No. 08-1521

In the
Supreme Court of the United States

OTIS McDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is the individual right of citizens to keep and bear arms among the "privileges or immunities" that the Fourteenth Amendment protects from state deprivation?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the proposition that governments are established to secure unalienable rights, including the right to keep and bear arms in self-defense and as a check against government tyranny. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before this court is one of special importance to the plan of the Constitution. Article IV, section 2, was the original protection for fundamental liberties, including the right to keep and bear arms. The Second

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[1] Pursuant to this Court's Rule 37.3(a), all parties have filed consents to amicus briefs with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Amendment was enacted to more explicitly guarantee that right—considered essential to the preservation and protection of liberty and safety—against federal deprivation. The Fourteenth Amendment was enacted to require the states to recognize just such rights for all citizens. To permit the states to encroach upon the right to keep and bear arms would be to ignore the significance of not only the fundamental nature of this right itself, but also the purpose of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

A careful consideration of "the historical events that culminated in the Fourteenth Amendment"[2] reveals that the "privileges or immunities" clause of the Fourteenth Amendment protects against state infringement on the individual right of citizens to keep and bear arms.

The terms "privileges" and "immunities" have held a constant meaning from the Founding era through the debates and ratification of the Fourteenth Amendment and the Civil Rights Act of 1866. Indeed, a review of the writings of the political and legal thinkers who inspired our republic reveals an understanding that the terms "privileges" and "immunities" refer to fundamental, natural entitlements or rights essential to the preservation of life, liberty, and other necessary aspects of existence—political or individual. The generation which enacted the Constitution intended the "privileges and immunities" clause of Article IV to

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[2] *Adamson v. California*, 332 U.S. 46, 71 (1947) (Black, J., dissenting).

refer to well-understood, fundamental rights. This understanding of the scope of the "privileges and immunities" clause of Article IV was recognized and adopted by those who came after the Framers. Subsequently, the authors of the Fourteenth Amendment created a "privileges or immunities" clause which they intended to codify the protection of these fundamental rights[3] against the states—in response to efforts by states to deprive freed Americans of African descent of these well-understood, fundamental rights.[4]

In addition, the Congress which drafted and the states that ratified the Fourteenth Amendment intended the "privileges or immunities" clause to

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[3] Even modern legal thought and language recognizes that the terms "privileges" and "immunities" refer to fundamental rights. As Professor Akhil Reed Amar of Yale Law School has pointed out, we speak of a "'privilege' against compelled self-incrimination, or the 'immunity' from double prosecution[.]" Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1221 (1992). *See*, *also*, OXFORD ENGLISH REFERENCE DICTIONARY 1151 (2d ed., rev. 2002) (defining "privilege" as "a right, advantage, or immunity"). The Fourteenth Amendment's "privileges or immunities" clause does not refer to mere licenses or grants, but something far more fundamental. Importantly, the Second Amendment was seen as a privilege "that the Thirty-ninth Congress meant to protect and that the States understood and accepted when they ratified the amendment." Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 12-13 (2007).

[4] This was especially necessary in light of *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833), which rejected the claim that the Bill of Rights protected citizens from state action.

extend to the right to keep and bear arms—a fundamental, individual right long recognized as essential to the preservation of liberty and personal safety. The conclusion that the right to keep and bear arms is a well-understood, fundamental right demanding protection against governmental encroachment finds support from those who came before American Independence and upon whom the Framers of the Constitution relied. Unsurprisingly, it was also asserted by the Framers themselves and those who came after the Framers—and was a significant influence on the Fourteenth Amendment. Finally, the authors of the Fourteenth Amendment explicitly stated their intention that the amendment protects well-understood, fundamental rights—including the right to keep and bear arms.

ARGUMENT

I

THE RIGHT TO KEEP AND BEAR ARMS, RECOGNIZED IN THE SECOND AMENDMENT, IS AMONG THE PRIVILEGES OR IMMUNITIES THAT THE FOURTEENTH AMENDMENT PROTECTS FROM STATE DEPRIVATION

A. The Authors of the Fourteenth Amendment Recognized and Adopted the Widely-Held Historical Consensus That the Terms "Privileges" and "Immunities" Embrace Well-Understood, Fundamental Rights

1. Political Theorists Who Preceded the Framing of the Constitution Understood the Terms "Privileges" and "Immunities" to Refer to Well-Understood, Fundamental Rights

"Privileges" and "immunities"—terms used in Article IV of the United States Constitution and, later, in the Fourteenth Amendment[5]—historically had an established meaning, namely, well-understood, fundamental rights essential to the preservation of life and liberty. When colonists left England, the Crown promised that they and their

[5] These terms, however, existed well before the founding of America. David Skillen Bogen, PRIVILEGES AND IMMUNITIES xvii (2003) (stating that the concept of "privileges" and "immunities" "has been a part of English and American history from feudal England to modern America.").

families would always have the rights of citizens under English law.[6] These promises were memorialized in many American colony charters which prefigured the language of Article IV's "privileges and immunities" clause.[7]

William Blackstone, the preeminent authority on English law at the time of the Founding,[8] used the terms "privileges" and "immunities" to describe numerous rights deemed so fundamental by the English people as to be included in the Magna Charta's "Charters of liberty," the Petition of Right, the Habeas Corpus Act, the English Bill of Rights of 1689, and the Act of Settlement of 1700.[9] As Professor Amar has noted, these documents constituted "the fountainhead of the common law, and the widely understood source of many particular rights that later appeared in the federal Bill, sometimes in identical language."[10] The Founders

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[6] *Id.* at 1-3; *Saenz v. Roe*, 526 U.S. 489, 522-23 (1999) (Thomas, J., dissenting) ("At least in American law, [the Article IV "privileges and immunities clause"] (or its close approximation) appears to stem from the 1606 Charter of Virginia, which provided that 'all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realme of *England*.").

[7] Bogen, *supra*, note 5, at 1-2.

[8] *Alden v. Maine*, 527 U.S. 706, 715 (1999).

[9] William Blackstone, 1 COMMENTARIES *127-45.

[10] Amar, *supra*, note 3, at 1221. *See*, *also*, Bogen, *supra*, note 5, at 10 ("The First Continental Congress issued a Declaration and resolves . . . asserting their rights to 'all the immunities - *continued* -

used "the words *rights*, *liberties*, *privileges*, and *immunities* . . . interchangeably."[11]

2. The Framers of the Constitution Intended the "Privileges and Immunities" Clause of Article IV to Extend to Well-Understood, Fundamental Rights

The Founders of America sought to establish a nation "conceived in liberty."[12] They believed that the purpose of government was to secure inalienable rights, including the rights to "life, liberty, and the pursuit of happiness."[13] Hence, the Framers wrote the "Privileges and Immunities" clause into the fourth article of the Constitution to provide a means to accomplish these natural ends.[14] States were presumed interested in protecting the essential liberties of their own citizens. Article IV, section 2,

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and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.'").

[11] Michael Kent Curtis, NO STATE SHALL ABRIDGE 64-65 (1986).

[12] Abraham Lincoln, Gettysburg Address.

[13] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure [the unalienable Rights with which all men are endowed by their Creator], Governments are instituted among Men, deriving their just Powers from the Consent of the Governed").

[14] Bogen, *supra*, note 5, at 10-11 (finding that the phrases "*liberties*, *franchises*, *privileges*, and *immunities* . . . were identified with the basic principles the colonists found in English government—privileges of protection by governments of life, liberty, and property through the civil and criminal law and immunities from government found in documents like the Magna Carta.").

required protection of those same rights for citizens of other states.

Of course, the Framers did not intend the clause to encompass everything which might fall under the appellation "right." Rather, the Framers were primarily concerned with the protection of those fundamental, natural rights which they understood to be essential to the achievement of life, liberty, and the pursuit of happiness. For example, Jefferson concluded that the right to earn a living at a lawful occupation, free from unreasonable governmental intrusion, was central to individual liberty and hence fell directly within the purview of the "Privileges and Immunities" clause.[15] Similarly, this Court, in *Meyer v. Nebraska*, recognized that "the right of the individual to contract" was among "those *privileges* long recognized at common law as essential to the orderly pursuit of happiness by free men."[16] Also the terms "privileges" and "immunities" were used to refer to fundamental rights in the 1775 Declaration of the Causes and Necessity of Taking Up Arms which described the fundamental right to a jury as the "inestimable privilege of trial by jury."[17]

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[15] John C. Eastman, *Re-evaluating the Privileges or Immunities Clause*, 6 Chap. L. Rev. 123, 126-27 (2003).

[16] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

[17] Second Continental Congress, *Declaration of the Causes and Necessity of Taking Up Arms* para. 3 (1775), *reprinted in* 1 GREAT ISSUES IN AMERICAN HISTORY 46, 49 (Richard B. Hofstadter ed., 1958).

As Justice Clarence Thomas recognized when considering the original meaning of the "privileges or immunities" clause,

> [t]he colonists' repeated assertions that they maintained the rights, privileges, and immunities of persons 'born within the realm of England' and 'natural born' persons suggests that, at the time of the founding, the terms 'privileges' and 'immunities' (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons.[18]

Thus, the Framers intended the "Privileges and Immunities" clause to include well-understood, fundamental rights essential to the preservation of life and the protection of liberty.

3. Those Who Came After the Framers Recognized and Accepted That the Terms "Privileges" and "Immunities" Embrace Well-Understood, Fundamental Rights

That the terms "privileges" and "immunities," especially as used in Article IV, included well-understood, fundamental rights enjoyed recognition and acceptance in the years after the Constitution was adopted. For example, Supreme Court Justice Washington in *Corfield v. Coryell* stated that the "Privileges and Immunities" clause extends to "those

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[18] *Saenz*, 526 U.S. at 524 (Thomas, J., dissenting).

privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[19]

Justice Washington's views were widely shared by his contemporaries. As Justice Clarence Thomas recently recognized, "[d]uring the first half of the 19th century, a number of legal scholars and state courts endorsed Washington's conclusion that the [Privileges and Immunities] Clause protected only fundamental rights."[20] Further, Circuit Justice William Johnson, described a bill which listed rights such as "'freedom of religious opinions;' 'the benefit of the writ of habeas corpus;' and protections against 'excessive bail,' 'cruel and unusual punishments,' and confiscation without 'just compensation'" as "in nature of a bill of rights, and of privileges, and immunities."[21] Those who came after the Founders

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[19] *Corfield v. Coryell*, 6 F. Cas. 546, 551 (E.D. Pa. 1823).

[20] *Saenz*, 526 U.S. at 526 n.4 (Thomas, J., dissenting) (citing, inter alia, "Douglass v. Stephens, 1 Del.Ch. 465, 470 (1821) (Clause protects the 'absolute rights' that 'all men by nature have')" and "2 J. Kent, Commentaries on American Law 71-72 (1836) (Clause 'confined to those [rights] which were, in their nature, fundamental').").

[21] Amar, *supra*, note 3, at 1221-22 (1992) (Also discussing how "[a]fter invoking Blackstone and the above-listed landmarks, Chief Justice Lumpkin's opinion in *Campbell* unsurprisingly described various rights in the federal Bill as 'privileges'—including the right at issue in *Campbell* itself, the right to be confronted with witnesses[,]" and observing that "Lumpkin's ideas about *Barron* may have been unorthodox in 1852, but his

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continued to use the terms "Privileges" and "Immunities" to refer to well-understood, fundamental rights.

4. The Authors of the Fourteenth Amendment Intended the "Privileges or Immunities" Clause to Extend to Well-Understood, Fundamental Rights

Prior to the Fourteenth Amendment, the terms "privileges" and "immunities" were consistently understood to include well-understood, fundamental rights. This Court has recognized that this continuity of thought regarding the legal significance of the terms "privileges" and "immunities" influenced those who ratified the Fourteenth amendment.[22]

Justice Washington's opinion, discussed above, was the authority to which "[w]hen Congress gathered to debate the Fourteenth Amendment, Members frequently, if not as a matter of course, appealed . . . arguing that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified in his opinion."[23] An

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language was utterly conventional; that same decade, the Supreme Court in *Dred Scott* labeled the entitlements in the federal Bill 'rights and privileges of the citizen.'").

[22] *Saenz*, 526 U.S. at 502 n.15 (1999) ("The Framers of the Fourteenth Amendment modeled this Clause upon the "Privileges and Immunities" Clause found in Article IV."); *Id.* at 526 (Thomas, J., dissenting) ("Justice Washington's opinion in *Corfield* indisputably influenced the Members of Congress who enacted the Fourteenth Amendment.").

[23] *Id.* at 526. *See*, *also*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1418 - *continued* -

instructive example referenced by Justice Clarence Thomas is Senator Jacob M. Howard of Michigan, who discussed in detail the Fourteenth Amendment to the Constitution.[24] Although Senator Howard recognized that the terms "privileges" and "immunities" "cannot be fully defined in their entire extent and precise nature," still he asserted without contradiction[25] that the terms included "the personal rights guarantied and secured by the first eight amendments of the Constitution."[26]

Senator Lyman Trumbull waxed eloquent in support of the Civil Rights Act of 1866 and stated clearly that the "privileges and immunities of citizens in the several states" are "such fundamental rights as belong to every free person."[27] Upon a thorough review of the Congressional debates around the Civil Rights Act and the Fourteenth Amendment,

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(1992) (referring to a Member's "obligatory quotation from *Corfield*").

[24] *Saenz*, 526 U.S. at 526. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Senator Howard cited Justice Washington's *Corfield* opinion for the proposition that "the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution" are those which are "fundamental, which belong of right to the citizens of all free Governments.").

[25] *Saenz*, 526 U.S. at 526 ("Furthermore, it appears that no Member of Congress refuted the notion that Washington's analysis in *Corfield* undergirded the meaning of the Privileges or Immunities Clause.").

[26] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). Of course, this includes the right to keep and to bear arms.

[27] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

one is inescapably led to the conclusion that the terms "privileges" and "immunities" as used by the authors of the Fourteenth Amendment extended to fundamental, natural rights. In light of such a history, it is not surprising that Justice Hugo Black said,

> [m]y 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.[28]

B. The Right to Keep and Bear Arms—Also Recognized in the Second Amendment—Is Among the Well-Understood, Fundamental Rights Within the Scope of the Terms "Privileges" and "Immunities"

1. History Demonstrated to the Framers of the Constitution That the Right to Keep and Bear Arms Is Essential to Liberty and Safety

History is replete with examples, from which the Framers took their lessons about human governance, that reveal the fundamental nature of the individual right of to keep and bear arms. For example, Aristotle tells the story of how the tyrant

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[28] *Adamson*, 332 U.S. at 71-72 (Black, J., dissenting).

Pisistratus took over Athens in the sixth century B.C. by disarming the people through trickery.[29] Indeed, Aristotle stated that "arms bearing" was an essential aspect of each citizen's proper role.[30] Similar events took place in Seventeenth Century England. This Court noted that "[b]etween the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using

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[29] Aristotle, THE ATHENIAN CONSTITUTION ch. 15 (Sir Frederic G. Kenyon trans., 1901). Aristotle explains

> [a]fter his victory in the battle at Pallene he captured Athens, and when he had disarmed the people he at last had his tyranny securely established, and was able to take Naxos (a Greek island) and set up Lygdamis as ruler there. He effected the disarmament of the people in the following manner. He ordered a parade in full armour in the Theseum (a temple), and began to make a speech to the people. He spoke for a short time, until the people called out that they could not hear him, whereupon he bade them come up to the entrance of the Acropolis, in order that his voice might be better heard. Then, while he continued to speak to them at great length, men whom he had appointed for the purpose collected the arms and locked them up in the chambers of the Theseum hard by, and came and made a signal to him that it was done. Pisistratus accordingly, when he had finished the rest of what he had to say, told the people also what had happened to their arms; adding that they were not to be surprised or alarmed, but go home and attend to their private affairs, while he would himself for the future manage all the business of the state.

[30] Stephen P. Halbrook, THAT EVERY MAN BE ARMED 11 (1994).

select militias loyal to them to suppress political dissidents, in part by disarming their opponents."[31]

Those thinkers who most influenced the Framers understood that the right to keep and bear arms is essential for the preservation of liberty. John Locke noted the "fundamental, sacred, and unalterable law of self-preservation."[32] Locke wrote of a righteous resistance that ultimately depended on the use of force.[33] In addition to the right to keep

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[31] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008). This Court also discussed the 1671 Game Act wherein "the Catholic James II had ordered general disarmaments of regions home to his Protestant enemies." *Id.*

[32] John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 149 (1690).

[33] John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 155.

> It may be demanded here, what if the executive power, being possessed of the force of the commonwealth, shall make use of that force to hinder the meeting and acting of the legislative, when the original constitution or the public exigencies require it? I say, using force upon the people without authority, and contrary to the trust put in him that dose so, is a state of war with the people, who have a right to reinstate their legislative in the exercise of their power: for having erected a legislative, with an intent they should exercise the power of making laws, either at certain set times, or when there is need of it; when they are hindered by any force from what is so necessary to the society, and wherein the safety and preservation of the people consists, the people have a right to remove it by force. In all states and conditions, the true remedy of force without authority is to oppose force to it. The use of force without authority always puts him that uses it into

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and bear arms to protect against private acts,[34] Locke considered the right to use force in self-defense to be a necessity.[35] Of course, other thinkers such as William Blackstone, Algernon Sydney, Thomas Hobbes, and Hugo Grotius—to name a few—also agreed that the right to keep and bear arms is an

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> a state of war, as the aggressor, and renders him liable to be treated accordingly.

[34] *Heller*, 128 S. Ct. at 2817 (finding that "the inherent right of self-defense has been central to the Second Amendment right.").

[35] John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 207.

> A man with a sword in his hand demands my purse in the highway, when perhaps I have not 12d. in my pocket; This Man I may lawfully kill. To another I deliver £100 to hold only whilst I alight, which he refuses to restore me, when I am got up again, but draws his sword to defend the possession of it by force. I endeavour to retake it. This mischief this man does me, is a hundred, or possibly a thousand times more than the other perhaps intended me, (whom I killed before he really did me any); and yet I might lawfully kill the one and cannot so much as hurt the other lawfully. The reason whereof is plain; because the one using force which threatened my life, I could not have time to appeal to the law to secure it, and when it was gone it was too late to appeal. The law could not restore life to my dead carcass. The loss was irreparable; which to prevent the law of Nature gave me a right to destroy him who had put himself into a state of war with me and threatened my destruction. But in the other case, my life not being in danger, I might have the benefit of appealing to the law, and have reparation for my £100 that way.

essential right.[36] These thinkers merely repeated a doctrine recognized, at least, from the time of the first republic.[37]

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[36] William Blackstone, 1 COMMENTARIES *139 (recognizing the right of the subject to have arms for their defense as following from the natural right of resistance and self-preservation); Thomas Hobbes, LEVIATHAN 98 (Richard Tuck ed., 1991)

> [a] covenant not to defend my selfe from force, by force, is always voyd. For . . . no man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment . . . and therefore the promise of not resisting force, in no Covenant transferreth any right; nor is obliging.

Hugo Grotius, THE RIGHTS OF WAR AND PEACE 76-77, 83 (A.C. Campbell trans., 1901).

> When our lives are threatened with immediate danger, it is lawful to kill the aggressor, if the danger cannot otherwise be avoided . . . . [T]his kind of defense derives its origin from the principle of self-preservation, which nature has given to every living creature . . . . For I am not bound to submit to the danger or mischief intended, any more than to expose myself to the attacks of a wild beast . . . when an assailant seizes any weapon with an apparent intention to kill me I have a right to anticipate and prevent the danger. What has been already said of the right of defending our persons and property . . . may nevertheless be applied to public hostilities . . . . [S]overeign powers have a right not only to avert, but to punish wrongs. From whence they are authorized to prevent a remote as well as an immediate aggression.

[37] Marcus Tullius Cicero, SELECTED SPEECHES OF CICERO 222, 234 (Michael Grant ed. & trans., 1969).

> There exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by

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Plainly, the great weight of those authorities upon which the Framers relied, led inevitably to the conclusion that the citizens' right to keep and bear arms is a fundamental, natural right that is included within the rights recognized as "privileges" and "immunities." This Court has long recognized this fact, stating that the Second Amendment "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."[38]

> training or custom or reading by be derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice, too, and meanwhile they must suffer injustice first. Indeed, even the wisdom of a law itself, by sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with and starts to consider motive, a man who has used arms in self-defense is not regard is having carried with a homicidal aim . . . . Civilized people are taught by logic, barbarians by necessity, communities by tradition; and the lesson is inculcated even in wild beasts by nature itself. They learn that they have to defend their own bodies and persons and lives from violence of any every kind by all the means within their power.

[38] *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *accord. Heller*, 128 S.Ct. at 2797.

2. The Framers of the Constitution Held That the Right to Bear Arms Is a Well-Understood, Fundamental Right

The generation which enacted the Constitution held that the right to keep and bear arms is necessary both for the assurance of personal safety—a sine qua non for the preservation of the ends discussed in the Declaration of Independence[39]—and as the final barrier between an over-reaching government and the liberties of the citizenry. So important is the capacity to preserve one's safety, that many of the states included a right of self-defense within their declarations of inalienable rights. For example, Massachusetts's Declaration of Rights stated that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and *defending their lives and liberties*; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."[40] The use of the term "defending"

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[39] If one is unable to protect and ensure one's safety, then one is at constant peril of the loss of life and liberty and one is unable to achieve the orderly pursuit of happiness. Thus, citizens always retain the natural right of revolution. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[40] MASS. CONST. of 1780, pt. I, art. I (emphasis added). *See*, *also*, Va. DECLARATION OF RIGHTS § 1

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing

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emphasizes the personal nature of the "individual right to possess and carry weapons in case of confrontation."[41]

James Madison praised the Constitution for preserving "the advantage of being armed, which Americans possess over the people of almost every other nation … [where] the governments are afraid to trust the people with arms."[42] Alexander Hamilton lent support to this conclusion by his recognition that "to model our political system upon speculations of lasting tranquility would be to calculate on the weaker springs of the human character."[43] Similarly, Thomas Jefferson stated that "[n]o freeman shall ever be debarred the use of arms."[44] Noting that "all power is inherent in the people," Thomas Jefferson even asserted that "it is

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property, and pursuing and obtaining happiness and *safety*.

(emphasis added); N.H. CONST. of 1784, pt. I, art. II ("All men have certain natural, essential, and inherent rights; among which are—the enjoying and *defending life and liberty*—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.") (emphasis added); N.H. CONST. of 1792, pt. I, art. II (same).

[41] *Heller*, 128 S. Ct. at 2797 (finding an "individual right to possess and carry weapons in case of confrontation").

[42] THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

[43] THE FEDERALIST NO. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[44] Thomas Jefferson, *Proposal to Virginia Constitution* (June 1776) *in* PAPERS OF THOMAS JEFFERSON 334 (C.J. Boyd ed., 1950).

their right and duty to be at all times armed."[45] Of course, these quotations reflect a sentiment which pervaded throughout the entire nation.[46]

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[45] Letter from Thomas Jefferson to John Cartwright, 1824, *in* 16 THE WRITINGS OF THOMAS JEFFERSON 45 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903-04). This position was shared by others who signed the Declaration of Independence. *See*, *e.g.*, James Wilson, *Of the Law of Nations, Lectures on Law* (1791) *reprinted in* 1 THE WORKS OF JAMES WILSON 148-67 (Robert G. McCloskey ed., 1967) ("But yet, between the duty of self-preservation required from a state, and the duty of self-preservation required from a man, there is a most material difference; and this difference is founded on the law of nature itself.").

[46] *See*, *also*, DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86–87 (Pierce & Hale eds., 1850) ("the said Constitution shall never be construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms"); 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 646 (2nd ed. 1836) (quoting Zachariah Johnson who said "[t]he people are not to be disarmed of their weapons. They are left in full possession of them."); Thomas Paine, THOUGHTS ON DEFENSIVE WAR, PHILADELPHIA, July 1775 ("The balance of power is the scale of peace . . . . Horrid mischief would ensue were one half the world deprived of the use of [arms] . . . the weak will become prey to the strong."); Trench Coxe, THE PENNSYLVANIA GAZETTE, Feb. 20, 1788 ("the unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people."); Richard Henry Lee, THE PENNSYLVANIA GAZETTE, Feb. 20, 1788 ("[W]hereas, to preserve liberty, it is essential that the whole body of the people always possess arms.").

Hence, it is apparent that the Founders recognized that that the right to keep and bear arms is a well-understood, fundamental right of individual citizens and thus belonging to that category of rights included in the terms "privileges" and "immunities."[47]

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[47] *See*, *also*, 14 DEBATES IN THE HOUSE OF REPRESENTATIVES 92-93 (Linda G. De Pauw ed., 1972)

> [C]onceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made. The particular states, like private citizens, have a right to be armed, and to defend, by force of arms, their rights, when invaded.

James Madison, 1 ANNALS OF CONGRESS 434, June 8, 1789 ("The right of the people to keep and bear arms shall not be infringed. A well regulated militia, composed of the body of the people, trained to arms, is the best and most natural defense of a free country."); Elliot, *supra*, at 386 (quoting Patrick Henry who said "[t]he great object is, that every man be armed . . . . Every one who is able may have a gun." and

> Are we at last brought to such humiliating and debasing degradation that we cannot be trusted with arms for our defense? Where is the difference between having our arms in possession and under our direction, and having them under the management of Congress? If our defense be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?

Letter from Thomas Jefferson to William Stephens Smith, 1787, *in* 6 THE WRITINGS OF THOMAS JEFFERSON 373 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903-04) ("What country can preserve its liberties if its rulers are not warned from time to time that their people preserve the spirit of resistance? Let

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3. Those Who Came After the Framers Understood That the Right to Keep and Bear Arms Was Among the Privileges and Immunities Protected by the Constitution

Those who succeeded the Framers recognized that the right to keep and bear arms is fundamental to the assurance of liberty and protection against violence. Touching on both issues, St. George Tucker stated that "the right to self-defense is" not just the "first law of nature" but also "the true palladium of liberty."[48] Justice Story of the United States Supreme Court found the Bill of Rights, and therefore the Second Amendment right to keep and bear arms, to contain the "fundamental principles of a free republican government, and the right of the people to the enjoyment of life, liberty, property, and the pursuit of happiness."[49] These and the writings

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them take arms."); Elliot, *supra*, at 380 (quoting George Mason who said that "to disarm the people—that was the best and most effectual way to enslave them."); *Heller*, 128 S. Ct. at 2817 ("the inherent right of self-defense has been central to the Second Amendment right").

[48] William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 238-39 (2nd ed., 1829).

[49] Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 301 (1833). This does not mean that individual citizens have a right to tanks, nuclear weapons, or the latest and deadliest weaponry available to the military. As Justice Story cogently observed, "The right of the citizens to keep and bear arms . . . offers a strong *moral check* against the usurpation and arbitrary power of rulers[.]" *Id.* § 1890 (emphasis added). Even if citizens are not able to acquire those advanced weapon systems which would permit them to successfully resist a modernized military, still the right to keep

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from other thinkers at the time reveal a consensus as to the fundamental nature of the citizenry's right to keep and bear arms in order to protect their life and liberty.[50]

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and bear arms constitutes a compelling moral check on tyranny since a people who feel capable of defending themselves are quite unlikely to be enticed into subjective tyranny. Of course, where the entire nation has the right to keep and bear arms, this right will also constitute a considerable physical check on tyranny.

[50] *See*, *e.g.*, Rawle, *supra*, at 125-26 ("No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people."); Cassius Clay, THE WRITINGS OF CASSIUS MARCELLUS CLAY 257 (Horace Greeley ed., 1848)

> We say, that when society fails to protect us, we are authorized by the laws of God and Nature to defend ourselves; based upon the right, 'the pistol and the bowie knife' are to us as sacred as the gown and the pulpit; and the Omnipresent God of battles is our hope and trust for victorious vindication.

2 James Kent, COMMENTARIES ON AMERICAN LAW pt. 4, lect. 24 (1826-30)

> The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable. The history of our colonial governments bears constant mars of vigilance of a free and intelligent people; who understood the best securities for political happiness.

Albert Gallatin, *The New York Historical Society* (Oct. 7, 1789) ("The whole of the Bill (of Rights) is a declaration of the right of the people at large or considered as individuals . . . . It

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The North Carolina Supreme Court found that "[t]he maintenance of the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions."[51] Indeed, Justice Washington, although he was unwilling to give a comprehensive list of rights contained within the "Privileges and Immunities" clause, concluded that "[t]hey 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."[52] Of course, the right to keep and bear arms is the ultimate means to assure the protection of these noble ends.

Finally, even in the infamous case of *Dred Scott v. Sandford*, the Court recognized that the right to keep and bear arms is a fundamental right enjoyed by all citizens. The Court relied on this recognition to justify its erroneous conclusion that African-Americans could not be considered citizens. Chief Justice Taney, writing the majority opinion, recognized that if African-Americans were "entitled to *the privileges and immunities* of citizens"[53] they could rightfully claim fundamental rights such as

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establishes some rights of the individual as unalienable and which consequently, no majority has a right to deprive them of.").

[51] *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921).

[52] *Corfield*, 6 F. Cas. at 551-52.

[53] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416 (1856) (emphasis added).

> the right to enter every other State whenever they pleased . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and *to keep and carry arms* wherever they went.[54]

Furthermore, the Chief Justice stated that Congress cannot "deny to the people the right to keep and bear arms" because this power, "in relation to rights of person . . . are, in express and positive terms, denied to the General Government."[55] In sum, "Taney's logic was clear: if blacks were citizens, they would have a right to bear arms, and state laws prohibiting their possession of firearms would be void."[56] Significantly, a dissenting justice agreed with Taney's logic. Justice Curtis concluded that, under Article IV of the Constitution, "free persons of color might be entitled to the *privileges* of general citizenship . . . is clear."[57] The Fourteenth Amendment overturned this decision and extended the protections of equal privileges and immunities to all citizens of the nation, including freed slaves.

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[54] *Id*. at 417 (emphasis added).

[55] *Id*. at 450.

[56] Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 38 (1998).

[57] *Dred Scott*, 60 U.S. (19 How.) at 585 (Curtis, J., dissenting) (emphasis added).

4. The Authors of the Fourteenth Amendment Intended It to Extend Its Protections to the Fundamental, Natural Right to Keep and Bear Arms

The foregoing demonstrates that, from before the Founding era until the enactment of Civil Rights Act of 1866 and the Fourteenth Amendment, the right to keep and bear arms was consistently recognized as fundamental to ensuring the liberty and personal safety of the citizenry. Certainly, this common understanding influenced the authors of the Fourteenth Amendment who intended the "privileges or immunities" clause to extend to the right to keep and bear arms.

The Fourteenth Amendment's "privileges or immunities" clause was enacted, in part, to protect the rights of recently-freed slaves. Article IV, section 2 protected citizens of "other states." African-Americans quickly learned, however, that they required protection from their home state. With the end of the Civil War, it became apparent that the defeated South was not about to allow newly freed slaves access to all rights and privileges held by whites.[58] *Barron v. City of Baltimore* could be used

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[58] Amar, *supra*, note 3, at 1217.

> When the Thirty-ninth Congress convened in December 1865, various unrepentant Southern governments were in the process of resurrecting slavery de facto through the infamous Black Codes. As with the slavery system itself, the new codes would invariably require systematic state abridgments of the core rights and freedoms in the Bill of Rights. These abridgments would of course hit blacks the hardest, but the resurrection of a

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by southern states to deny the protections of the Bill of Rights to former slaves just as *Dred Scott* denied African-Americans the fundamental rights of citizenship.[59] Southern states began reintroducing, through "black codes," the limitations previously found in "slave codes"[60] curtailing the fundamental rights fundamental to free government.[61] Of course, this extended to the right to keep and bear arms.[62]

Widespread racist state action occurred with the purpose of limiting African-American's access to guns.[63] Disturbingly, "firearms confiscated would

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> caste system would also require repression of any whites who might question the codes or harbor sympathy for blacks.

[59] *Barron*, 32 U.S. at 250-51 (holding the Fifth Amendment is not applicable to the States); *Dred Scott*, 60 U.S. 393.

[60] Halbrook, *supra*, note 56, at 1 (finding that "slave codes, which limited access to blacks to land, firearms, and the courts, began to reappear as 'black codes.'").

[61] Lawrence, *supra*, note 3, at 19.

[62] Clayton E. Cramer, *The Racist Roots of Gun Control*, 4-WTR KAN. J.L. & PUB. POL'Y 17, 20 (1995) ("The former states of the Confederacy, many of which had recognized the right to carry arms openly before the Civil War, developed a greater willingness to qualify that right after the passage of the Fourteenth Amendment."); Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1309 n.7 (1995) (finding that throughout the South, there had been a "historical desire to disarm the black population").

[63] Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 71 (1991) ("The Special Report of the Anti-Slavery Conference of 1867 noted with particular

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often be turned over to the Klan, the local (white) militia or law enforcement authorities which would then, safe in their monopoly of arms and under color of the Black Codes, further oppress and violate the civil rights of the disarmed freedmen."[64]

In response, Congress passed the Civil Rights Bill of 1866, over President Johnson's veto, to declare all persons born in the United States, and not subject to foreign powers or untaxed Indians, to be United States Citizens. This Act granted "the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property," and "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[65] Later that year, the Senate proposed the Fourteenth Amendment out of a fear that the Civil Rights Act would be later repealed or invalidated by the courts.[66] Because both the Civil Rights Act of 1866 and the Fourteenth

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emphasis that under these Black Codes blacks were 'forbidden to own or bear firearms, and thus were rendered defenseless against assaults.'").

[64] *Id*.

[65] 1866 CIVIL RIGHTS ACT, 14 STAT. 27-30, Apr. 9, 1866 A.D., Ch. XXXI.

[66] Chester James Antieau, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 115 (1997).

Amendment are similar in substance and purpose, a consideration of Senatorial debates surrounding each is instructive.

A purview of the Congressional Record for the Thirty-Ninth Congress reveals that the members of that Congress considered the right to keep and bear arms among the well-understood, fundamental rights to be protected by the Fourteenth Amendment. Representative James Wilson noted that the fundamental rights which may not be alienated from citizens included the right to *personal security*, liberty, and property.[67] Of course, the right to bear arms is often a necessary, or even the sole means, by which an individual citizen ensures his or her personal safety.[68] Even more explicitly, Senator Samuel Pomeroy noted that among the three "indispensible" safeguards of liberty "under our Constitution" that "[e]very man should have" there falls the "right to bear arms for the defense of himself and family and his homestead."[69] Other senators who opposed the Civil Rights Act and the Fourteenth Amendment recognized that these protections would grant African-Americans the right to keep and bear arms.[70]

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[67] CONG. GLOBE, 39th Cong., 1st Sess. 1118-19 (1866).

[68] Locke, *supra*, note 32.

[69] CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866). The Senator noted that a "well-loaded musket" in the hands of individual citizens is a right necessary to "liberty under our form of Government." *Id.*

[70] CONG. GLOBE, 39th Cong., 1st Sess. 476-78 (1866) (Senator Willard Salsbury of Delaware opposed the Civil Rights Act because he believed that if it passed it would invalidate the - *continued* -

Senator Jacob Howard, who brought forward in the Senate the proposed Fourteenth Amendment,[71] explained that the terms "privileges" and "immunities," as used in the amendment, incorporated the personal rights protected by the Bill of Rights.[72] Further, Representative John Bingham "who authored Section 1 of the Fourteenth Amendment . . . made it clear that the Amendment would apply the Bill of Rights against the States."[73] Senator Howard and Representative Bingham's

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Delaware laws which prohibited African-Americans from possessing guns); CONG. GLOBE, 39th Cong., 1st Sess. 266-67 (1866) (Representative Henry S. Raymond from New York said that it would give an African-American "a right to defend himself, to bear arms."); CONG. GLOBE, 39th Cong., 1st Sess. 1121-22 (1866) (Senator Rogers—who resisted what he called "so odious a bill" because it would prevent the states from making laws which "provide that the punishment of death shall be inflicted upon a negro who shall commit a rape upon a white woman, which is not imposed upon a white man for the same offense"—recognized a fundamental "the right of self-defense, the right to protect our lives from invasion by others."); CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866) (Representative Henry Dawes of Massachusetts recognized that the Fourteenth Amendment "secured the right to keep arms in [any person's] defense.").

[71] Antieau, *supra*, note 66, at 115.

[72] CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) ("the personal rights guaranteed and secured by the first eight amendments to the United States Constitution such as . . . the right to keep and bear arms.").

[73] Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1995).

understanding was shared by numerous congressmen.[74]

Now, the first section of the Fourteenth Amendment "is a general prohibition upon all States, as such, from abridging the privileges and immunities of the Citizens of the United States."[75] Thus, the authors of that amendment clearly understood its protections against state encroachment to extend to the well-understood, fundamental right to keep and bear arms codified in the Second Amendment.[76] The clear intent of those who authored the "privileges or immunities" clause of the Fourteenth Amendment stands in direct opposition to the holdings of the *Slaughter-House Cases*[77] and *United States v. Cruikshank*,[78] and the Court should overturn those decisions.[79]

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[74] *Id.* (finding that "[a]ll the leading figures in the House and Senate—Jacob Howard, James Wilson, and Thaddeus Stevens, for example—shared similar concerns. By my count there were about thirty speeches in the House and Senate sharing Bingham's concern.").

[75] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

[76] *See*, *e.g.*, Cottrol & Diamond, *supra*, note 62, at 1309 n.7 ("The intent of many of the Framers of the Fourteenth Amendment was to make the Second Amendment's right to keep and bear arms apply to the states through the privileges or immunities clause of the Fourteenth Amendment.").

[77] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

[78] *Cruikshank*, 92 U.S. at 553.

[79] John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW 462 (7th ed.) (*Slaughter-House Cases* "decision had the effect of eliminating the provision which was both historically and logically the one most likely to have intended to include within

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CONCLUSION

From the Founding era to the ratification of the Fourteenth Amendment, the terms "privileges" and "immunities" were consistently understood to extend to well-understood, fundamental rights, including the right to keep and bear arms. Article IV, section 2, was designed to protect this right from infringement by states against citizens of other states. The Second Amendment was written to protect this individual right from infringement by the federal government. The "Privileges or Immunities" clause of the Fourteenth Amendment protects this right for all citizens against the states. It is time for this Court to once again give effect to the privileges and immunities that the Framers sought to protect in the original Constitution, and

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its protections the guarantees of the Bill of Rights."); CURTIS, *supra*, note 11, at 175. Similarly, the court in *Cruikshank* tethered its holding on the *Slaughter-House Cases* and "utterly ignored the possibility that the Fourteenth Amendment" was meant to incorporate the Bill of Rights. *See Cruikshank*, 92 U.S. at 549; Lawrence, *supra*, note 3, at 38.

that the authors and ratifiers sought to protect in the Fourteenth Amendment.

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