them, as the *law directs*."<sup>276</sup>

Another article cited the English Bill of Rights, natural law, and William Blackstone as proof of the individual's right to have firearms. "It is a

274. HALBROOK, *supra* note 100, at 55-56 (quoting H. MILLER, *THE CASE FOR LIBERTY* 76 (1965)).

275. *Id.* at 57. Bissell wrote,

Private arms ownership for personal necessities was indeed an absolute right in colonial times and in the early days of the republic. . . . In that society, people hunted for food. They protected themselves from the dangers of the frontier, including Indians and wild animals. They traveled for long periods of time on lonely roads and shared accommodations with strangers in taverns and boarding houses. Of course, there was limited police presence in the dark streets of their towns and even less on the roadways.

Bissell, *supra* note 255, at 813.

276. MALCOLM, *supra* note 260, at 144-45 (quoting *BOSTON EVENING POST*, Feb. 6, 1769, *reprinted in* *BOSTON UNDER MILITARY RULE, 1768-1769, AS REVEALED IN A JOURNAL OF THE TIMES* 61 (Oliver Morton Dickerson ed., 1936)).

natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression."<sup>277</sup>

After the British reinforced their military presence in Boston in 1768, *A Journal of the Times* "urged Americans to retain their arms and reminded them that the English Bill of Rights had recognized the 'privilege of possessing arms,' . . . declar[ing], 'It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence.'"<sup>278</sup>

Such were the conditions at the founding that led to the Second Amendment. To that generation,

[a]n aristocratic central government, lacking sympathy with and confidence from ordinary constituents, might dare to resist — especially if that government were propped up by a standing army of . . . mercenaries, vagrants, convicts, aliens, and the like[.]. Only an armed populace could deter such an awful spectacle. Hence the need to bar Congress from disarming freemen.<sup>279</sup>

The Second Amendment thus operated as "no less than the safety valve of the Constitution. It afforded the means whereby, if parchment barriers proved inadequate, the people could protect their liberties or alter their government. It gave to the people the ultimate power of the sword."<sup>280</sup>

277. *Id.* at 145 (quoting N.Y. J. SUPPLEMENT, Apr. 13, 1769, reprinted in BOSTON UNDER MILITARY RULE, 1768-69, AS REVEALED IN A JOURNAL OF THE TIMES 79 (Oliver Morton Dickerson ed., 1936)).

278. LEVY, *supra* note 261, at 140-41. Levy suggests that "[s]entiments like these explain the intense American reaction to General Thomas Gage's appropriation of private arms in Boston. The Revolution [itself] began with the British effort to seize [colonials'] arms and ammunition." *Id.* at 141.

279. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1163 (1991).

280. MALCOLM, *supra* note 260, at 164. This view of the Amendment was reflected by leading legal treatises over the next one hundred years. See, e.g., STORY, *supra* note 3, at § 1897. Story characterizes the Second Amendment as a "palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, . . . thus] enabl[ing] the people to resist and triumph over them." *Id.* (footnote omitted). Thomas M. Cooley writes,

The right of the people to bear arms in their own defence, and to form and drill military organization . . . is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people.



For his part, Thomas Jefferson wrote that ownership of guns was indispensable, because the

right of arms is one of the first to be taken away by tyrants, not only for the physical security despotism gains in monopolizing armed power in the hands of the state, but also for its moral effects. The tyrant disarms his citizens in order to degrade them; he knows that being unarmed “palsies the hand and brutalizes the mind: an habitual disuse of physical forces totally destroys the moral . . . .”<sup>281</sup>

Jefferson’s fellow Virginian Patrick Henry was of similar mind, stating that “The great object is that every man be armed. . . . Every one who is able may have a gun.”<sup>282</sup>

As for the militia preamble, it merely expressed the point that people’s “right to keep and bear arms for individual self-defense included the right to combine into independent militias for defense against the official colonial standing army and militias.”<sup>283</sup> It

Thomas M. Cooley, *The Abnegation of Self-Government*, July-Dec. PRINCETON REV. 209, 213 (1883) (emphasis added).

281. See Reynolds, *supra* note 159, at 512. For example, “a model constitution that [Jefferson] drafted for Virginia in 1776 included a provision guaranteeing that ‘no freeman shall be debarred the use of arms within his own lands.’” *Id.* at 468-69. (footnote omitted). Levy reports that, “[i]n a letter to a fifteen-year-old nephew, Jefferson praised the importance of ‘the gun’ as contributing to ‘boldness, enterprise and independence of mind,’ concluding: ‘Let your gun therefore be the constant companion of your walks.’” LEVY, *supra* note 261, at 141.

282. Reynolds, *supra* note 159, at 469 (omission in original). According to Malcolm, “The American Bill of Rights, like the English Bill of Rights, recognized the individual’s right to have weapons for his own defence . . . .” MALCOLM, *supra* note 260, at 161. “And like the Convention Parliament in 1689, the senators rejected a motion to add ‘for the common defense’ after ‘to keep and bear arms.’” *Id.*

283. HALBROOK, *supra* note 100, at 55. For the modern-day argument that the Second Amendment’s militia preamble suggests that the Second Amendment protects a “collective” right of the states to maintain militias, see *supra* notes 253-58 and accompanying text. Halbrook writes,

If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis. The phrase “the people” meant the same thing in the Second Amendment as it did in the First, Fourth, Ninth and Tenth Amendments – that is, each and every free person.

HALBROOK, *supra* note 100, at 163. Malcolm argues that to the founding generation, “[a] select militia was regarded as little better than a standing army.” Malcolm, *supra* note 260, at 163 (footnote omitted). Additionally,

[a] strong statement of preference for a militia must have seemed more tactful than an expression of distrust of the army. The Second Amendment, therefore, stated that it was the militia, not the army, that was necessary to the security of a free state. The reference to a “well regulated” militia was

was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but *rather to express the preference for a militia over a standing army*.<sup>284</sup> The army had been written into the Constitution. Despite checks within the Constitution to make it responsive to civil authority, the army was considered a threat to liberty.<sup>285</sup>

As Samuel Adams had earlier said, “[i]t is always dangerous to the liberties of the people to have an army stationed among them, over which they have no control.”<sup>286</sup> Adams stated later, “The Militia is composed of free Citizens. There is therefore no Danger of their making use of their Power to the destruction of their own Rights, or suffering others to invade them.”<sup>287</sup>

Thus, the fact the Constitution’s original Articles gave the federal government both the power to raise/support an army and extensive control over state militia was controversial, but the people were mollified somewhat by the proposed amendment.<sup>288</sup> As explained in several newspapers in 1789,

[a]s civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed . . . in their right to keep and bear their private arms.<sup>289</sup>

meant to encourage the federal government to keep the militia in good order.

*Id.* at 164.

284. The colonists viewed standing armies as potential instruments of oppression, whereas a citizen militia presented no such threat.

285. MALCOLM, *supra* note 260, at 163. Malcolm observes that

[s]tate constitutions that had a bill of rights had copied the English model and prohibited a standing army in time of peace . . . . Some had suggested that a two-thirds or even a three-fourths vote of members of each house be required to approve a standing army in time of peace.

*Id.* at 163-64 (footnote omitted).

286. Letter from Samuel Adams to Elbridge Gerry (Oct. 29, 1775), in III THE WRITINGS OF SAMUEL ADAMS, 1773-1777, at 230 (Harry Alonzo Cushing, ed., 1907) [hereinafter III WRITINGS].

287. Letter from Samuel Adams to James Warren (Jan. 7, 1776), in III WRITINGS, *supra* note 286, at 251.

288. Halbrook explains that

the [pro-Constitution] Federalists promised that the new government would have no power to disarm the people. The anti-Federalists predicted that a standing army and select militia would come to overpower the people. In 1791, the American federal Bill of Rights was ratified, in part, as a formal recognition that private individuals would never be disarmed.

HALBROOK, *supra* note 100, at 55.

289. Tench Coxe, *Remarks on the First Part of the Amendment to the Federal Constitution*, PHILADELPHIA FED. GAZETTE, June 18, 1789, at 2, available at [http://www.madisonbrigade.com/library\\_bor\\_2nd\\_amendment.htm#ARTICLES](http://www.madisonbrigade.com/library_bor_2nd_amendment.htm#ARTICLES).

Or as Noah Webster put it,

[b]efore a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because *the whole body of the people are armed*, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.<sup>290</sup>

Moreover, although the amendment was acknowledged as specifically limiting only Congress, its true scope was understood to protect the people from inappropriate power-grabs by government of *any* description. William Rawle, selected by George Washington to be the nation's first Attorney General (but who declined), said,

[t]he prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, *either* should attempt it, this amendment may be appealed to as a *restraint on both*.<sup>291</sup>

Rawle's words were prescient, for by the time of the Reconstruction some four score years later it was indeed the States that had proven themselves to be the more dangerous.<sup>292</sup> One might think the North's Civil War victory would have put an end to the southern States' misbehavior, but such was not to be the case. Even after the Civil War, through the enactment of so-

290. The James Madison Research Library and Information Center, [http://www.madisonbrigade.com/n\\_webster.htm](http://www.madisonbrigade.com/n_webster.htm) (emphasis added).

291. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (2d ed., Philadelphia, 1829) (emphasis added).

292. The breadth and scope of the oppressions imposed by southern States were monumental. Amar explains that the southern States "enacted sweeping antebellum laws prohibiting not just slaves but free blacks from owning guns. In response, anti-slavery theorists emphasized the personal right of all free citizens – white and black, male and female, northern and southern, visitor and resident – to own guns for self-protection." AMAR, *supra* note 35, at 262 (footnote omitted). Curtis states that "[e]ven free blacks in the North often were prohibited from testifying in cases where a white was a party and . . . were barred from entering or remaining in the state." CURTIS, *supra* note 29, at 28 (footnotes omitted). Furthermore,

a number of southern state legislatures passed resolutions demanding that northern states pass laws to suppress antislavery expression. Most northern legislatures and leaders were equivocal or worse in response. . . .

. . . and southern states adopted laws restricting freedom of speech and of the press in an effort to suppress antislavery ideas.

*Id.* at 30 (footnotes omitted). "Southern states [also] passed laws requiring postmasters to rifle the mail and to notify justices of the peace if they found [anti-slavery] publications." *Id.* at 31. As a result, "abolitionists were the victims of mob violence. In these cases local authorities often failed to make any effort to protect the victims." *Id.* (footnotes omitted).

called “Black Codes,” southern States continued to deny the freedmen the full benefits of their newly-won freedom, including the right to keep and bear arms.<sup>293</sup>

Protecting the substantive right to keep and bear arms from State interference thus became integral to the Reconstruction Republicans’ overarching effort to eliminate all vestiges of slavery. The Freedman’s Bureau Bill, for example, enacted by the Thirty-ninth Congress in 1866, guaranteed all blacks “full and equal benefit of all laws and proceedings for the security of person and estate, *including the constitutional right of bearing arms.*”<sup>294</sup> That same year, Congress enacted over President Andrew Johnson’s veto the Civil Rights Act of 1866, an important purpose of which was “to protect the right of freedmen to carry and bear arms in the states.”<sup>295</sup>

It was therefore only natural given Reconstruction Republicans’ determination to provide comprehensive protection and equal treatment for *all* citizens, that a key prong in their multi-faceted approach was to cement through constitutional amendment the principle that the Bill of Rights, including the Second Amendment, would be enforceable against the greatest offenders themselves: the States.<sup>296</sup> “The whole idea of the Fourteenth amendment,” Amar explains, “was to break up the Slave Power, and to do that, the framers of the Amendment repeatedly invoked one handy catalog of rights and freedoms, privileges and immunities: the Bill of Rights.”<sup>297</sup> And so in 1866 Republicans in the Thirty-ninth Congress successfully passed and proposed the Fourteenth Amendment, making abundantly clear their intentions that its purpose was to apply the Bill of Rights to the States. The States — which themselves had full notice that the Amendment would have the effect

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293. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 345 (1991) (“[N]orthern Republicans were particularly alarmed at provisions of the black codes that effectively preserved the right to keep and bear arms for former Confederates while disarming blacks.”).

294. CURTIS, *supra* note 29, at 72 (footnote omitted) (“Virtually all Republicans who spoke on the subject [during debate over the Bill] believed that the rights in the Bill of Rights were rights of citizens that limited or should limit the power of the states . . .”).

295. AMAR, *supra* note 35 at 448.

296. By so amending the Constitution, Reconstruction Republicans guaranteed that the right to “carry and bear arms” could not be overturned by mere legislative enactment — rather, it could only be overcome by amendment through the Article Five process.

297. Akhil Reed Amar, *Panel VI: The Original Meaning of the Fourteenth Amendment*, 19 HARV. J.L. & PUB. POL’Y 443, 448 (1996); According to Cottrol and Diamond, “efforts to disarm the freedmen were in the background when the 39th Congress debated the Fourteenth amendment.” Cottrol & Diamond, *supra* note 293, at 346. Such disarming “fed the determination of northern Republicans to provide national enforcement of the Bill of Rights.” *Id.* at 345-46.

of applying the Bill of Rights to the States — for their part then duly ratified the Amendment in 1868.<sup>298</sup>

The actions of lower courts<sup>299</sup> and government officials in the several years after the Amendment's ratification reflected these understandings. U.S. Attorney Daniel Corbin commented in an 1871 circuit court case that the Fourteenth Amendment

lays the same restriction upon the States that before lay upon the Congress of the United States — that, as Congress heretofore could not interfere with the right of the citizen to keep and bear arms, now, after the adoption of the fourteenth amendment, the State cannot interfere with the right of the citizen to keep and bear arms. The right to keep and bear arms is included in the fourteenth amendment, under "privileges and immunities."<sup>300</sup>

Despite this seemingly clear understanding, over the next hundred years the States persisted in their official efforts to restrict the right to keep and bear arms. Challenges in state and lower federal courts to state gun-control laws, many of which were primarily intended to disarm black people and immigrants,<sup>301</sup> were routinely denied, with the courts usually citing *Slaughter-House*, *Cruikshank*, and/or *Presser* as precedent,<sup>302</sup> and providing as rationale the states'/collective-right theory of the Second Amendment.<sup>303</sup>

The Fifth Circuit Court of Appeals has recently broken with mainstream judicial inertia on this issue, however. After a comprehensive review of the

298. See *supra* notes 98-103 and accompanying text.

299. See, e.g., *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871).

300. AMAR, *supra* note 35, at 210 (footnote omitted).

301. Judge Buford wrote,

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State . . . for the purpose of disarming negro laborers . . . and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied.

*Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring specially). See also *State v. Nieto*, 130 N.E. 663, 669 (Ohio 1920) (Wannamaker, J., dissenting) ("[T]he race issue . . . has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions."). See also Powe, *supra* note 255, at 1376 ("[E]ven as convictions of white defendants were overturned, the laws were upheld for use in other circumstances[, such as to disarm blacks].").

302. See *supra* note 252.

303. See *supra* note 253. See also Reynolds, *supra* note 152, at 488. Reynolds states that the "states' rights' argument thus served [in its early days] . . . to protect a racially discriminatory power structure from constitutional scrutiny." *Id.* at 495. In its later days, it has served not so much to discriminate against particular disfavored groups but more generally to limit an entire populace which "is untrustworthy where weapons are concerned." *Id.*

historical materials, the court concluded in *United States v. Emerson*<sup>304</sup> in 2001 that the amendment “protects the right of individuals<sup>305</sup> . . . to privately possess and bear their own firearms . . . that are suitable as personal, individual weapons.”<sup>306</sup> While *Emerson* is of limited value for our purposes since it deals with a federal statute and so does not address the question of incorporation, it performs the important first step of separating from State possession the right protected by the Second Amendment.<sup>307</sup>

A final criterion in the Supreme Court’s selective incorporation analysis for whether a particular Bill of Rights provision should be applied to the States is whether the right in question has been recognized in the states themselves.<sup>308</sup> On this point, as of 2006, forty-four states have similar amend-

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304. 270 F.3d 203 (5th Cir. 2001). The Supreme Court denied *certiorari*. *Emerson v. United States*, 536 U.S. 907 (2002) (cert. denied).

305. This is contrasted with protecting the people collectively. *Emerson*, 307 F.3d at 227. The Fifth Circuit split the traditional general “collective right” position into two subcategories: first, the “states’ rights” (states’/collective right) interpretation that the Second Amendment recognizes no individual right but rather “merely recognizes the right of a state to arm its militia,” and second, the “sophisticated collective rights model,” in which the right “to bear [and keep] arms can only be exercised by members of a functioning, organized state militia who bear the arms while and as a part of actively participating in the organized militia’s activities.” *Id.* at 218-19 (second emphasis added) (footnotes omitted). As the court notes, even under the latter model “the Second Amendment poses no obstacle to the wholesale disarmament of the American people,” since the National Guard has long been “virtually the only such organized and actively functioning militia,” and because the federal government long has provided arms to the National Guard. *Id.* at 219.

306. *Id.* at 260. The Court upheld the challenged federal statute, reasoning, “those rights may . . . be made subject to . . . limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.” *Id.* at 261. *Emerson* illustrates the important principle that government may, under narrow circumstances, regulate (but not prohibit) a constitutionally-protected right.

307. After *Emerson*, it is important *where* a challenger’s Second Amendment rights were allegedly abridged - if in a fifth circuit state (Texas, Louisiana, Arkansas), the federal government action will be subject to heightened scrutiny, with its presumption of unconstitutionality, because the right protected is “individual”; whereas if in any non-fifth circuit state, the government action likely will be subject to rational basis review because the right protected is “collective.” This discrepancy lends added urgency for Supreme Court review of the issue to resolve the split of authority in the Circuits.

308. See *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968). One might argue that “practice in the states” should be discounted in the Court’s selective incorporation analysis - after all, it took a Civil War and another hundred years of time to elapse before many States could be “convinced” by the Court to recognize the fundamental rights of millions of citizens.

ments.<sup>309</sup> Moreover, as explained above, the right was considered fundamental in the colonies and original states from their very beginnings,<sup>310</sup> through the antebellum era and into Reconstruction.<sup>311</sup> The “first [state] constitutions reflected traditional attitudes toward professional armies, militia, and the right of individuals to be armed,” Malcolm explains.<sup>312</sup> “They denounced standing armies and endorsed a militia, provided that it was a general and not a select militia. Such a militia required general ownership of firearms, and general skill in their use.”<sup>313</sup> Further,

[s]ome states also included a specific right for an individual to have firearms for his own defence. But even states that failed to include a list of rights affirmed a citizen’s right to defend himself and his property and incorporated English statute and common law with the English Bill of Rights provision for individuals to have arms.<sup>314</sup>

In sum, the right to bear arms was considered throughout American history and pre-history by American revolutionaries and reconstructionists and their English progenitors alike to be “fundamental . . . that is, [the right] is necessary to an Anglo-American regime of ordered liberty.”<sup>315</sup> The Second Amendment must, accordingly, be incorporated by the Supreme Court to apply to the States.

## V. CONCLUSION

With the Declaration of Independence supplying the inspiration, the framers created a constitutional template for a nation the likes of which the world had never seen: a nation in which government would serve, instead of rule, the people, and one in which the people would enjoy a freedom approximating as nearly as practically possible that which occurs in a state of nature itself. Government would exercise its rightfully and necessarily limited role, and otherwise leave the people alone. The Constitution would stand ever

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309. See ROBERT J. SPITZER, *THE RIGHT TO BEAR ARMS* 218-227 (2001); NRA Institute for Legislative Action, *Compendium of State Firearms Laws*, found at <http://www.nraila.org/media/misc/compendium.htm>.

310. See *supra* note 268 and accompanying text.

311. Southern states, as a condition to reentering the Union after the Civil War, were required by law to conform their constitutions to the U.S. Constitution, including the not-yet-ratified Fourteenth Amendment. See Act of Mar. 2, 1867, 14 Stat. 428. Halbrook explains, “on the adoption of the Fourteenth Amendment, most [southern] state constitutions already protected, and three were amended to protect, the right of all private citizens or persons to keep and bear arms.” See HALBROOK, *supra* note 92, at 134.

312. MALCOLM, *supra* note 260, at 150.

313. *Id.*

314. *Id.*

315. Duncan, 391 U.S. at 149 n.14. See *supra* text accompanying note 259.

watchful as guardian to assure that government would not overstep its bounds, as governments are apt to do.

After traveling a hard road for nearly eighty years and enduring a war in which 500,000 gave their lives, the people amended the Constitution in 1868 to correct serious defects in the original and to affirm, once again, the core underlying principles upon which the nation was founded: namely, individual freedom and limited government. Shortly thereafter, the Supreme Court, betraying the people and abdicating its constitutional responsibility, unilaterally nullified a key component of the amendment: the privileges or immunities clause. To this day, one hundred thirty years later, the Court has still failed to correct its initial error.

The people's true intent for the privileges or immunities clause was to apply the entire list of Bill of Rights restrictions, and more, to the States. Over time, the Court has devised an alternate mechanism, the due process clause, for applying most, but not all, of the Bill of Rights to the States. The Second Amendment, however, has never been so applied, and hence presents a useful vehicle for the Court finally to correct the errors of its ways and to recognize the privileges or immunities clause as it was intended by the people. Short of that, because the Second Amendment satisfies the requirements set forth in the Court's chosen selective incorporation doctrine, the Court should apply the Second Amendment to the States through the due process clause.