No. 08-1521

In The
Supreme Court of the United States

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

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

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

REPLY BRIEF

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SUMMARY OF ARGUMENT

1. Respondents offer no coherent alternative interpretation of the Privileges or Immunities Clause, nor do they defend the reasoning of *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Relying on illogical assumptions, selective quotation of the Fourteenth Amendment's opponents and discredited scholarship, Respondents aver only that the Clause is either indeterminate or redundant of other provisions. It is neither. And included within the Clause's protection is the right to keep and bear arms as understood in 1868 America.

2. Ignoring their present violation of Petitioners' Fourteenth Amendment rights, Respondents condemn imaginary future consequences of accurate constitutional interpretation, failing to acknowledge that applying constitutional text as plainly intended by the Framers and understood by the ratifying public possesses high intrinsic value. Nowhere is that value higher than when enforcing basic national civil rights standards, a task Respondents suggest is undesirable.

Enforcing the Privileges or Immunities Clause does not threaten the rights of immigrants and corporations. The threat—to all individuals—is posed by Respondents' argument that the Fourteenth Amendment was never understood to secure civil rights.

3. Regarding selective due process incorporation, Respondents' veneration of precedent would have well-served their treatment of *District of Columbia* v.

Heller, 128 S. Ct. 2783 (2008); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); and *Washington* v. *Glucksberg*, 521 U.S. 702 (1997).

Respondents misstate the due process incorporation standards. This Court applies enumerated and unenumerated rights of substantive due process by way of *Duncan* and *Glucksberg*, respectively. Both approaches are rooted in the unique history of the American people. Only by denying the role of Anglo-American tradition and ignoring this Court's clear recent pronouncements on the right to arms can Respondents deny that right is a fundamental aspect of American constitutional liberty.

4. Unable to articulate the correct standard for substantive due process incorporation, or interpret the Privileges or Immunities Clause, Respondents offer irrelevant political arguments against application of the right to keep and bear arms against the States, failing to accept that the decision to secure the right in our Constitution has already been made.

ARGUMENT

I. RESPONDENTS FAIL TO DISPROVE THE ORIGINAL PUBLIC MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE.

Respondents do not seek to explain Section One's opening command to the States, averring only that the Privileges or Immunities Clause is unfathomable or merely duplicative of other provisions.

"It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). "[T]he usual canon of [constitutional] interpretation . . . requires that real effect should be given to all the words it uses." *Myers* v. *United States*, 272 U.S. 52, 151 (1926) (citations omitted).

> [T]he difficulty of the task does not excuse us from giving these general and abstract words whatever of specific content and concreteness they will bear as we mark out their application, case by case. That is the method of the common law, and it has been the method of this Court with other no less general statements in our fundamental law.

Edwards v. *California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring).

Under Respondents' view, the core principle animating civil rights law—that States are bound by federal civil rights—is a judicial fiction, lacking any persuasive historical or textual basis in the Constitution. The Constitution's text and history instruct otherwise.

A. Respondents Offer No Evidence of the Text's Original Public Meaning.

Respondents reason that so long as a word appearing in the Constitution admits of multiple

definitions, it has no meaning at all and must be disregarded: "Because 'privileges' and 'immunities' had more than one meaning, it cannot be concluded that the public would have understood those words to invoke [fundamental civil rights]." Respondents Br. 58.

Similarly, Respondents' amici concede that "the terms 'privileges' and 'immunities' were widely used as synonyms for 'rights,' including constitutional rights," but complain that Section One is indeterminate because "it simply fails to specify at all the particular rights to which it applies." Historians & Legal Scholars Br. 14 (citations omitted).

These are not approved approaches to constitutional interpretation. "This Court has not been timorous about giving concrete meaning to such obscure and vagrant phrases as 'due process,' 'general welfare,' 'equal protection,' or even 'commerce among the several States.'" *Edwards*, 314 U.S. at 183 (Jackson, J., concurring). As the Due Process Clauses illustrate, not all rights must be specifically described. *Cf.* U.S. Const. amend. IX.

Had Respondents established alternative definitions for "privileges" and "immunities," the Clause would not automatically be rendered inoperative. Faced with numerous examples of "privileges" and "immunities" describing fundamental civil rights—including the right to keep and bear arms—Respondents would need to show that such usage did not reflect the words' "normal and ordinary as distinguished from technical meaning," or was not in the

"sense most obvious to the common understanding." Petitioners Br. 9, 15 (citations omitted).

Yet Respondents fail to even establish an alternative meaning for these words. Reliance on amici's computer search of newspaper databases for the words "privileges and/or immunities" misconstrues the study's asserted value. Respondents Br. 57 (citing George Thomas, *Newspapers and the Fourteenth Amendment: What did the American Public Know About Section 1?* 18 J. CONTEMP. LEGAL ISSUES (2009), available at http:/ssrn.com/abstract=1392961 ("Newspapers")).

> I should make clear at this point what my project is *not.* Michael Curtis has made a beautiful, elegant argument that "privileges and immunities" were terms that would be understood by most educated readers as including the Bill of Rights guarantees. My paper is in no way a response to that theory.

Newspapers, at 4 (footnote omitted).[1]

Seeking evidence disputing the original public meaning of "Privileges or Immunities," Respondents next point to Rep. Kerr's post-ratification statement that "[i]t is most erroneous to suppose that the words 'rights,' 'privileges,' and 'immunities' are synonymous." Respondents Br. 57-58 (citation omitted).

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[1] The study's defects in describing original intent are discussed *infra*.

This is disingenuous. In the same speech, Kerr declared:

> But I want also to invite attention to the meaning of the words "privileges and immunities" as used in this section of the amendment. It appears to be assumed in the popular mind, and too often by the law makers, that these are words of the most general and comprehensive nature, and that they embrace the whole catalogue of human rights, and that they confer the power and the obligation to enact affirmative and most dangerous laws.

Cong. Globe, 42d Cong., 1st Sess. app. 47 (1871).

Kerr clearly recognized that "the popular mind" and "law makers" rejected his personal view of "privileges and immunities."[2]

Respondents' reliance on Webster's Dictionary and *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) to dispute the meaning of "privileges" and "immunities" is also misplaced. With respect to Webster's, Respondents Br. 57, these are the very dictionary entries Professor Tribe properly invokes for the contrary argument. Petitioners Br. 22. The claim that *Corfield*'s definition of these words in Article IV

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[2] Kerr also believed the Citizenship Clause merely restated existing law. *Id.* In 1864, he had joined a treasonous organization. TREASON HISTORY OF THE ORDER OF SONS OF LIBERTY 93 (Felix Stidger, ed. 1903).

omits rights secured in the Bill of Rights is Respondents' view, decidedly not that of nineteenth-century Americans, including the Fourteenth Amendment's framers. Petitioners Br. 18-26.[3]

Finally, Respondents claim that had the Fourteenth Amendment encompassed the Bill of Rights, it should have used narrower language to evince that meaning. Respondents Br. 55. Such reasoning can attack the meaning of almost any constitutional provision. The First Amendment, for example, specifically protects "speech" and "press," but not expressive conduct.[4] Yet Respondents also claim the Privileges or Immunities Clause merely constitutionalized principles of equal protection contained in the Civil Rights Act of 1866, Respondents Br. 64-65, although it does not recite the words of either that act *or* of the more-specific Equal Protection Clause. These arguments are neither consistent nor compelling.

B. Respondents Assert an Impossible Standard of Original Intent.

If anyone in 1866-68 disputed the meaning and intent of the Privileges or Immunities Clause as

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[3] *Corfield*'s definition included rights "which have, at all times, been enjoyed by the citizens of the several states which compose this Union," and disclaimed offering an exhaustive list. *Corfield*, 6 F. Cas. at 551-52.

[4] That the Privileges and Immunities of citizenship are not strictly defined as those secured by "the Bill of Rights" does, however, indicate that these rights are not so limited.

declared by its framers, such statements are missing from the opposing briefs. No one challenged the Framers' declarations that federal civil rights standards would bind the States. Petitioners Br. 32. The ratification process evinces this intent was understood. Petitioners Br. 33-40.

Respondents are thus reduced to asserting the Clause is meaningless by the negative inference of allegedly missing expressions of legislative intent. Not all newspapers, courts, and treatises that *should* have reflected the Amendment's original public meaning did so, therefore, it was ratified without discernible reason and cannot be given any effect. In their amicus's words, this Court should seek an ever-elusive "critical mass" of expressed intent. George Thomas, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1630 (2007) ("Riddle").

For an 1868 constitutional amendment, "critical mass" might be five newspaper accounts of a congressional speech, plus an amorphous "public embrace." Newspapers, at 4.[5] The volume of media accounts, court decisions, and treatises reflecting the public's understanding is apparently inadequate evidence of a "public embrace." "History cannot settle all questions

[5] Senator Howard's speech appeared in well over five newspapers. Petitioners Br. 34-35.

. . . the Fourteenth Amendment [incorporation] riddle is one of them." Riddle, at 1657.

Respondents' heavy reliance on computerized searches of ancient newspapers for the proposition that the public was unaware of the Fourteenth Amendment's meaning defies credulity. Professor Thomas offers a "caveat" that he was not "sure how accurate the search engines are," Newspapers, at 4, especially as identical searches did not always return identical results. *Id.* at 4-5.

A paper based on little more than a Google search should not be used against decades of detailed, disciplined scholarly work by some of the Nation's leading legal historians. *See* Constitutional Law Professors Br. Indeed, Thomas acknowledges his methodology failed to locate several articles Professor Curtis had found "the old-fashioned way." Newspapers, at 9. Nor did Professor Thomas's search unearth various relevant newspaper usages of "privileges" and "immunities" identified by Petitioners.

Technological limitations explain these underinclusive results. David Hardy, *Originalism and Its Tools: A Few Caveats*, 2 UNIV. AKRON STRICT SCRUTINY 1, 15-19 (2009) ("Limitations"). "Retrieving the text files underlying the images" in the newspaperarchive.com database,

> these were found to be unreliable and, in many places, sheer gibberish. Some characteristic errors suggested text files had been created, not by human readers, but by an

> optical character recognition program. The program faced major obstacles—19th century newspaper fonts, 140 years of fading and staining of the result, with longitudinal scratches indicative of well-used microfilm. The software was unable to overcome these barriers.

Limitations, at 15. The Google Archive search also appeared underinclusive of newspaper content. *Id.* at 16-17.

Respondents are not content to conjecture about hypothetical newspapers that should have discussed the Amendment's impact. Referring to those that unmistakably did so, Respondents retort: "Nor is there evidence about how widely these newspapers were read by the ratifying public across the nation." Respondents Br. 72.

On this logic, all constitutional amendments must be meaningless, for no matter how widely they are reported, a tally of readers is unavailable. But circulation figures are a different matter. The leading Eastern newspapers were primarily responsible for reporting national news, and their national distribution was significant. Limitations, at 18-19.

Responding to the fact that pre-*SlaughterHouse* courts interpreted the Privileges or Immunities Clause to apply basic civil rights, including those secured in the Bill of Rights, against the States, Respondents allege three cases should have incorporated Bill of Rights provisions were that plausible. Respondents

Br. 59 (citing *Twitchell* v. *Commonwealth*, 74 U.S. (7 Wall.) 321 (1869); *United States* v. *Crosby*, 25 F. Cas. 701, 704 (C.C.D.S.C. 1871); *Rowan* v. *State*, 30 Wis. 129 (1872)).

Courts and litigants routinely overlook available arguments. Failure to raise an argument does not mean, necessarily, that it was untenable. *Compare Mistretta* v. *United States*, 488 U.S. 361 (1989) with *United States* v. *Booker*, 543 U.S. 220 (2005). *Twitchell*, a case filed, argued, and decided in under a week, failed to address the Fourteenth Amendment at all. Three of the justices who held against Twitchell later dissented in *SlaughterHouse*.

Crosby, contrary to Respondents' claims, had nothing to do with incorporation of the Bill of Rights. The case concerned a conspiracy to deny freedmen the vote. The indictment's portion cited by Respondents failed because it did not allege the victim was qualified to vote and, in any event, because "[t]he right of a citizen to vote depends upon the laws of the state in which he resides . . . " *Crosby*, 25 F. Cas. at 704.

Rowan found that the Fourteenth Amendment was limited by "the object" of "protect[ing] this class [African-Americans] especially from any arbitrary exercise of the powers of the state government . . . " *Rowan*, 30 Wis. at 149. The Due Process Clause was thus held to secure only the right to application

of state procedures, a view at odds with modern concepts of procedural (let alone substantive) due process.

Addressing the various legal treatises contemporaneous to the Amendment's ratification that explicitly declared its incorporationist effect, Respondents claim that others "plainly did not" accept incorporation, reflecting "divided views." Respondents Br. 74.

This is disingenuous. The scholars offered by Respondents and their amici either did not mention the Fourteenth Amendment, reflecting only lack of diligence in updating their volumes, or addressed it only following *SlaughterHouse*.[6] Respondents' reliance on Joel Bishop is particularly misguided:

> [T]hough most of the amendments are restrictions on the General Government alone, not on the States, [the Second Amendment] seems to be of a nature to bind both the State and National legislatures; and doubtless it does.

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[6] Cooley claimed his 1873 treatise was largely printed when *SlaughterHouse* was announced. 2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 693 app. (4th ed. 1873). His discussion echoing *SlaughterHouse* did not appear in the treatise's 1871 edition, which may be read as supporting incorporation. Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 91-93 (1993). Cooley's 1868 treatise did not mention the amendment.

Joel Bishop, 2 COMMENTARIES ON THE CRIMINAL LAW 74 (4th ed. 1868).

C. Ambiguity Claims Do Not Deprive Text of All Meaning.

Another tactic employed by the "indeterminate" camp is to re-state various aspects of the Privileges or Immunities Clause, and offer such restatement as evidence of "cacophony." Mayors Br. 25. "There is some support in the legislative history for no fewer than four interpretations of the . . . Privileges and Immunities Clause . . . " (citation omitted).

But competing interpretations of all constitutional provisions abound. *Heller* is testament enough to that, where no Justice suggested that the Second Amendment not be interpreted. One noted scholar found the Free Speech Clause is susceptible to four different originalist interpretations with respect to seditious libel. "After studying this for twenty years, I can't tell you what was the meaning of the First Amendment in 1791. I just don't know. All four of these choices are available . . . " Lucas Powe, Jr., *Civil Rights: The Heller Case*, 4 NYU J.L. & LIBERTY 293, 300 (2009). This Court would not ignore the First Amendment in reviewing seditious libel convictions.

At least with respect to the Privileges or Immunities Clause, the supposedly different interpretations

are overlapping and consistent. The Clause encompasses the same rights understood to be secured against non-discrimination under Article IV, as well as the Bill of Rights. Together these would be the "basic rights that all citizens must enjoy," Mayors Br. 25, against state action. Thus abridgement of these rights, total and partial (discrimination), would be unconstitutional. Congress could remedy violations under Section 5.

Ambiguity claims are especially inapt when drawn from the Fourteenth Amendment's opponents. Critics pointed to the Amendment's broad impact—including its imposition of federal civil rights standards upon the States—as reasons for its rejection. Petitioners Br. 37-38. But some opposition took the form of claiming the Amendment was meaningless or unnecessary. Some "were antagonistic to both the letter and the spirit of the [Reconstruction] Amendments, and wished them to have the most limited effect." *Brown* v. *Bd. of Education*, 347 U.S. 483, 489 (1954).

> It is clear that attempts were made by the Democratic minority to obscure the meaning of these words and it is common to cite, for example, speeches of Senator Reverdy Johnson (D-Md.) for claims about defects in the proposed amendment.

Richard Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PENN. J. CONST. L. 1295, 1301 n.36 (2009) ("Meaning") (citation omitted). Indeed, Respondents and their amici repeatedly

invoke Johnson. Respondents Br. 66-67; Mayors Br. 25; Historians & Legal Scholars Br. 18. As Sandford's counsel, Johnson argued that liberty required the perpetuation of slavery. During Reconstruction, he frequently argued to limit the federal government's ability to check Klan violence. Johnson's record "places him on the wrong side of history and, more importantly, among the worst people of his generation." Meaning, at 1301-02 n.36.

But most important, Johnson and his cohorts were decidedly in the minority. The Nation rejected their views by ratifying the Fourteenth Amendment. These are valid sources of the Amendment's original public meaning only to the extent their statements are considered antithetical.

In a similar vein, Respondents and their amici rely heavily on the now-discredited works of Charles Fairman and Raoul Berger, incorporation's leading opponents whose work has failed to withstand serious critical evaluation. In a brief surveying many of Fairman and Berger's errors, one amicus observes:

> Both Fairman and Berger are unreliable sources in the debate over incorporation in that they approached their work from a now-repudiated historical perspective that was hostile toward the Reconstruction and contemptuous of the Framers of the Fourteenth Amendment.

Calguns Foundation Br. 5; *cf.* Michael Curtis, *The Bill of Rights After Heller*, 60 HASTINGS L.J. 1445, 1483 (2009) (Fairman endorsed political results of Colfax Massacre; Berger favorably cited racially-tinged critique of Sen. Howard).

D. The Privileges or Immunities Clause Does Not Duplicate the Equal Protection Clause.

Were the Privileges or Immunities Clause redundant of the Equal Protection Clause, then both *SlaughterHouse* and *Saenz* v. *Roe*, 526 U.S. 489 (1999) were wrongly decided.[7] The existence of a perfectly-specific Equal Protection Clause alongside the Privileges or Immunities Clause indicates the two are not the same. So does the Amendment's legislative history.

Petitioners, at 37, recounted how Southern leaders unsuccessfully sought to replace the Privileges or Immunities Clause with a non-discrimination provision. And as noted by amici Constitutional Law Professors, at 7 n.2, Section One's drafting history supplies additional relevant evidence.

On April 21, 1866, Senator Stevens proposed a multi-part amendment, its first section providing: "No discrimination shall be made by any state, nor by

[7] *Saenz* correctly found the Clause protects the right of interstate travel. Petitioners Br. 17.

the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." Benjamin Kendrick, THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 83 (1914). Bingham then successfully moved that his eventual contribution to Section One be added as the fifth section of that amendment. *Id.* at 87. For the next four days, Bingham's language coexisted with Stevens' nondiscrimination provision.

On April 25, Bingham's language was struck, and he responded by moving it be submitted as a separate amendment, again showing that he, at least, did not believe the meaning of his language was the equivalent of Stevens' proposal. *Id.* at 98-99. On April 28, Bingham successfully moved to replace the exclusively nondiscrimination language of the first section with his previously stricken Section One language. *Id.* at 106.

Thus, Section One contains a separate nondiscrimination clause; it coexisted with, and eventually displaced an exclusively nondiscrimination text; and its Privileges or Immunities Clause survived an attempt at displacement by nondiscrimination text.

The distinction between Bingham's February, 1866 formulation and the Amendment as adopted was that the former allowed Congress, rather than this Court, to define constitutional standards. *City of Boerne* v. *Flores*, 521 U.S. 507 (1994). Bingham correctly rejected the argument that this change

altered Section One's substantive scope. The Fourteenth Amendment

> is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.

Cong. Globe, 42d Cong., 1st Sess. app. 83 (1871). The February version "never was rejected by the House or Senate." *Id.*

Indeed, regardless of whether Congress or this Court defines the rights of citizenship, it is difficult to see why the meaning of "Privileges or Immunities" would have changed from one version to the next. Bingham proceeded to explain that the Equal Protection Clause dealt with equal protection, while Section One as a whole barred the violation of civil rights. *Id.*

E. The Right to Arms Was Understood to Be a Privilege or Immunity of Citizenship.

Petitioners and amici have submitted numerous examples of 19th-century Americans referring to a private right to arms as a constitutional privilege or immunity. Respondents counter by re-arguing *Heller*, and demonstrating that arms were regulated at the time. Neither argument is responsive to the overwhelming evidence that the right to arms is within the constitutional test.

The fundamental flaw underlying Respondents' approach is their erroneous conception of rights as something granted by the Constitution when judges deem it suits public policy. *See, e.g.*, Respondents Br. 11; Mayors Br. 2, 30. The Second Amendment, like the First, grants nothing. These secure pre-existing rights against the federal government. *Heller*, 128 S. Ct. at 2812. In 1868, the Nation decided to secure them against the States as well.

Conceiving of rights as positively granted by text, Respondents adopt an erroneous view of incorporation as mechanistically transmuting the Bill of Rights' literal text against the States, rather than the rights reflected by that text. This has never been the law. "In what is regarded as the first selective incorporation case," wherein this Court allegedly "incorporat[ed] [the] Takings Clause" over Chicago's objections, Respondents Br. 9, the Fifth Amendment was never mentioned. *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226 (1897). Similarly, every right listed in the First Amendment has been incorporated as against the States, notwithstanding the fact that the text admonishes "Congress." U.S. Const. amend. I.

Respondents err in assuming that the 1868 Framers' conception of the right to arms was necessarily limited or altered by the Second Amendment's militia preamble. Respondents' focus on the Second Amendment's ratification history is simply irrelevant here. Even were *Heller* wrongly decided, the relevant

inquiry in this case concerns the original intent and public meaning of the *Fourteenth* Amendment.

And even if that Amendment's Framers and their public erred in interpreting the Second Amendment (or Article IV, or anything else), their understanding nonetheless defines the content of the Amendment they enacted. No serious question exists that the Fourteenth Amendment was designed to secure the right to arms against state infringement. Constitutional Law Professors Br. 28.

Indeed, there is no evidence that anyone discussing the right to arms during Reconstruction held the collectivist, militia-centric view of the Second Amendment Respondents advance notwithstanding its recent rejection. To the contrary: Reconstruction Americans' disconnection of the individual Second Amendment right from its militia preamble manifested itself in Congress's approach to the problem of Southern militias.

Originally Republicans proposed that Southern militias "be forthwith disarmed and disbanded," in part because these militias had "disarm[ed] portions of the people." Cong. Globe, 39th Cong., 2d Sess. 1848 (1867). Senator Willey noted that "there may be some constitutional objection against depriving men of the right to bear arms and the total disarming of men in times of peace." *Id.* Quoting the Second Amendment, Senator Hendricks complained the proposal "does not relate to states alone, it relates to people." *Id.* at 1849. The sponsor agreed to "strik[e] out the word

'disarmed.' Then it will provide simply for disbanding these organizations." *Id.* at 1849. This proved "much more acceptable" to Senator Willey, as "disarming the whole people of the South seemed to me to be so directly in the face of the Constitution itself, as to strike me as somewhat strange." *Id.*

That the Thirty-Ninth Congress invoked the Second Amendment in allowing violent ex-Confederates to retain their weapons—even as they were denied state militia service—conclusively proves that the Amendment's framers did not accept a collectivist, militia-centric right to arms.

F. The *SlaughterHouse* Line Remains Indefensible.

Notwithstanding its unsuitability as a tool of constitutional interpretation, negative inference is useful in surveying the opposing briefs to evaluate *SlaughterHouse*'s current vitality. Aside from pointing out the decision is old, no attempt is made to defend it. "When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished." *Citizens United* v. *Federal Election Comm'n*, 2010 U.S. Lexis 766 at *90 (2010).

Decisions improperly limiting enjoyment of constitutional rights create no valid reliance interests. *Id.* at *92-93. Nor can legislative reliance on erroneous precedent diminish this Court's ability to

interpret the Constitution. *Id.* Moreover, as Chicago concedes, the Second Amendment's selective incorporation has never been considered. Br. in Opp. to Cert. 6-8. There cannot be reliance interests against its application via one clause that would not hold true for its application via the other.[8]

In endorsing the *SlaughterHouse* line, Respondents endorse decisions that "have been thoroughly discredited," NAACP Br. 12, and "that are rightly regarded as among the most misdirected in the history of the Court." NAACP Br. 13. From the moment it issued, the press, Members of Congress (including those who enacted the Fourteenth Amendment), and legal commentators generally agreed *SlaughterHouse* was wrongly decided, even when applauding the error. Richard Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and The Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 678-86 (1994) ("Constricting").

Yet Respondents suggest that the *Slaughter-House* Court was "in a uniquely advantageous position to discern the meaning of the Privileges or Immunities Clause" owing to its historical proximity to the framing. Respondents Br. 60. This view ignores *SlaughterHouse*'s failure to discuss the framing, and the fact that the Court bitterly divided 5-4. The dissenters, too, lived through the ratification.

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[8] Deciding cases based on constitutional text, rather than judicially-inferred theory, also supplies a narrower ground of decision. *Cf. Citizens United*, at *106 (Roberts, C.J., concurring).

Moreover, the Justices' personal experience might render their views less, not more, reliable. Justice Miller, for example, did not support ratification of the Privileges or Immunities Clause and instead supported the alternative version of the Fourteenth Amendment pressed by President Johnson. Constricting, at 660. Sometimes, the "cold historical record," Respondents Br. 62, is preferable to the passions and prejudices of the moment.

SlaughterHouse clearly bifurcated rights into mutually-exclusive "state" or "federal" spheres. The notion that *SlaughterHouse* might allow the Bill of Rights, or at least the Second Amendment, to bind the States as so-called "national citizenship" rights, repeats Respondents' errors that rights are created by the government, and that incorporation involves application of literal text rather than rights previously enumerated. Both errors improperly diminish the meaning of rights.

United States v. *Cruikshank*, 92 U.S. 542 (1876), which Justice Miller joined, recognized that fundamental rights pre-exist the Constitution, and thus faithfully excluded First and Second Amendment rights from the Fourteenth Amendment's protection under *SlaughterHouse*'s erroneous paradigm. *Id.* at 549. This Court subsequently clarified that under *SlaughterHouse*, the Bill of Rights does not bind the States. Respondents Br. 44.

NRA's novel theory, at 40, that *Cruikshank* did not bar the Second Amendment's application to the States, contradicts over a century of understanding.

See, e.g., *Heller*, 128 S. Ct. at 2813 ("States, we said, were free to restrict or protect the right under their police powers"). Erroneous precedent should be overruled, not tortured further to achieve politically-desirable results.

II. CORRECTLY APPLYING THE PRIVILEGES OR IMMUNITIES CLAUSE WOULD INCREASE, NOT REDUCE, PROTECTION OF INDIVIDUAL RIGHTS.

This Court interprets the Constitution as enacted, not as it might optimally have been written. Fortunately, the document properly interpreted and applied does not lend itself to Respondents' predicted parade of horribles.

Petitioners reject the nativist view that reliance on the Privileges or Immunities Clause excludes immigrants from constitutional protection. Respondents Br. 49 n.23. These regrettable sentiments flow from the erroneous notion "that 'the people' referenced in the Constitution, such as in the Second Amendment, refer [sic] to the U.S. citizenry." ACRU Br. 8. And contrary to GOA's view, at 15, this Court has never held that "documented" or "undocumented" aliens are excluded from "the people" as understood in the Bill

of Rights. Nor could it. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).[9]

Aliens enjoy the rights to worship, speak, be secure against unreasonable searches and seizures—and keep and bear arms for self-defense—free from unwarranted interference. *Cf. Saenz*, 526 U.S. at 524 (Thomas, J., dissenting) (at founding, "privileges" and "immunities" included rights "specifically enjoyed by English citizens, and more broadly, by all persons").

Even inhabitants of territories not destined for statehood enjoy fundamental constitutional rights. *Verdugo-Urquidez*, 494 U.S. at 268 (citations omitted). Alienage status may justify regulation, but usually does not vitiate the right—not least a right necessary for the exercise of self-defense. American citizenship may be the original font of rights that States may not abridge, but once recognized such rights are secured to all persons from state deprivation under the Equal Protection Clause, assuming the alienage classification is not pre-empted by the federal immigration power.[10] Petitioners Br. 62-63.

Puzzling is the lamentation that this Court might be required "to sort out which unenumerated and

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[9] Federal law does not prohibit resident aliens from obtaining firearms. Non-resident aliens may also acquire firearms under some circumstances. 18 U.S.C. § 922(y)(2).

[10] Corporations have long enjoyed equal protection. *Northwestern Nat'l Life Ins. Co.* v. *Riggs*, 203 U.S. 243, 253 (1906).

previously unrecognized rights are protected by the Privileges or Immunities Clause." Respondents Br. 50. If the Clause secures civil rights, should they not be enforced? Respondents suggest the enforcement of civil rights is in and of itself something to be avoided. Those who ratified the Fourteenth Amendment surely would disagree.

This Court has a rich tradition of upholding unenumerated rights. That such rights are secured in the Privileges or Immunities Clause does not make the task of enforcing them impossible. *Edwards*, 314 U.S. at 183 (Jackson, J., concurring); Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed*, 8 GEORGETOWN J.L. & PUB. POL'Y 1 (2010), available at http://ssrn.com/abstract=1503583. To the contrary, as the Clause was always understood and intended to contain substantive civil rights protection, there is a greater historical record guiding this Court's interpretation of the Clause to evaluate unenumerated right claims than exists for evaluating such arguments as aspects of substantive due process.

The Framers left much evidence as to what they considered to be the privileges and immunities of citizenship. Obvious historical "guideposts" for defining Privileges or Immunities include those rights as described by *Corfield*, rights that Congress sought to protect in Reconstruction legislation (*e.g.*, the Civil Rights Act of 1866), or other rights the violations of which were matters of grave concern as reflected in important historical texts, *e.g.*, the widely-distributed Report of the Joint Committee on Reconstruction.

In the end, the process for enforcing the Privileges or Immunities of citizenship may not differ much from that enunciated in *Glucksberg*. *Nordyke* v. *King*, 563 F.3d 439, 447 n.5 (9th Cir. 2009) (in *Glucksberg*, substantive due process doctrine "appears to arrive at a result similar to that urged by the [*SlaughterHouse*] dissenters.") By extending this existing jurisprudence, the Court could find well-established "guideposts for responsible decisionmaking in this unchartered area." *Glucksberg*, 521 U.S. at 721 (citation omitted).

Accordingly, future Privileges or Immunities questions may not be much more difficult than the question presented in this case, where the privilege at issue is enumerated in the Bill of Rights, within *Corfield*, within established lexical usage, and was a matter of top concern during Reconstruction.

Application to the States of the grand jury right in "capital, or otherwise infamous crime[s]," U.S. Const. amend. V, and the civil jury right, would pose no problems. When the Fourteenth Amendment was ratified, seventy-eight percent of the states guaranteed a grand jury right, and approximately eighty-nine percent of Americans lived in states that at least utilized the grand jury. Bryan Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. CONTEMP. LEG. ISSUES (2009), available at http://ssrn.com/abstract=1354404 at 59-61. In contrast, at the time this Court applied the Fourth Amendment exclusionary rule to state courts, twenty-four to twenty-eight states had rejected it. *Id.* at n.181

(citation omitted). Federal courts, where the Grand Jury Clause applies, have just seen record numbers of criminal defendants, and the highest number of criminal cases since Prohibition. 2009 YEAR-END REPORT ON THE FEDERAL JUDICIARY app. 3, available at http://www.uscourts.gov/newsroom/2009/2009YearEndReport.pdf. The District of Columbia's courts operate under the Seventh Amendment without issue.

Had Petitioners' arguments threatened much disruption, Respondents might have garnered support from more than three states.

III. RESPONDENTS MISSTATE THE SELECTIVE INCORPORATION STANDARD.

The concept of "ordered liberty" Respondents invoke twenty-seven times never referred to the government's liberty to issue orders. Petitioners acknowledge that liberty requires order, the two existing side-by-side. Respondents mistakenly view liberty as a government-conferred condition, denying that order may coexist with individual freedom. Respondents err:

> There is no basis for saying that freedom and order are not compatible. That would be a decision of desperation. Regulation and suppression are not the same, either in purpose or result, and courts of justice can tell the difference.

Poulos v. *New Hampshire*, 345 U.S. 395, 408 (1953) (footnote omitted). A right's incorporation under the "ordered liberty" standard has not always been held to absolutely proscribe an area of government regulation.

"Ordered liberty" has not exclusively defined the selective incorporation standard for over four decades. Referring to the standard, Respondents assert that "'[I]f a civilized system could be imagined that would not accord the particular protection,' incorporation is not appropriate." Respondents Br. 9 (quoting *Duncan*, 391 U.S. at 149 n.14). But the quoted passage describes the test *rejected* by this Court. *Duncan*'s test asks whether a right is "necessary to an *Anglo-American* regime of ordered liberty," 391 U.S. at 149 n.14 (emphasis added), or "fundamental to the *American* scheme of justice." *Id.* at 149 (emphasis added).

Respondents misread *Duncan*, averring that the more-restrictive rule applies in considering substantive rights, while the analysis is system-specific only with respect to procedural rights. This is erroneous. The right against double-jeopardy at issue in *Palko* v. *Connecticut*, 302 U.S. 319 (1937) is procedural as well as substantive. In overruling *Palko*, this Court made clear that the *Duncan* test applies to all provisions of the Bill of Rights without reference to a procedural/substantive distinction:

> *Palko* represented an approach to *basic* constitutional rights which this Court's recent

> decisions have rejected . . . Our recent cases have thoroughly rejected the *Palko* notion that *basic* constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the *American* scheme of justice," the same constitutional standards apply against both the State and Federal Governments.

Benton v. *Maryland*, 395 U.S. 784, 794-95 (1969) (citations omitted) (emphasis added).

Nor is it correct that "the great substantive rights of the First, Fourth, and Fifth Amendments," Respondents Br. 10 n.3, were incorporated pursuant to a restrictive *Palko* standard. *See, e.g.*, *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931) ("Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press . . . ").

And although this case concerns incorporation of an enumerated right under *Duncan*, Respondents also notably misstate the due process incorporation test for unenumerated rights. *Palko*'s language might be referenced in *Glucksberg*, but the latter case stands for the proposition that unenumerated rights of substantive due process must be both "carefully refined by concrete examples [and] deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722. *Glucksberg*'s emphasis on the importance of history

counsels the Second Amendment's incorporation. *Nordyke*, 563 F.3d at 451.

Respondents' formulation of "ordered liberty" as a but-for requirement for modern civilization would leave few rights incorporated. England may be civilized, but it establishes an official church headed by that nation's monarch, who presides over a legislative body partially composed of birthright nobles. England's lack of protection for free speech has transformed that nation into a center for libel tourism, rendering English judgments of dubious enforceability in American courts. *See, e.g.*, *Governor Patterson Signs Legislation Protecting New Yorkers Against Infringement of First Amendment Rights by Foreign Libel Judgments*, http://www.state.ny.us/governor/press/press_0501082.html (May 1, 2008); N.Y. C.P.L.R. § 5304(b)(8).[11]

Japan, too, is civilized. However, last year saw the first use of juries in Japanese criminal trials in over half a century, in a form fundamentally inconsistent with Sixth Amendment standards. Douglas Levin, *Saiban-in-Seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay*

[11] Modeling constitutional standards on English practice would defeat the purpose of the American Revolution. In any event, English gun prohibition failed to produce much "ordered liberty." James Slack, *Culture of violence: Gun crime goes up by 89% in a decade*, THE DAILY MAIL, Oct. 29, 2009, http://www.dailymail.co.uk/news/article-1223193/Culture-violence-Gun-crime-goes-89-decade.html

Assessor System May Determine Its Fate, 10 ASIAN-PACIFIC L. & POL'Y J. 199, 205 (2008).

It is too easy to identify nations that in some respect fail to maintain an American standard of individual liberty, yet remain more-or-less free. But American constitutional liberty is not defined by the lowest common denominator of freedom prevailing among other nations. The right to arms is consistent with our relatively greater protection of individual liberty.[12]

Unhinging the protection of liberty from historical standards threatens the continued incorporation of all other rights. Indeed, Respondents suggest exactly that, offering that "due process is to be defined by the gradual and empiric process of inclusion and *exclusion*." Respondents Br. 12 (citations and quotation marks omitted) (emphasis added). One wonders what other enumerated rights must be gradually excluded from the Fourteenth Amendment owing to litigants' evolving notions of public necessity. Respondents' selective incorporation standard unsettles all incorporation precedent.

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[12] High gun ownership corresponds to greater political, civil and economic freedom, and lower corruption. David Kopel, et al., *Is There a Relationship Between Guns and Freedom? Comparative Results from 59 Nations*, 13 TEX. REV. L. & POLITICS 1 (2008).

The notion that Second Amendment rights are, among those enumerated in the Bill of Rights, uniquely controversial, Respondents Br. 11, is specious. The notion that such controversy itself justifies a right's violation, *id.*, defeats the entire enterprise of judicially-enforcing constitutional rights against political majorities. A right's controversial status has not led to its demise in this Court. *See, e.g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

Respondents' re-argument of *Heller* would not satisfy the "ordered liberty" test in any event. Respondents claim that because "the Second Amendment protects weapons regardless of whether they are useful for self-defense," the "scope of the Second Amendment right" does not encompass "an individual right related to self-defense." Respondents Br. 5. This is illogical and contradicts *Heller*.

The militia preamble illuminated a purpose for the right's codification, but did not limit the right. *Heller*, 128 S. Ct. at 2801. Individuals obtain firearms for private purposes, not to prepare for militia duty.

> The traditional militia was formed from a pool of men bringing arms in common use at the time for lawful purposes like self-defense. In the colonial and revolutionary war era, small-arms weapons used by militiamen and weapons used in defense of person and home were one and the same.

Heller, 128 S. Ct. at 2815 (citation and quotation marks omitted). *Heller* did not hold that the Second Amendment protects a right to weapons with high "militia" but no self-defense value.

The Second Amendment's framers assumed that the People's ability to act as militia, preserved by the ownership of self-defense weapons, "is necessary to the security of a free state." U.S. Const. amend. II. The constitutional text thus reflects the Framers' conclusive judgment that the right to arms is essential to "ordered liberty," were that the selective incorporation standard.

IV. POLICY DIFFERENCES DO NOT TRUMP CIVIL RIGHTS.

Respondents overstate the relevance of federalism principles in this case. Were federalism the overriding consideration in regulating guns, the federal government would be unable to enact gun laws conflicting with a local community's contrary preferences. Notably, the States' traditional police power to regulate firearms lacks a federal analog.

That firearm regulation is within the police power hardly answers the question. *Loving* v. *Virginia*, 388 U.S. 1, 7 (1967) ("state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power") (citation omitted). States have traditionally regulated speech and administered criminal justice systems, too, but rights limiting those powers are nonetheless incorporated.

That the Bill of Rights naturally burdens government officials is no reason for ignoring it. *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009). One can imagine the benefits to state crime-fighting efforts if only the accused were not entitled to costly lawyers. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Unique local efforts to reduce criminal activity, though arguably effective, must nonetheless satisfy constitutional standards. *Kennedy* v. *Louisiana*, 128 S. Ct. 2641 (2008); *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000); *City of Chicago* v. *Morales*, 527 U.S. 41 (1999).[13]

Indeed, pervasive state intrusion into matters impacting individual liberty, autonomy and dignity is a compelling reason to ensure compliance with basic standards. Concern for peculiar local customs and institutions has long been the rallying cry for opponents of national civil rights.

Once invoked to protect slavery, federalism since 1868 has not excused compliance with national civil rights standards. States are decidedly *not* unfettered laboratories of democracy when it comes to the

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[13] Disturbingly, Respondents endorse criminalization of constitutionally-protected activity as a useful pretext to arrest suspected criminals. Respondents Br. 16; Mayors Br. generally. The argument endorses nothing less than a total police state. Petitioners—and millions upon millions of American gun owners—are not drug-dealing gangsters. *Heller* makes clear that dangerous people can be deprived of arms. *Heller*, 128 S. Ct. at 2817. Yet even Chicago's drug-dealing gangsters enjoy some constitutional rights. *See Morales*. Enforcing the Constitution qualifies as "law enforcement," too.

establishment of religion, *Engel* v. *Vitale*, 370 U.S. 421 (1962); suppression of the press, *Near*; racial segregation, *Brown*; interference with family planning, *Casey*; intrusion into personal relationships, *Lawrence* v. *Texas*, 539 U.S. 558 (2003); imposition of criminal punishment, *Kennedy*; search and seizure, *Edmond*; *Morales*—or disarmament. *Cf. Heller*, 128 S. Ct. at 2818 n.27.

The Second Amendment "surely elevates above all other interests"—including federalism—"the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 128 S. Ct. at 2821. That people disagree about gun policy, or that firearms pose unique dangers in the wrong hands, Respondents Br. 11, is irrelevant. The Fourth Amendment is uniquely dangerous in that it shields criminals and their activities from police detection, and debate about the limits of police search and seizure authority is robust. But the Second Amendment, like the Fourth, affords uniquely valuable benefits traditionally held fundamental in American society.

Petitioners do not contend that states must have uniform gun laws, only that such experimentation be consistent with constitutional standards.[14] Science

[14] Contrary to Respondents' claims, states courts have successfully applied meaningful standards in reviewing gun laws. David Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1 (2010), available at http://ssrn.com/abstract=1542544

does not always suffer when laboratories are regulated.

Social science is a poor substitute for constitutional rights. *Buck* v. *Bell*, 274 U.S. 200 (1927). The people's decision to constitutionally-protect the right to arms is not necessarily unsound.[15] In any event, it was the people's decision to make, and that decision must now be enforced.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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[15] *See, e.g.*, Florenz Plassman & John Whitley, *Comment: Confirming "More Guns, Less Crime,"* 55 STAN. L. REV. 1313, 1365 (2003) ($2-$3 billion average crime-reduction benefit in first five years of liberalized gun laws).